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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002162-MR

WILLIAM BOHL — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 07-CI-00909

CITY OF COLD SPRING — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: This appeal is from the trial court's summary judgment in favor of Appellee on Appellant's claims for disability discrimination, retaliation, constructive discharge, intentional infliction of emotional distress ("IIED"), and disability harassment. For the reasons stated herein, we affirm.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Appellant began working for Appellee as a police officer in June 1999. In 2005, Appellant was assigned to focus on investigations and was called a "detective," although the Department did not have a dedicated detective position. It only had job descriptions for the positions of police chief, sergeant, officer, and clerk. Appellant would also occasionally work patrol shifts when other officers were on vacation or when he wanted to earn overtime pay.

In 2006, Edward Burk was hired as police chief. Sometime between July and September 2006, the City Council asked Chief Burk to draft job descriptions for the positions of detective and lieutenant. The job descriptions were completed in November or early December 2006 and were approved by the City Council on February 26, 2007.

Meanwhile, in October 2006, Appellant informed Chief Burk that Appellant might have multiple sclerosis and was going to undergo further tests. He stated that his day-to-day job functions would not be affected but requested that he be excused from a physical fitness test. This was approved by Chief Burk. Appellant was referred to a neurologist, and as early as November 2006, Appellant told the neurologist that he was "contemplating early retirement" from his job because of the physical demands. During this time, Chief Burk was considering placing Appellant on the third shift, as officers were needed to provide coverage during that time, and because Chief Burk felt that Appellant's case load was not sufficiently significant.

The neurologist confirmed Appellant's diagnosis of multiple sclerosis, and Appellant communicated this information to Chief Burk on December 1, 2006. At a meeting on December 3rd or 4th, Appellant asked Chief Burk to accommodate him temporarily by allowing him to continue in his detective position and to work the same schedule while he became accustomed to his new medications. Chief Burk granted this request. Chief Burk also noted at this meeting that he had been asked to create a job description for the detective position and indicated that he would eventually need a doctor's note stating what activities Appellant could and could not perform. Chief Burk confirmed at this meeting that Appellant was most likely "un-inclined" to work the third shift position. Chief Burk also reiterated that the detective position was not permanent and discussed the possibility of retirement with Appellant.

Thereafter, a second meeting occurred between Chief Burk and Appellant. At this meeting, Appellant claims Chief Burk stated that the City Council wanted the position of detective posted for application by other officers, but Chief Burk disputes that he stated this to Appellant. At this time, Chief Burk also gave Appellant the existing job description for a police officer and a draft of the description for detective, and asked Appellant to have his doctor identify the duties Appellant could and could not perform. Also about this time, Chief Burk indicated that Appellant would not be allowed to work any overtime or be assigned any new projects.

Appellant took the job descriptions to his specialist and, according to the specialist's notes, asked for "a note stating that he was not able to perform his regular duties as a police detective." Appellant's neurologist was unable to make such a determination and sent Appellant to an occupational therapist for a functional capacity evaluation. The therapist's report indicated that Appellant could not tolerate the demands of a "light" level of work for an 8-hour day or 40-hour workweek. The therapist referred to balance and coordination as "major areas of dysfunction," and said Appellant's performance was affected by fatigue and decreased muscle strength in his extremities. Appellant provided the results of the evaluation to Chief Burk, and Chief Burk again asked for a doctor's note describing what Appellant could and could not do.

During this time period, Chief Burk also made joking comments regarding Appellant's condition. In the company of other officers and office staff, Chief Burk suggested that multiple sclerosis was making Appellant "shaky" and stated that he would not now have to buy an automatic weapon for Appellant. Later, when Appellant arrived late to a luncheon, Chief Burk remarked in front of the attendees that Appellant "forgot where you were going and probably who you are." Additionally, after the City's holiday party, Appellant asked Chief Burk if members of the City Council were upset with him, as he felt that they did not speak to him at the party. Chief Burk laughed and suggested that the members were probably worried that they would "catch MS."

On January 15, 2007, Appellant applied for short-term disability benefits with a private insurer. The provider allowed him to work only up to eight hours per week without sacrificing his benefits. Also about January 15 or 16, in response to Chief Burk's request that Appellant obtain a doctor's note describing what duties Appellant could and could not perform, Appellant gave Chief Burk a note from his specialist stating that Appellant was "not able to do the duties of a police officer or a detective." Appellant claims that Chief Burk thereafter removed him from his detective duties based on the doctor's note. Thereafter, Appellant performed clerical work on an as-needed basis for the Department.

On January 17, 2007, Appellant applied for state permanent disability retirement benefits, stating his "termination date" as April 30, 2007, and his retirement date as May 1, 2007. Also on or about January 17, Chief Burk asked Appellant to provide a letter of resignation for April 30, 2007, the date on the retirement benefits application, so that the Department could begin the hiring process. Appellant refused to resign at that time. He was ultimately approved for permanent disability benefits on April 13, 2007, and formally resigned from the Department on April 27, 2007.

Appellant sued Appellee for disability discrimination, retaliation, constructive discharge, intentional infliction of emotional distress, and disability harassment. Both parties moved for summary judgment, and the trial court granted Appellee's motion. Thereafter, Appellant moved to alter, amend, or vacate the

trial court's order, and this motion was denied by the trial court. This appeal followed.

Summary judgment is proper and "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. When summary judgment is the issue, the trial court does not find facts as in CR 52.01 proceedings; rather, the court examines the record to determine whether the party against whom the motion is made could prevail under any state of facts that could be presented. On summary judgment, it is not the court's function to decide issues of fact but only to determine whether there are such issues to be tried. *Mitchell v. Jones*, 283 S.W.2d 716 (Ky. 1955). On motion for summary judgment, the trial court must "view the evidence in the light most favorable to the nonmoving party[.]" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)).

Appellant first claims error related to his disability discrimination claim. Under KRS 344.040(1),[2] it is unlawful for an employer to discharge or otherwise discriminate against an individual "with respect to compensation, terms,

[2] Because of the similar language and the stated purpose of KRS Chapter 344 to mirror the federal civil rights statutes, including the Americans with Disabilities Act, this Court may look to federal case law when interpreting a plaintiff's state claims of disability discrimination, retaliation, and harassment. *Hallahan v. The Courier-Journal,* 138 S.W.3d 699, 705-06 (Ky. App. 2004).

conditions, or privileges of employment . . . because the person is a qualified individual with a disability[.]" KRS 344.040(1). The plaintiff must first establish a prima facie case by offering proof that (a) he had a "disability" within the meaning of the statute; (b) despite the disability, he was otherwise qualified to perform the essential functions of the job in question, either with or without reasonable accommodation; and (c) he suffered an adverse employment action because of his disability. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706-07 (Ky. App. 2004). The plaintiff's burden is "not onerous" and requires less than a typical preponderance of the evidence showing. *Jones v. Potter*, 488 F.3d 397, 404 (6th Cir. 2007) (citing *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)); *Dixon v. Gonzales,* 481 F.3d 324, 333 (6th Cir. 2007) ("The burden of proof at the prima facie stage is minimal").

If the plaintiff fails to establish a prima facie case, the defendant is entitled to summary judgment. Otherwise, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse action. *Hash v. University of Kentucky*, 138 S.W.3d 123, 125-26 (Ky. App. 2004). After a defendant has provided a nondiscriminatory reason for the termination, the plaintiff must persuade the trier of fact by a preponderance of the evidence that the employer's explanation was false, or that it was merely a pretext for the discrimination. *Id.* To survive summary judgment, a plaintiff must not only establish a prima facie case but must also make a substantial showing that the

employer's explanation was false. *Kentucky Dept. of Corrections v. McCullough,* 123 S.W.3d 130, 134 (Ky. 2003).

Appellant first argues that the trial court erred by concluding that Appellant was not otherwise qualified to perform the essential functions of his job.[3] The U.S. Court of Appeals for the Sixth Circuit has stated that "[s]uch a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." *Hall v. U.S. Postal Service*, 857 F.2d 1073, 1079 (6th Cir. 1988). The relevant time for determining whether the plaintiff is a "qualified individual" is at the time of the alleged adverse action. *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998) (citing *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884 (6th Cir. 1996)). One of the primary means by which a plaintiff can show that he is "qualified" is by successfully performing the job after the onset or exacerbation of a disability. In *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *overruled in part by Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999), for example, the court held that a police officer with monocular vision was qualified for his job, reasoning that he had satisfactorily performed his job after his sight in one eye was lost. Additionally, in *Griffith*, where the employer testified that plaintiff had no job performance problems after he was diagnosed with severe back problems, plaintiff was held to have met the "otherwise qualified" element of his prima facie case.

[3] Appellee conceded that Appellant was disabled under the statute.

In this case, Appellant made a prima facie showing of the "essential functions" element, because he produced evidence that he continued to perform his job to the satisfaction of his employer after he was diagnosed with multiple sclerosis, to and including the day he ceased working as a detective. Chief Burk stated in his deposition that there were no job performance issues with Appellant at any point during his time with the Department or after he was diagnosed with multiple sclerosis and that he was performing his job duties to the Department's satisfaction. Therefore, from this evidence and in view of the low threshold showing required of a plaintiff, we conclude that Appellant provided sufficient proof to meet his prima facie case as to this element.

Appellant also argues that the trial court erred when it found that he failed to make a prima facie showing that he suffered an adverse employment action due to his disability. An adverse employment action includes "significantly diminished material responsibilities[.]" *Kocsis*, 97 F.3d at 886.

In his deposition, Chief Burk testified that after receipt of the doctor's letter indicating that Appellant could not perform the duties of a police officer or detective, Chief Burk made the decision that Appellant should no longer work shifts as a police detective or officer. Specifically, he testified as follows:

> Q And following receipt of [the doctor's letter], [Appellant] was actually removed from his position as police detective; is that correct?
>
> . . .
>
> A What do you mean by removed?

> Q He was no longer allowed to work his shift as police detective.
>
> A Correct, or as a police officer.
>
> Q And who made that decision?
>
> A I did.

Further, Chief Burk stated that he made the decision based solely on the doctor's note regarding Appellant's disability and not based on the fact that Appellant went on short-term disability and would only be allowed to work eight hours a week:

> Q Okay. Is it correct to state that you based the entire decision to remove [Appellant] from his – to not allow him to return to his position based on [the doctor's note]?
>
> A Yes.

Therefore, Appellant has provided evidence that Chief Burk removed him from his shift as a detective. As this particular action dramatically impacted Appellant's responsibilities, this is sufficient for a prima facie showing that Appellant was subjected to an adverse employment action based on his disability.

However, the analysis does not end there. Upon Appellant's proof of a prima facie case, the burden shifted to Appellee to offer a legitimate business purpose. Appellee bears only the burden of production, not persuasion, and no credibility assessments are involved. *Williams v. Wal-Mart Stores, Inc.,* 184 S.W.3d 492, 497 (Ky. 2005). Appellee met this burden by producing evidence that it had a legitimate business purpose in acting for the safety of Appellant, other

police officers, and the community served by the police department. The doctor's note supports the actions of the Department. It explicitly stated that Appellant was "not able to do the duties of a police officer or a detective." In his deposition, Chief Burk stated that his "concern was [Appellant's] safety, the safety of other officers, and – and physical well-being." In response to the question of why he needed to know what Appellant could and could not do, Chief Burk said: "To make sure that he was safe himself and so that other officers on the department and other officers on the street were safe."

The physician's note and the police chief's explanation revealed a sufficient business purpose to cause the burden to shift back to Appellant to prove, by a preponderance of the evidence, that "(1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; and (3) the plaintiff could show that the reasons given were insufficient to motivate the decision." *Williams*, 184 S.W.3d at 497 (citing *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994)).

Appellant failed to meet his burden in this respect. He failed to provide any proof that Appellee's explanation was false. There was no evidence that the detective job description was purposely drafted so as to prevent Appellant from meeting the requirements or to force Appellant out of the Department. Rather, the evidence indicated that Appellee was simply in need of a job description for the position, as one was lacking, and Chief Burk took steps to address this need. Further, Appellant offered no evidence that Chief Burk's refusal

to let him work overtime or to work on extra projects was anything other than an attempt to comply with Appellant's own request to keep working the same hours. Moreover, Appellant was never actually required to work the third shift, even though it was at one time contemplated by Chief Burk because Appellant's case load was not sufficiently significant.

Upon the foregoing, the trial court correctly granted summary judgment for failure of Appellant to produce evidence of a genuine issue of material fact at the third-stage analysis. Accordingly, we affirm the trial court's summary judgment on Appellant's disability discrimination claim.

Appellant next contends that the trial court erroneously concluded that Appellee's conduct was not sufficient to establish a claim for IIED. Appellant's argument fails. As the trial court explained, Appellant's IIED claim is subsumed by his KRS Chapter 344 claims of disability discrimination, retaliation, and disability harassment. *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001). "Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Grzyb v. Evans,* 700 S.W.2d 399, 401 (Ky. 1985). Thus, summary judgment on Appellant's IIED claims was proper.

Turning to Appellant's retaliation claim, for a prima facie case of retaliation, a plaintiff must demonstrate that: (1) the plaintiff engaged in a protected activity; (2) the defendant was aware of the protected activity taken by the plaintiff; (3) the defendant took an adverse employment action against the

plaintiff; and (4) there is a causal connection between the protected activity and the adverse employment action. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 803 (Ky. 2004) (citing *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870, 877 (6th Cir. 1991), *cert. denied*, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991)). The burden-shifting analysis discussed at length hereinabove applies in a disability discrimination case. *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008).

In this regard, Appellee proffered a legitimate, non-discriminatory reason for its actions – the safety of Appellant and others. Appellant failed to overcome Appellee's proof by a preponderance of the evidence. Therefore, summary judgment was appropriate on Appellant's retaliation claim.

Appellant further argues that, with regard to his disability harassment claim, the trial court erroneously concluded that Appellee's conduct was not sufficiently severe or pervasive as to create a hostile work environment. A hostile working environment "must be sufficiently severe or pervasive" so as "to alter the conditions of [the victim's] employment and create an abusive working environment."[4] *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)). Whether the alleged harassment is "severe or pervasive" in context depends on all the circumstances, including the frequency of the conduct,

[4] The standard for ADA hostile work environment claims is consistent with the standard for sexual harassment hostile work environment claims. *See Coulson v. Goodyear Tire & Rubber Co.*, 31 Fed. Appx. 851, 858 (6th Cir. 2002).

the severity of the conduct, whether the conduct is physical in nature or merely an "offensive utterance," and whether the conduct unreasonably interferes with work. *Plautz v. Potter*, 156 Fed. Appx. 812, 819 (6th Cir. 2005). Bad manners, boorish behavior, and coarse utterances are not actionable.

The annoying circumstances identified by Appellant, when viewed in their totality, do not rise to the required level. Chief Burk's jokes do not constitute severe and pervasive harassment under the prevailing standard. The jokes were not frequent, severe, or physical in nature, they stopped when Appellant told Chief Burk he was offended, and there is no evidence that these jokes interfered with Appellant's work performance. The record demonstrates that Appellant himself made light of his condition and allowed those he regarded as friends in the Department to also make jokes about it. Thus, it was not unreasonable for Chief Burk to believe that his conduct would not offend Appellant. Chief Burk's comments may have been improper, in poor taste, and reveal bad manners, but they did not create a pervasive abusive work atmosphere. As previously discussed, Appellant's other examples of a hostile work environment, including claims that the job description was drafted in such a way to specifically keep Appellant from being able to meet the requirements, are not supported by the record.

Finally, Appellant argues that the trial court erroneously concluded that he was not constructively discharged. The standard for constructive discharge is whether, based on objective criteria, "the conditions created by the employer's actions are so intolerable that a reasonable person would feel compelled to resign."

Brooks, 132 S.W.3d at 807 (quoting *Northeast Health Management, Inc. v. Cotton*, 56 S.W.3d 440, 445 (Ky. App. 2001)). "To constitute a constructive discharge, the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit." *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999). While the conditions in this situation may not have suited Appellant, they were not intolerable and did not compel resignation. Additionally, there was no evidence to show that, through these actions, Appellee intended and foresaw that Appellant would resign as a result. Therefore, summary judgment was appropriate.

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

ALL CONCUR.

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