RENDERED: FEBRUARY 1, 2013; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-001436-MR

UNIVERSITY OF LOUISVILLE
ATHLETIC ASSOCIATION, INC. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CI-008225

MARY BANKER AND
BRYAN M. CASSIS APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE; JUDGES.

LAMBERT, JUDGE: University of Louisville Athletic Association, Inc., (ULAA) has appealed from the judgment and orders of the Jefferson Circuit Court in favor of Mary Banker and her attorney, Bryan Cassis, resulting from a jury verdict in favor of Banker on her retaliatory discharge claim. ULAA contends that there was

insufficient proof to support a retaliatory discharge verdict in her favor or to permit her to recover $300,000.00 in emotional distress damages or lost wages, and that the award of $149,325.00 in attorney fees was unreasonable. We agree with ULAA that Banker failed to prove a *prima facie* case of retaliation. Hence, we reverse the judgment and orders on appeal and remand this matter for dismissal of Banker's claim.

In September 2007, Mary Banker entered into a one-year employment contract with ULAA to work as an assistant men's and women's track and field coach in the University of Louisville's NCAA Division 1 intercollegiate athletic program. The contract was for a nine-month term beginning September 5, 2007, and ending June 30, 2008, and it included a non-renewal notification deadline of April 30, 2008. Over the course of her employment, Banker claimed to have been subject to gender and sexual discrimination. On April 22, 2008, Banker made an oral complaint to Malinda Durbin, the University Affirmative Action/Sexual Harassment Officer in the Human Resources Department, who instituted an investigation of her claims. On May 15, 2008, ULAA head men's and women's track and field coach, Ron Mann (Coach Mann), notified Banker that ULAA had decided not to renew her contract, a decision that had been at least contemplated on April 16, 2008.[1] The following day, Banker sent an e-mail to Coach Mann and

[1] A few weeks later, ULAA informed Banker that it would deem her original contract to have been renewed, but it would opt to immediately terminate her contract on Coach Mann's recommendation effective July 30, 2008. Banker was paid and retained her health insurance coverage until that date.

ULAA Executive Senior Associate Athletic Director Julie Hermann stating her assumption that her termination was in retaliation for the HR investigation.

On August 6, 2008, Banker filed a multi-count complaint against ULAA and ULAA Athletic Director Tom Jurich seeking damages related to her employment and termination. She alleged causes of action for gender discrimination, retaliation, and hostile work environment pursuant to the Kentucky Civil Rights Act (KCRA), Kentucky Revised Statutes (KRS) Chapter 344, as well as for breach of contract, breach of implied covenants of good faith and fair dealing, public policy wrongful discharge, and intentional infliction of emotional distress. Banker sought compensatory damages for past and future lost wages and benefits, and for emotional distress, mental anguish, humiliation, and embarrassment. She also sought punitive damages as well as the payment of attorney fees and costs.

In its answer, ULAA set forth several affirmative defenses, including the application of the doctrine of sovereign immunity, the failure to state a claim upon which relief could be granted, and the doctrines of waiver and estoppel. It also stated that punitive damages were not available for alleged breach of contract or for violations of the KCRA. Prior to filing an answer, Jurich moved to be dismissed as a defendant. The circuit court dismissed the claims against Jurich for public policy wrongful discharge, gender discrimination, hostile work environment, and breach of contract. However, the circuit court did not dismiss the claims for retaliation or intentional infliction of emotional distress at that time.

Jurich then filed his answer to Banker's complaint. In November 2009, by agreed order of partial dismissal, the circuit court dismissed Banker's claims for public policy wrongful discharge and intentional infliction of emotional distress as to both ULAA and Jurich pursuant to Kentucky Rules of Civil Procedure (CR) 41.01. This ruling left five claims remaining against ULAA and one against Jurich (retaliation).

Both ULAA and Jurich filed motions for summary judgment seeking a dismissal of Banker's complaint, stating that no genuine issues of material fact existed and that they were entitled to a judgment as a matter of law. They argued that there was a lack of causal connection between Coach Mann's decision to terminate Banker's contract on April 16, 2008, and her complaint to HR several days later on April 22, 2008. By order entered September 10, 2010, the court denied Jurich's motion, but granted ULAA's motion in part related to Banker's claims for breach of contract and for breach of implied covenants of good faith and fair dealing. The court permitted Banker's claims against ULAA for gender-based hostile work environment, gender discrimination, and retaliation to proceed.

The circuit court held a jury trial beginning September 13, 2010. At the conclusion of Banker's case, the court granted a directed verdict in favor of Jurich on the retaliation claim, dismissing him from the case entirely. The court also granted a directed verdict in favor of ULAA on Banker's gender discrimination claim, but denied this motion as to the other two claims. Following the presentation of ULAA's case, the court again denied ULAA's renewed directed

verdict motions. After deliberation, the jury returned a verdict in favor of ULAA on Banker's hostile work environment claim and in favor of Banker on her retaliatory discharge claim. The jury awarded $300,000.00 in damages for mental and emotional distress for retaliation.[2] The jury then awarded Banker $71,875.00 in lost wages, the full amount she had requested, for a total award of $371,875.00. The court entered interim findings setting forth the jury's verdict and permitting Banker to recover her costs and a reasonable attorney fee. Banker's attorney, Bryan Cassis, requested a total of $250,000.00 in attorney fees for his work on the case, as well as costs totaling $1,938.33. After considering the parties respective positions relative to a reasonable fee, the circuit court ultimately awarded attorney Cassis $149,325.00 in attorney fees and $875.33 in taxable costs. Finally, the court opted not to assess post-judgment interest against ULAA. By order entered May 18, 2011, the court made its interim findings and subsequent rulings related to costs, attorney fees, and post-judgment interest a final and appealable ruling.

On May 31, 2011, ULAA filed a motion for a judgment notwithstanding the verdict (JNOV) or for a new trial, arguing that Banker offered no evidence to prove her HR complaint was causally connected to the decision to terminate her employment, that the $300,000.00 award was excessive, that she failed to mitigate her damages and was therefore not entitled to lost wages, and that the amount of attorney fees awarded was unreasonable. Banker objected to the

[2] The jury instructions indicated that the amount for this particular measure of damages was not to exceed $1,000,000.00.

motion, and the circuit court denied ULAA's motion on July 12, 2011. This appeal by ULAA now follows.

On appeal, ULAA continues to argue as it did before the circuit court that Banker did not present sufficient proof to support a retaliatory discharge verdict, the recovery of lost wages, or the award for damages for emotional distress. Regarding attorney fees, ULAA contends that the amount of fees awarded to attorney Cassis was excessive. We agree with ULAA that Banker failed to establish sufficient proof to establish a causal connection between her termination and her HR complaint.

Banker's retaliation claim is premised on a causal connection between the filing of her HR complaint on April 22, 2008, and the notification of her termination on May 15, 2008, approximately three weeks later. ULAA bases its argument that she failed to establish a causal link upon the holding of the United States Supreme Court in *Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001), contending that the undisputed proof introduced at trial established that ULAA had been contemplating the non-renewal of Banker's contract prior to her complaint to the HR department, meaning that there was no causal connection between Banker's protected activity and her termination. In her brief, Banker does not address *Breeden*, but instead confines her response to the argument that she met her *prima facie* case to prove retaliation.

In *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985), this Court set forth the standard for ruling on a motion for a JNOV:

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ. *See Sutton v. Combs*, Ky., 419 S.W.2d 775 (1967).

With this standard in mind, we shall consider whether the circuit court should have granted a JNOV reversing the jury's verdict on Banker's retaliation claim.

Banker's claim for retaliation arises under KRS 344.280 of the KCRA, which provides, in relevant part, as follows:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
>
> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]

Because the KCRA is virtually identical to the Federal Civil Rights Act of 1964, this Court may consider how federal law has been interpreted. *Jefferson County v. Zaring*, 91 S.W.3d 583 (Ky. 2002), *citing Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226 (Ky. 1984).

Kentucky follows the burden shifting formula set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93

S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once the plaintiff establishes a *prima facie* case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id*. at 802. If the employer meets this burden, "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

In *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003), the Supreme Court of Kentucky set out the procedure to establish a retaliation claim:

> A claim for unlawful retaliation requires the plaintiff to first establish a *prima facie* case of retaliation, which consists of showing that "(1) she engaged in a protected activity, (2) she was disadvantaged by an act of her employer, and (3) there was a causal connection between the activity engaged in and the [defendant] employer's act." *Kentucky Center for the Arts v. Handley*, Ky.App., 827 S.W.2d 697, 701 (1991), *citing De Anda v. St. Joseph Hospital*, 671 F.2d 850, 856 (1982). In a case where there is no direct evidence of retaliation, as is the case here, the burden of production and persuasion follows the familiar *McDonnell Douglas* framework.

Specifically related to the causation element, *McCullough* instructs that a causal connection may be established by direct or circumstantial evidence. *Id*. at 135. In this case, Banker did not establish any direct proof; therefore, she must establish this element through circumstantial evidence.

> Circumstantial evidence of a causal connection is "evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." *Nguyen*, 229 F.3d at 565. In most cases, this requires proof that (1) the decision-maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action. *See, e.g., Breeden*, 532 U.S. at 273, 121 S.Ct. at 1508, 149 L.Ed.2d at 515.

*McCullough*, 123 S.W.3d at 135. *See also Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 804 (Ky. 2004).

In *Breeden*, *supra*, cited in both *McCullough* and *Brooks* and relied upon throughout this case by ULAA, the United States Supreme Court held that no causal connection existed when evidence established that the employer was contemplating the future transfer of the petitioner prior to her filing suit. The Supreme Court stated: "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Breeden*, 532 U.S. 268, 272, 121 S. Ct. 1508, 1511. We have also reviewed the federal cases ULAA cites in its brief uniformly applying this rule.

The policy reasons behind the decision in *Breeden* include that an employer should not be put at the mercy of an underperforming or unqualified employee, who could see the writing on the wall and make a complaint so as to be put in a protected position against termination. It would be wholly unjust to put employers

in such situations. On the other hand, employees have the right to engage in protected conduct and not to be retaliated for it. *Breeden* balances these considerations and provides a solid framework to evaluate cases such as the present one.

In denying ULAA's motion for a directed verdict at the close of Banker's proof, the circuit court explained:

> Have you seen Plaintiff's Exhibit 8 [an e-mail dated May 6, 2008, from Ms. Hermann]? Where it says, Ms. Hermann says "Mary very much knows her job is under review;" where it says "this has caused her relationship to become very difficult and likely unrecoverable?" "Will likely result in non-renewal?" It doesn't say that we made a decision three weeks ago to can her, or to non-renew her, it says "it's trending that way, it's looking like that, it's likely," it doesn't say the decision's been made. So – you say that [the non-renewal decision was made on April 16, 2008,] but I can't sit here and say that the jury would have to conclude that that's true. . . . I'm saying because of this exhibit, it's not undisputed.

In its order ruling on ULAA's motion for a JNOV, the circuit court stated:

> ULAA contends that the Plaintiff failed to satisfy all three elements of her prima facie case and failed to discredit the factual basis for ULAA's decision not to renew her contract as a pretext for unlawful retaliation. As to the first contention, ULAA points to its April 16, 2008, non-renewal decision as precluding the Plaintiff from proving any nexus between her April 22, 2008, human resources complaint and her termination. In support, ULAA presents *Clark C. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) and a number of subsequent federal cases. However, ULAA ignores the possibility that a jury considered the testimony and evidence presented over the course of the trial and determined that ULAA's version of events was untrue, or at least not as believable as ULAA contends. Indeed, under *Breeden* and its

> progeny, all a plaintiff must do is create the *inference* that the protected activity was the triggering action that caused termination, which is an issue of material fact that the jury had an opportunity to consider. The Court finds it difficult to imagine a scenario where an employee, terminated in retaliation for filing a harassment complaint, would not have a sufficiently checkered employment record so that, under ULAA's approach, the employer would be protected from any retaliation claim.

We believe that the circuit court misinterpreted the U.S. Supreme Court's holding in *Breeden*, *supra*, in denying the motion for a JNOV. We also recognize the high standard a moving party must meet to establish entitlement to this form of relief; a court is precluded from granting such relief "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Taylor v. Kennedy*, 700 S.W.2d at 416. We hold that ULAA has met this burden.

Here, the undisputed proof introduced at trial establishes that Ms. Hermann and Coach Mann met to discuss Coach Mann's strategic plan for the year on April 16, 2008, approximately one week prior to Banker's HR complaint on April 22, 2008. Ms. Hermann testified that she brought up her concerns regarding Banker's contributions and how she was affecting team and staff dynamics. She testified that she and Coach Mann decided that day not to go forward with Banker's contract for the next season, but opted to delay notifying Banker due to an upcoming Big East championship the following month. Ms. Hermann referred to this decision in a May 6, 2008, e-mail she sent to Harvey Johnson and Kevin

Miller after she had completed her review of Banker's HR complaint. Her conclusion read as follows:

> Mary very much knows that her job is under review and feels she is under performing. This is true. She told me she went to HR to "cover herself." I asked her what this means and she said, she knows Ron [Coach Mann] is disappointed in her and does not respect her work and it's made her paranoid. Throughout this process it has become clearer that Mary has struggled from the beginning to perform and out of frustration has confronted and verbally disrespected Head Coach Ron Mann repeatedly in the staff meetings and out of frustration. This has caused their relationship to become very difficult and likely unrecoverable. This, combined with her lack of performance, will likely result in a non-renewal. I would recommend that Ron proceed to do so to the betterment of the program. . . . I had left you a couple of messages regarding proceeding to speak with Mary about her employment status. We cannot wait much longer as this should not linger to me.

Banker admitted in her testimony that she did not have any personal knowledge about when any decisions regarding her continued employment were made.

While the circuit court was correct in ruling that Banker needed only to establish an inference that her termination was triggered by her protected activity (the HR complaint), the court went too far when it concluded that the jury could have considered the evidence related to the date the decision was made to terminate Banker and determined that it was not true or not as believable as ULAA contended. We disagree with this description of the evidence because the testimony and evidence related to the April 16, 2008, meeting was undisputed by Banker during the trial. Ms. Hermann testified that she and Coach Mann met that

day and decided not to renew Banker's contract for the following season. The May 6, 2008, e-mail certainly referenced this meeting and the decision to review Banker's position. We note that although the e-mail does not state that Ms. Hermann and Coach Mann had definitively decided not to renew her contract at that meeting, *Breeden* does not require that the decision had to have been actually made. Rather, *Breeden* only requires that the employment action had been contemplated prior to the knowledge of the protected activity.

Based upon the undisputed proof, even in a light most favorable to Banker and giving her every fair and reasonable inference that can be drawn from the evidence presented, ULAA proved that Ms. Hermann and Coach Mann had contemplated, if not decided, not to renew Banker's contract prior to Banker's complaint to HR. Therefore, pursuant to the holding in *Breeden*, Banker cannot prove the causal connection element between her protected activity and the decision to terminate her in order to establish her *prima facie* case of retaliation. Accordingly, the circuit court erred as a matter of law when it denied ULAA's motion for a JNOV because the cause of action should never have been permitted to go to the jury for a decision. We therefore must reverse the circuit court's judgment.

Even if we were to hold that Banker met the first prong of the *McDonnell Douglas* burden shifting formula, her claim would nevertheless fail because she failed to present any evidence that ULAA's stated reasons for its decision not to renew her contract were pretextual. Had Banker established the first prong of the

three-part formula, the burden would have been on ULAA to establish a legitimate, nondiscriminatory reason for her discharge. ULAA bore "only the burden of production and this involve[d] no credibility assessments." *Woods v. Western Kentucky University*, 303 S.W.3d 484, 487 (Ky. App. 2009) (quoting *Reeves v. Sanderson Plumbing Prods, Inc.,* 530 U.S. 133, 142, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000)). The "key issue" in determining causality is whether there was "retaliatory motive when making the decision." *Regan v. Natural Resources Group, Inc.*, 345 F.Supp.2d 1000, 1011 (D. Minn. 2004).

Here, ULAA offered a variety of reasons for contemplating a decision to terminate Banker prior to her complaints to HR. These reasons included, *inter alia*, Banker's failure to sign more than one student-athlete to compete in multi-events for ULAA; Banker's failure to make a sufficient number of recruiting telephone calls; Banker's disagreement with ULAA's "combined team" approach; regression of athletes' objective athletic measurements; an athlete calling Banker the worse coach she had ever had; and Banker's delay in drafting and delivering a multi-event athletes' "annual plan" to the strength and conditioning staff. Thus, the undisputed evidence shows that ULAA's actions were supported by legitimate nondiscriminatory reasons.

Once ULAA met its burden by providing evidence to establish that it had legitimate, nondiscriminatory reasons to support the decision to terminate Banker's contract, Banker then had the burden to "present evidence sufficient to raise the inference that [her] protected activity was the likely reason for the adverse action."

*Mickey*, 516 F.3d at 527-28 (quoting *In re Rodriguez*, 487 F.3d 1001, 1011 (6th Cir. 2007) (internal quotations and citation omitted)) (internal quotations omitted). As the United States Sixth Circuit Court of Appeals explained in *Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 526 (6th Cir. 2008):

> The "plaintiff must produce sufficient evidence from which the jury could reasonably reject [the defendants'] explanation and infer that the defendants ... did not honestly believe in the proffered nondiscriminatory reason for its adverse employment action." *Braithwaite v. Timken Co*., 258 F.3d 488, 493-94 (6th Cir. 2001) (internal quotations and citations omitted). To show an honest belief, "the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Smith v. Chrysler Corp*., 155 F.3d 799, 806-07 (6th Cir. 1998).

The Supreme Court of Kentucky has explained that:

> The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." In other words, "[i]t is not enough . . . to *dis* believe the employer, the factfinder must *believe* the plaintiff's explanation of intentional discrimination."

*Woods*, 303 S.W.3d at 487 (quoting *Williams v. Wal-Mart Stores, Inc.,* 184 S.W.3d 492, 498-99 (Ky. 2005) (quoting *Reeves*, 530 U.S. at 146-47, 120 S.Ct. at 2108) (internal citations omitted))) (emphasis in original).

In order to meet her burden, Banker needed to demonstrate that ULAA's reasons were pretextual by showing "(1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate [the employment

decision], or (3) that the proffered reason was not sufficient to motivate [the employment decision]." *Woods*, 303 S.W.3d at 487 (quoting *Smith v. Leggett Wire Co*., 220 F.3d 752, 759 (6th Cir. 2000)) (citations omitted).

Banker failed in her burden of proof regarding pretext. She did not present any proof that the legitimate reasons articulated by ULAA did not motivate its decision to terminate her contract. Therefore, even assuming she proved causation, Banker has failed to present evidence to prove pretext.

Based upon our holding that Banker failed to establish causation or pretext, we need not address the remainder of ULAA's arguments, but we specifically hold that the award of attorney fees to attorney Cassis must be reversed because Banker's entire claim failed.

For the foregoing reasons, the judgment and orders of the Jefferson Circuit Court are reversed, and this matter is remanded for dismissal of Banker's claim.

MOORE, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: I would affirm on the jury issue but reverse on the salary issue.

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BRIEF FOR APPELLEES:

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