

RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000098-MR

SOUTH WILLIAMSON LODGING, INC./
SUPER 8 MOTEL

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CI-00069

WILBERT HATCHER

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: South Williamson Lodging, Inc./Super 8 Motel (hereinafter "Super 8") appeals from an order entered by the Pike Circuit Court following a trial by jury awarding Wilbert Hatcher the sum of \$10,440.00 for net lost wages. The case was the result of Hatcher filing a complaint against Super 8 for violation of KRS 342.197, alleging Super 8 discriminated against

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

him for filing and/or pursuing a lawful workers' compensation claim. Having thoroughly reviewed this matter, we affirm.

Hatcher started working for Super 8 as a night clerk/auditor on November 24, 2002. Shortly thereafter, he was given additional duties, including providing security, during his work shifts. His rate of pay was set at \$10.00 per hour. On June 21, 2003, Hatcher was injured on the job. He was off work for a period of time due to his injuries and received workers' compensation benefits. Sometime in mid-September, Hatcher informed Leslie Prescott, the owner of Super 8, that he would be released to return to work in two to three weeks. On September 23, 2003, Hatcher notified the hotel manager, Floyd Church, he would be available for work on October 2. During the first week of October, Hatcher contacted Church as to when he should report for work. Hatcher was eventually informed that Super 8 did not have a full-time position for him in his previous position but that he could work in housekeeping for \$5.50 per hour.

Not satisfied with what was transpiring with his employer, Super 8, Hatcher contacted an attorney who advised him to file for unemployment benefits. Hatcher claimed Super 8's actions resulted in his employment being terminated, while Super 8 claimed Hatcher had quit. On January 15, 2004, Hatcher filed a claim against Super 8 seeking lost wages in the sum of

\$17,964.00. Following a trial by jury on November 3, 2004, the jury returned a verdict for Hatcher in the sum of \$10,440.00. Thereafter, on December 10, 2004, the court entered an order and judgment reflecting the jury's verdict and ordering Super 8 to pay attorney fees in the sum of \$4,837.40 and costs of \$186.00. This appeal followed.

On appeal, Super 8 argues that the trial court erred when it failed to direct a verdict in its favor and that the jury instruction as to the calculation of wages which could be awarded was erroneous.

Super 8 first contends Hatcher failed to prove a *prima facie* case of discrimination under KRS 342.197. KRS Chapter 342 deals with workers' compensation. KRS 342.197(1) states: No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter. Relying on Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790 (Ky. 2004), Super 8 argues that Hatcher did not suffer an adverse employment action. In support of its position, Super 8 contends Hatcher was not terminated, that it had legitimate business reasons for not immediately placing Hatcher on the schedule in his original position, and that the offer to work in housekeeping was only temporary and not at \$5.50 per hour as claimed by Hatcher. In Brooks, the Kentucky Supreme Court set

forth the following requirements to demonstrate a *prima facie* case of retaliation in the context of a discrimination action under KRS 344.040.

A *prima facie* case of retaliation requires a plaintiff to demonstrate "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Christopher v. Stouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir. 1991), *cert. denied*, 502 U.S. 1013, 112 S. Ct. 658, 116 L. Ed. 2d 749 (1991).

Id. at 803. Super 8 contends Hatcher did not suffer an adverse employment action and thus it was entitled to a directed verdict. The trial court denied the motion concluding that the evidence offered by Hatcher was sufficient to overcome such a motion. The court concluded that Hatcher's testimony that Prescott had harassed him, filled his position only after he notified her that he was medically released to return to work, the offering of a lesser job (housekeeper) with less pay, and the posting of signs implying Hatcher had committed fraud created a jury issue. We agree. When taken as a whole, Hatcher presented sufficient evidence to induce a reasonable juror that Super 8 had discriminated against him simply for filing a workers' compensation claim. See generally Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

Super 8 also contends that the jury instructions were erroneous as to the calculation of wages the jury could award. Instruction number three (3) permitted the jury to award Hatcher up to \$17,964.00 as lost wages. This amount was determined based upon Hatcher's salary of \$10.00 per hour for forty hours per week times the number of weeks he had been off work due to the injury until the date of trial (58 weeks). From this gross amount, the court deducted income Hatcher received from his workers' compensation claim and wages from other employment he had earned during this time frame. Super 8 argued that any potential lost wages should also be reduced by the \$5.50 per hour Hatcher would have received had he taken the housekeeping position. The trial court denied Super 8's proposed instruction but allowed it to argue its position on closing argument. The jury returned a verdict awarding Hatcher net lost wages of \$10,440.00.

On appeal, Super 8 miscalculates the amount Hatcher would have earned had he taken the housekeeping position and argues Hatcher was entitled to only \$5,644.00 as net lost wages. However, as Hatcher points out, if one deducts the \$5.50 per hour Hatcher would have earned in housekeeping from the \$10.00 per hour he earned in his prior positions and multiplies the difference of \$4.50 per hour times 40 hours per week times the 58 weeks he was off, the result is \$10,440.00. The exact amount

the jury awarded. As such, while we do not believe the court erred in giving instruction number three (3) because the jury could have believed Hatcher did not have to accept a lesser job from a discriminating employer, the issue is moot because the jury awarded the sum Super 8 was contending was the appropriate net lost wages.

For the foregoing reasons, the order entered by the Pike Circuit Court awarding Hatcher \$10,440.00 in his discrimination claim against Super 8, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen L. Hogg
David C. Stratton
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Lawrence R. Webster
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