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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000836-MR

JASON HALL — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 05-CI-00561

HAMMOND TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: Jason Hall appeals from the Jessamine Circuit Court summary judgment in favor of his former employer, Hammond Transportation, Inc. (Hammond). Hall's complaint alleged he was fired from his job as a tractor-trailer

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

driver for Hammond because he filed a claim for workers' compensation benefits. Hammond moved for summary judgment on two grounds: (1) that Hall failed to establish a *prima facie* case for retaliation; and (2) that Hall was foreclosed from pursuing such a claim by a settlement agreement. The trial court granted summary judgment "as the deposition testimony of [Hall] together with [Hammond's] documented Motion for Summary Judgment shows there is no genuine issue as to any material fact, and [Hammond] is entitled to a judgment as a matter of law." We affirm.

Facts and Procedure

Hall was hired by Hammond in July 2004 and subsequently attended a training session for new drivers at Hammond's business office in Nicholasville, Kentucky. Hammond's training for drivers included the proper procedure for reporting accidents or damage to the company's $90,000 tractors, one of which Hall drove. When not on the road, these tractors were parked at a lot near the Toyota Motor manufacturing plant in Georgetown, Kentucky.

Hall testified that on a typical day, he drove his personal vehicle to the tractor parking lot and began his workday by undertaking "the DOT [Department of Transportation] pre-truck inspection . . . [t]o make sure that the truck is fit to drive." He used a specific DOT form for that purpose. Like the other drivers, Hall was "responsible for picking up empty equipment containers at the Toyota plant[.]" He would "take the empty containers to various suppliers in Ohio, Indiana . . . and Kentucky [and] drop off the empties, [and] pick up parts and take

them back to Toyota." To document all work, each Hammond driver, including Hall, completed a "Driver's Daily Log" documenting all of his time, whether on duty or off duty, and whether on or off the road.[2]

On Monday, October 4, 2004,[3] around 8:30 a.m., before going to Georgetown, Hall first went to Hammond's business office in Nicholasville to turn in his time sheets for the previous work period. Upon exiting the building, Hall stepped in a hole on Hammond's property and twisted his right ankle. He had previously injured the same ankle in a motorcycle accident and was already taking an anti-swelling medication, Naproxen, for the condition. Hall returned to the office and told the dispatcher he had twisted his ankle.

The re-injury of his ankle was not so severe as to prevent him from manipulating accelerator and brake pedals. According to his Driver's Daily Log, he went to Georgetown where he started his workday at 9:45 a.m. After 15 minutes "On Duty (Not Driving)," he drove his tractor to Somerset, Kentucky, returned to Georgetown, then drove a second route to Madison, Indiana, before returning to Georgetown to end his workday at 8:15 p.m. He also drove his scheduled routes on October 5, 6, and 7. He did not seek medical treatment during that period.

[2] The numerous Driver's Daily Log sheets in the record (those completed by Hall and at least three other drivers) clearly demonstrate how those forms are used. Each sheet documents an entire 24-hour period. Some log sheets in the record, including the log sheet Hall completed for October 8, 2004, simply show 24 consecutive "Off Duty" hours. The remainder uniformly shows that each driver, including Hall, began each day in Georgetown with 15 minutes categorized as "On Duty (Not Driving)," presumably inspecting the vehicle, immediately followed by a period of "Driving."

[3] Unless otherwise noted, all dates refer to the calendar year 2004.

On Thursday, October 7, Hall had an accident while driving his tractor. When he returned to Georgetown, he called Hammond's operations manager in Nicholasville to report that he had struck a tree limb, damaging the mirror on the passenger's side. He reported no other damage to the vehicle.

On Friday, October 8, Hall called Hammond's business office and told the dispatcher he needed to be off work because of his ankle. He testified that he believes he went to the medical clinic at the University of Kentucky (UK) to seek treatment for his swollen ankle.[4] Hall's absence from work made it necessary to assign a substitute to drive Hall's truck on his scheduled route. Hall's substitute was Bill Saylor.

In accordance with company policy, Saylor inspected Hall's truck and discovered more damage to the vehicle than the broken mirror reported by Hall the previous day. The additional damage included a dented hood and a malfunctioning hood latch that prevented Saylor from opening the hood to inspect the engine. Repairing the tractor put the vehicle out of service for two days. Saylor also discovered a one-gallon jug half-full of what Saylor, and later Tony Hammond, determined to be urine. There was also a beverage container partially filled with tobacco spittle. There was other garbage and debris in the cab. Saylor called the Hammond dispatcher and refused to drive Hall's truck because of its condition.

[4] In his deposition, Hall said he "believed" he went to the clinic that day and the parties' attorneys seem to reference some document memorializing that visit. However, there is not documentation of the visit in the record.

The condition in which Hall left his tractor[5], and his failure to report the full extent of damage to his tractor, are the reasons business owner Tony Hammond gave for subsequently terminating Hall. Whether the decision to terminate Hall was made on October 8, as asserted by Hall, cannot be determined with certainty. However, for purposes of our review, we assume it was. On the other hand, there is no dispute that no adverse employment action was taken until December 8, when Tony Hammond terminated Hall's employment.

On Monday, October 11, in order to comply with KRS 342.038(1)[6], a Hammond employee contacted Hall by telephone to elicit information needed to complete a form entitled "Workers Compensation – First Report of Injury or Illness." The employee asked Hall for documentation of his medical treatment. He said he had none at that time. Hammond employees again telephoned Hall on October 13, attempting to obtain necessary medical information but Hall provided none. Hammond then sent Hall a medical waiver to be completed and a form to provide medical information, but Hall never completed or returned these forms.

Hammond submitted the report of Hall's injury to its worker's compensation insurance carrier, Midwestern Insurance Alliance, though without the supporting medical documentation sought from Hall. On October 14, Midwestern wrote to Hall stating:

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[5] Earlier the same year, Hammond had terminated the employment of another driver for the unsanitary condition of the cab of his tractor.

[6] KRS 342.038(1) requires that "Every employer subject to this chapter shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment."

> We cannot confirm that a work-related traumatic event occurred and, as such, this is not covered under your employer's workers' compensation insurance and no benefits will be payable.
>
> If you have additional information including medical information that you feel may alter our decision, please submit it in writing.

Midwestern sent Hammond a copy of this letter. Hall never sent any medical or other information to Midwestern or Hammond.

Nevertheless, Hall asserts that between October 14, and December 8, "I kept them [Hammond] updated as far as my status and I provided whatever I was told to, I'm sure." However, he could provide no specific facts. When asked to identify to whom he spoke and when, or what information he provided, his answer was always "I'm not sure" or a similar response. On this point, Hall's evidence is best expressed in his deposition answer to a summarizing question regarding the issue.

> Q. Okay. So you don't recall having any conversation after you received that letter [from Midwestern] with any representative of Hammond Transportation Company?
>
> A. I don't recall, no.

Hammond's averments in pleadings, depositions, responses to interrogatories, and by affidavit, consistently state that there was no communication of any kind between October 14 and December 8. During that period, the only communication Hammond received from any source regarding

Hall was a copy of the October 14 letter from Midwestern denying coverage for Hall under Hammond's insurance policy.

As discovery eventually revealed, Hall did receive some medical treatment for his ankle during this period. He testified that he saw a physician on October 20.[7] An invoice from the UK Hospital shows that Hall had an MRI taken on November 26. On December 6, Hall went to the UK Orthopaedic/Sports Medicine Center where he had medical personnel there complete a form stating that he "is able to return to work . . . on 12-7-04 [with] No restrictions." He apparently received no treatment at that time. He returned to the same facility the next day, on December 7, and obtained a second note on an identical form that said "Mr. Hall was off work from 10/20/04 – 12/6/04." Again, he apparently received no treatment.

On December 8, Hall went to Hammond's Nicholasville office and attempted to return to work. Tony Hammond informed Hall that he was terminated. Hall testified that Hammond did not explain why at that time.

Hall applied for unemployment compensation benefits.[8] On December 29, the Kentucky Division of Unemployment Insurance denied Hall's application because "the discharge was for misconduct connected with the work." Hall appealed this determination.

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[7] The record contains no medical records or invoices or other documentation dated October 20, 2004. The only documentary reference to that date is contained in the December 7, 2004, form, quoted *infra*, showing that Hall told the medical provider he had not worked since then.

[8] The record reflects that Hall's application was filed on Sunday, December 5, 2004. No one has explained this anachronism and we do not believe it is relevant to our review.

A hearing on Hall's appeal was conducted on January 31, 2005. Hammond failed to make an appearance. Hall did not assert at the hearing that the reason he was terminated was his pursuit of a worker's compensation claim or even that he was injured at work. He did not dispute, as the hearing officer determined, that Hammond "terminated the claimant's employment on December 8 for failure to comply with policies." Hall won his appeal by asserting that he "was not the only person to use the truck for business purposes, and did not have exclusive access" to it. Hammond had relied upon its written response to the appeal and, according to the hearing officer, failed to meet its burden at the hearing to establish misconduct. *See, Brown Hotel v. Edwards*, 365 S.W.2d 299, 301 (Ky. 1963)("burden of proof on the employer to show disqualification"). The hearing officer determined that "the information relied upon by the employer regarding the incident for which claimant was discharged, and the testimony or evidence presented [in the form of Hammond's response to Hall's appeal], was based on hearsay."

On February 11, 2005, Hall filed a claim with the Department of Workers' Claims (the Department) seeking disability benefits. Hammond and Midwestern disputed Hall's claim. The parties negotiated a settlement.

On July 15, 2005, the parties completed the Department's Form 110-I, entitled "Agreement As To Compensation And Order Approving Settlement" (Settlement Agreement). The portions of the Settlement Agreement pertinent to this appeal are as follows.

> Monetary terms of settlement: To be paid in a lump sum of $2,700.
> . . . .
> The purpose and intent of the settlement that is set forth herein is to enable Hammond to fully and finally resolve and conclude the claim in the above-styled [workers' compensation claim] action without having to incur further litigation, costs and expenses.
> . . . .
> Hall is represented by counsel of his own choice and by signing this agreement he acknowledges and stipulates that he has discussed this agreement with his attorney and understands the terms and conditions of this agreement as fully settling and resolving his workers' compensation claim against Hammond for the October 4, 2004 accident, injury and any *sequela* of that injury.
> . . . .
> Other responsible parties against whom further proceedings are reserved: Any other claim pending against Hammond. None.

Two weeks later, on July 27, 2005, Hall filed suit alleging Hammond terminated him in violation of KRS 342.197(1). After substantial discovery, Hammond moved the Jessamine Circuit Court for summary judgment which was granted on April 8, 2008. Hall appealed.

Standard of Review

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v.*

Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* at 480. "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700-01 (Ky.App. 2000).

Analysis

Hammond successfully argued two grounds for summary judgment before the trial court: (1) that Hall is barred from bringing his KRS 342.197 claim by the terms of the Settlement Agreement; and (2) Hall failed to establish a *prima facie* case under KRS 342.197. On appeal, Hall argues that the Settlement Agreement does not bar this cause of action. He gives two reasons. First, he asserts that Form 110-I is not a settlement agreement but is "an enforceable judgment that can only enforce matters over which the ALJ [Department of Workers' Claims administrative law judge] has jurisdiction pursuant to KRS 342." Second, Hall asserts that the very language used in the Settlement Agreement restricts settlement to his workers' compensation claim only. Regarding the elements of a *prima facie* claim, Hall states that "A jury can infer retaliation was causally related to the discharge merely from the closeness in time of the two events of the seeking of benefits and the discharge." We shall address each of Hall's arguments.

I. The Settlement Agreement

Regarding the Settlement Agreement, we believe Hall is essentially correct. By using Form 110-I, the parties limited the scope of their settlement to matters within the jurisdiction of the Department's ALJ. Form 110-I, and similar forms promulgated by the Department,[9] were created to facilitate the settlement of claims in accordance with KRS 342.265, which states

> If the employee and employer and special fund or any of them reach an agreement conforming to the provisions of this chapter ***in regard to compensation***, a memorandum of the agreement signed by the parties or their representatives shall be filed with the executive director, and, if approved by an administrative law judge, shall be enforceable[.]

KRS 342.265(1)(emphasis supplied). Under the statute, a settlement utilizing Form 110-I embraces only "compensation" as that term is defined in Chapter 342. *Id.* "Compensation" is defined in KRS 342.0011(14) as "all payments made under the provisions of this chapter representing the sum of income benefits and medical and related benefits[.]" And although the statute protecting workers from retaliatory discharge is located in Chapter 342, "compensation" does not include an employee's claim for or recovery of damages for his employer's violation of that statute. Jurisdiction of that claim is with the judiciary.

Use of Form 110-I in conformity with Chapter 342 and approved by the ALJ will be enforceable by a circuit court. KRS 342.265(1); KRS 342.305. On the other hand, if matters extraneous to an ALJ's jurisdiction are included in a Form 110-I, the ALJ would lack the authority to approve them, *see, Custard Ins.*

[9] *See* 803 Kentucky Administrative Regulations (KAR) 25:010 Section 20(6) identifying Forms 110-F, 110-O and 110-CWP.

Adjusters, Inc. v. Aldridge, 57 S.W.3d 284, 288-89 (Ky. 2001), and could not make them enforceable by approval.

If the Form 110-I completed in this case had been perceived by the ALJ as settling anything other than Hall's claim for "compensation" as defined by KRS 342.0011(14), the ALJ should have, and we believe would have, rejected it. Settlement of any claim Hall could have pursued pursuant to KRS 342.197(1) would have necessitated a separate settlement agreement, supported by separate consideration, and independent of the limited agreement contemplated by KRS 342.265 and Form 110-I. Furthermore, the $2,700 total settlement sum shown on Form 110-I allocates all of the settlement proceeds to various forms of "compensation" under Chapter 342, leaving nothing attributable to the settlement of any other claim, specifically a claim under KRS 342.197(1). The language identifying no "[o]ther responsible parties against whom further proceedings are reserved[,]" refers to proceedings before the ALJ and within her jurisdiction, not to the universe of possible defendants or possible causes of action.

Therefore, we agree with Hall that the Settlement Agreement did not bar him from pursuing his retaliatory discharge claim.

II. The Prima Facie Case

The statutory provision relied upon by Hall in his retaliation claim states: "No employee shall be harassed, coerced, discharged or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this [the Workers' Compensation] chapter." KRS 342.197(1). This provision has been

construed to forbid retaliation for filing *or* pursuing a workers' compensation claim. *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 132 (Ky.App. 1990).

To survive Hammond's summary judgment motion, Hall had to establish at least a genuine issue of material fact regarding each of the four elements of a *prima facie* claim under KRS 342.197(1). Those elements are that: (1) the employee was engaged in a protected activity, meaning that he had filed or was pursuing a lawful workers' compensation claim, *Overnite Transp. Co* at 132; (2) the employer knew the employee had filed or was pursuing a lawful workers' compensation claim; (3) the employer took adverse employment action against the employee; and (4) that there was a causal connection between the protected activity and the adverse employment action. *See, Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 915 (Ky.App. 2006).

There is no dispute that Hall's termination on December 8 was an adverse employment action. Therefore, we examine the remaining three elements of the *prima facie* cause of action.

A. Was Hall Engaged In A Protected Activity When Terminated?

Hall did not file a claim for workers' compensation benefits until after he was terminated. The issue then becomes whether Hall was "pursuing a lawful [workers' compensation] claim." KRS 342.197. The Sixth Circuit, interpreting KRS 342.197(1) subsequent to the rendition of *Overnite Transp. Co.*, has further clarified that no *prima facie* claim exists absent evidence that the employee's "intent to pursue a workers' compensation claim existed at the time of the

[employee's] discharge[.]" *Hardaway Management Co. v. Southerland*, 977 S.W.2d 910, 915 (Ky. 1998), *quoting Southerland v. Hardaway Management Co., Inc.*, 41 F.3d 250, 256 (6th Cir. 1994).[10] Therefore, the question we ask is this: Does the evidence, viewed in a light most favorable to Hall, create a genuine issue as to whether Hall intended to pursue a workers' compensation claim at the time of his discharge on December 8?

We first note that statutory workers' compensation benefits are not automatic. Furthermore, an employee injured on the job is not required to pursue such benefits. However, if such benefits are to be secured, the employee must pursue them. Consequently, while Hall's pursuit of medical treatment is evidence he was injured, it is not evidence of pursuit of a worker's compensation claim.

Hall's best evidence to establish this element is that when he twisted his ankle, he immediately told his employer. He did not specifically identify this injury as being work-related at that time. In fact, the work record Hall himself completed shows that he did not start work until forty-five minutes *after* he incurred his injury. And although the employer had to take the initiative and actually pursue Hall to obtain information about his injury, one could infer that Hall's notification was the first step in pursuit of a workers' compensation claim.

Similarly, based on the November 26 invoice from UK Hospital, and notwithstanding that Midwestern had already denied coverage, Hall apparently told

[10] The Kentucky Supreme Court has held that Kentucky's anti-retaliation laws are to be construed consistently with federal anti-retaliation law, and our courts routinely refer to federal case law for guidance. *See, Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 801-02 (Ky. 2004).

the hospital that workers' compensation insurance would pay for his MRI. Hammond, however, never saw this document until discovery at trial revealed it.

There is no other evidence that Hall was pursuing a lawful workers' compensation claim prior to his filing such a claim on February 11, 2005.[11]

Hall's evidence in support of the first element of a *prima facie* claim of retaliatory discharge is, therefore, very weak. As we have said in another such case, the evidence "is by no means overwhelming[.]" *Bishop v. Manpower, Inc. of Cent. Kentucky*, 211 S.W.3d 71, 77 (Ky.App. 2006).

We need not address whether such minimal evidence is sufficient to create a *genuine* issue as to this element of Hall's claim because this is not the claim's weakest aspect. However, discussion of this evidence was still necessary to demonstrate how unlikely it was the Hammond knew that Hall was pursuing such a claim. Therefore, we turn to the second element of the *prima facie* claim.

B. Did Tony Hammond Know Hall was Pursuing Workers Compensation Benefits When Hall Was Fired?

Of the modicum of evidence outlined above supporting Hall's claim that he was actually pursuing a workers' compensation claim, Tony Hammond knew only three things: (1) Hall twisted his ankle on October 4; (2) he sought medical treatment on October 8; and (3) Midwestern denied coverage on October 14. Absent additional evidence, this is not enough to demonstrate that Hammond knew Hall was pursuing a claim. None of Hall's subsequent behavior supports any

[11] While the record indicates that on December 6 and 7, 2004, he discussed with medical personnel the fact that he had been off work since October 20, nothing indicates he told them his absence resulted from a work-related injury.

reasonable inference that Hammond knew he was pursuing workers' compensation benefits including Hall's: failure to contest Midwestern's determination; failure to provide medical information to Midwestern or Hammond including a medical excuse from work; failure to communicate with Hammond in any way; and failure to follow through by filing a workers' compensation claim. In fact, considering the condition of Hall's tractor on October 8 and Hall's decision not to contact Hammond for two months, there was no reason for Hammond to believe Hall intended or desired to return to work for Hammond much less to pursue a workers' compensation claim.

Having searched the record thoroughly, we find no evidence that would create a genuine issue in this regard. There is simply no evidence that Hammond knew Hall was pursuing a workers' compensation claim. There being a complete absence of proof on this issue, Hall did not present a *prima facie* claim for retaliatory discharge, and the Jessamine Circuit Court properly entered summary judgment in Hammond's favor.

C. Was There A Causal Connection Between Hall's Pursuit Of Workers' Compensation Benefits And His Termination?

Logically, if there was no evidence that Hammond knew Hall was pursuing a claim, such cannot be the cause of his termination. However, Hall argues that causation can be inferred because "proof shows an immediate decision to fire [Hall] within hours of learning he was off work due to a work-related injury." This argument fails for three reasons. First, it presumes that Hall's injury

was work-related, a fact never determined. Second, it presumes Hammond immediately decided to fire Hall when he saw the tractor's condition rather than after incurring repair costs or after Hall failed to report to work or contact Hammond for two months. Third, the statute required Hall to demonstrate "a causal connection between the protected activity and the adverse employment *action.*" *Dollar General Partners* at 915 (emphasis supplied), *citing Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004). The employer's thought process preliminary to taking any employment *action* is subject to change and would require inordinate speculation on the part of a jury. The statute, KRS 342.197(1), prohibits specific action, not thought. As noted above, there is no dispute that the adverse employment action occurred two months after Hall's injury.

In summary, we look to Hall's own testimony regarding this issue when he answered the following question.

> Q: What factual basis do you have to allege that you were fired for pursuing a workers' comp claim?
>
> A: I don't know.

(Hall deposition, p. 97).

We conclude that Hall presented no evidence of a causal connection between his presumed pursuit of workers' compensation benefits and his termination from employment.

For the foregoing reasons, the judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David R. Marshall
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BRIEF FOR APPELLEE:

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