RENDERED: JULY 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000670-MR

CORE MEDICAL, LLC (CORE LLC) APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CI-00220

DEBORAH SCHROEDER APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

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

DIXON, JUDGE: Appellant, Core Medical, LLC, appeals from a judgment of the Kenton Circuit Court awarding damages to Appellee, Deborah Schroeder, on her

[1] Senior Judge Joseph Lambert 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.

claims of pregnancy discrimination in violation of KRS § 344.040 and Title VII, 42 U.S.C. §§ 2000(e), *et seq*. For the reasons set forth herein, we affirm in part, reverse in part, and remand.

Schroeder was hired by Core Medical, Inc., D/B/A Commonwealth MRI on August 23, 2004. She was assigned to the 340 Thomas More Parkway site working four days a week from 7:30 a.m. until 4:00 p.m., an average of 32 hours per week. In April 2005, Schroeder informed her manager, Rusty Skinner, that she was pregnant and due to deliver in December 2005. Beginning in April 2005, Schroeder repeatedly requested a definite statement as to her maternity leave from both her on-site supervisor, Billy Styles, as well as Skinner.

In August 2005, Schroeder was informed that the 340 Thomas More Parkway facility was closing and that she would be reassigned to her employer's MRI facility at 500 Thomas More Parkway, the current site of Core Medical LLC. Following the transfer, Schroeder's work schedule changed to the afternoon hours of 2:00 p.m. until 10:00 p.m.

On August 23, 2005, Schroeder informed Core Medical, LLC that due to her pregnancy, her OB/GYN had limited her to lifting no more than twenty-five pounds and to a work schedule of twenty-four hours per week. Beginning the following week, Schroeder was scheduled to work the 5:00 p.m. to 10:00 p.m. shift by herself. Apparently, no employee had ever previously been required to work alone. As a result, Schroeder expressed concern about not only the safety of working by herself but also that it affected her lifting restrictions. In the months

that followed, Schroeder's shifts became very erratic, with her total weekly schedule ranging anywhere from six hours to twenty-six hours, including various shifts where she was still required to work alone, thus requiring her to do heavy lifting.

On November 28, 2005, Skinner telephoned Schroeder at work to discuss her maternity leave and schedule upon return to work. Styles also participated in the conversation. Schroeder was informed that upon her return her schedule would be increased to five days a week with the hours of 2:00 p.m. to 11:00 p.m. Schroeder later testified that when she asked Skinner and Styles if she could discuss the new schedule with her husband because of child care issues, she was summarily terminated and escorted from the premises.

On January 19, 2007, Schroeder filed a complaint in the Kenton Circuit Court against Core Medical, Inc., d/b/a Commonwealth MRI, alleging discrimination in violation of KRS 344.040, KRS 344.450, and Title VII, 42 U.S.C. §§ 2000(e), et seq. Appellant subsequently amended her complaint to include Core Medical, LLC, Imatech, Inc. and Imatech.[2] None of the defendants responded to the suit and on July 26, 2007, the trial court entered a default judgment against all defendants as to liability.

[2] As no reference is made to Imatech in the trial court's judgment, we are unable to discern what its relationship is to Core Medical, Inc. or Core Medical, LLC. However, the trial court did note that Kirk Bowman is registered as the President and person for service of process with the Kentucky Secretary of State for Core Medical, Inc., D/B/A Commonwealth MRI, Core Medical, Inc., Core Medical, LLC, IMATECH, Inc., and IMATECH.

On October 21, 2008, the trial court conducted a bench trial on damages. Core Medical, LLC was the only defendant represented during the trial. On January 20, 2009, the trial court rendered a judgment awarding Schroeder back pay of $28,942.20, compensatory damages of $125,000.00, and punitive damages of $200,000.00. The trial court subsequently denied Core Medical, LLC's motion to alter, amend or vacate, and this appeal ensued. Additional facts are set forth as necessary.

Core Medical, LLC first argues that there was no evidence presented to support the trial court's award of punitive damages. In the alternative, Core Medical, LLC claims that even if this Court finds that punitive damages were appropriate, the trial court's award failed to comport with the statutory cap set forth in 42 U.S.C. § 1981a(b)(3).

Our standard of review for a trial court's findings of fact following a bench trial is whether such findings are clearly erroneous. CR 52.01; *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Findings of fact are clearly erroneous if they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Substantial evidence is evidence of a probative value that a reasonable person would accept as adequate to support a conclusion. Even if this Court were to reach a contrary conclusion, we will not disturb the lower court's findings if supported by substantial evidence. Notwithstanding, the trial court's conclusions of law are subject to an independent *de novo* review. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005).

A plaintiff asserting a federal gender discrimination and retaliation cause of action is entitled to an award of punitive damages whenever he or she proves that "the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The plaintiff does not need to prove subjectively egregious behavior, but rather that the respondent discriminated against the plaintiff "in the face of a perceived risk that its actions [would] violate federal law . . . ." *Kolstad v. American Dental Assoc.,* 527 U.S. 526, 536, 119 S.Ct. 2118, 114 L.Ed.2d 494 (1999). Further, a corporate entity is liable for punitive damages occasioned by the misconduct of a managerial level employee if the manager is acting in that capacity within the scope of his employment. *Id.* at 543-45.

As it did in the lower court, Core Medical, LLC again argues that because it was not in existence at the time of the discriminatory practice, it cannot be liable for the acts of managers who were employed by its predecessor corporation. We agree with Schroeder, however, that the default judgment forecloses this argument on appeal. We would note that although there is a pleading in the record indicating Core Medical, LLC's intent to file a motion to set aside the judgment, no such motion was ever filed.

Notwithstanding the procedural bar, we are of the opinion that the evidence presented during the bench trial clearly refutes Core Medical, LLC's argument. The trial court made extensive findings on this issue:

The defendant argues that Core Medical, LLC is a separate entity from Core Medical, Inc., D/B/A Commonwealth MRI because Core Medical, LLC merely purchased the assets of Core Medical, Inc., D/B/A/ Commonwealth MRI. . . . The defendant Core Medical, LLC, argues that it was not in existence at the time of the plaintiff's termination and never employed Rusty Skinner the Plaintiff's off-site manager.

. . .

It is uncontroverted that the plaintiff was employed by Core Medical, Inc., D/B/A Commonwealth MRI. It is uncontroverted that Core Medical, Inc., is a corporation registered in Missouri. It is also uncontroverted that Plaintiff filed her charge with the EEOC on or about February 16, 2006, and received her right to sue notice on or about October 23, 2006, and that this action was filed on January 31, 2007. The pleadings and the testimony also establish that Core Medical, LLC was formed on March 31, 2006, and registered in Florida. Additionally, the defendant Core Medical, LLC plead and the court finds that the relationship between Core Medical, Inc. and Core Medical, LLC was not finalized until February or March of 2007. . . . The record is also uncontroverted that Kirk Bowman is registered as the President and person for service of process with the Kentucky Secretary of State for Core Medical, Inc., D/B/A Commonwealth MRI, Core Medical, Inc., Core Medical, LLC, IMATECH, Inc., and IMATECH.

In addition to the same assets, Core Medical, Inc. and Core Medical, LLC operated at the same location, have similar if not the same officers, have the same employees and have the same on-site supervisor, Billy Styles. Most importantly, both of these entities were notified prior to a sale of assets or a sale as a successor corporation that the plaintiff had filed an EEOC notice and were served with summons to notify them of the suit filed on January 31, 2007. Billy Styles, who was on the phone and instrumental in the termination of the plaintiff, is still managing most of the same employees who worked for Core Medical, Inc. There was no legal distinction between these entities proven to the court. The court

> finds that the defendant Core Medical, LLC is a successor in interest and/or owner of Core Medical, Inc.

As a panel of this Court in *Parker v. Henry A. Petter Supply Co.*, 165 S.W.3d 474, 479 (Ky. App. 2005), noted, "a successor company which continues with the same business, by the same officers and personnel, in the same location with only a slight change in name will be considered liable for the debts and liabilities of the selling company." Thus, even if Core Medical, LLC were permitted to relitigate the issue, it would fail on the merits.

The uncontroverted evidence demonstrated that Schroeder was discharged in her eighth month of pregnancy without warning or cause. In light of her unblemished work history, the evidence supported the trial court's finding that Core Medical, LLC engaged in a discriminatory practice with malice or with reckless indifference to Schroeder's federally protected rights. Accordingly, the award of punitive damages was appropriate.

However, while we are of the opinion that the evidence supported an award of punitive damages, we must agree with Core Medical, LLC that the trial court erred in awarding $200,000.00 without any determination of the number of employees that existed at the time of Schroeder's termination or during the preceding year. Punitive damages awards are limited by the provisions of 42 U.S.C. § 1981a(b)(3), which provides, in relevant part, as follows:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other

> nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Schroeder responds that the damages cap contained in § 1981a(b)(3) is an affirmative defense that would "constitute an avoidance" under CR 8.03. Relying upon *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987), Schroeder asserts that Core Medical's failure to plead the statutory cap constitutes a waiver of the affirmative defense, precluding it from challenging the amount of punitive damages at this point. We disagree.

Whether the limitation provision of § 1981a(b)(3) functions as an affirmative defense is not only an issue of first impression in Kentucky, but has, in fact, been discussed by very few courts. However, we are persuaded by the reasoning set forth in *Oliver v. Cole Gift Ctrs.*, 85 F.Supp.2d 109 (D. Conn. 2000), wherein the court held:

Plaintiff fails to cite any case law on the issue of whether Title VII's statutory cap must be pleaded as an affirmative defense. Rather, Plaintiff relies on cases in which the courts held that the defendants waived various statutory limitations other than § 1981a(b)(3) by failing to plead the limitations as affirmative defenses. Plaintiff's reliance on these cases is misplaced. In each of the cases Plaintiff cited, the limitations on damages were part of a statutory scheme distinct from the basis of recovery. The courts in those cases held that the caps were affirmative defenses in order to prevent unfair surprise because the caps were not evident on the face of the statutory schemes under which the plaintiffs had brought their claims. *See, e.g., Ingraham v. United States*, 808 F.2d 1075 (5th Cir. 1987) (defendant sought to apply Texas's statutory limitations on medical malpractice damages to reduce plaintiff's recovery under the Federal Tort Claims Act); . . . .

By contrast, [Title VII's] statutory cap is evident on the face of the statute as a Congressional limitation on the court's power to award damages to a Title VII plaintiff. *See Bereda v. Pickering Creek Indus. Park, Inc*., 865 F.2d 49, 54 (3rd Cir. 1989) (construing Title VII's provision limiting back pay liability). No plaintiff claiming damages under Title VII can complain of unfair surprise, prejudice, or lack of opportunity to respond when confronted with the [statutory] limitation of damages, because the limitation is part of the same statutory scheme under which the plaintiff has brought his or her claim.

The Supreme Court noted that "[i]t was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 1997, 141 L.Ed.2d 277 (1998). More recently, the Court referred to the cap as one example of "certain conditions and exceptions" set forth in [Title VII]. *West v. Gibson*, 527 U.S. 212, ----, 119 S.Ct. 1906, 1909, 144 L.Ed.2d 196 (1999). However, the

> Court has never referred to a requirement that the cap be pleaded as an affirmative defense or avoidance.
>
> Similarly, the Second Circuit has not referred to Title VII's statutory cap as an affirmative defense. *See Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir.1997) ("[I]f the sum of the compensatory and punitive damages awarded by the jury exceeds the relevant cap, the district court reduces the award to ensure that it conforms with subsection (b)(3); that is, that it '[does] not exceed' the relevant cap for an employer of the defendant's size.") (*quoting Hogan v. Bangor & Aroostook R.R. Co*., 61 F.3d 1034, 1037 (1st Cir. 1995)).
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> For the reasons set out above, we hold that the statutory cap set out in § 1981a(b)(3) is not an affirmative defense and is not waivable.

Oliver, 85 F.Supp.2d at 111-12. *See also Giles v. General Elec. Co.*, 245 F.3d 474 (5th Cir. 2001).

Similarly, central to Kentucky's CR 8.03 requirement of pleading affirmative defenses is the prevention of unfair surprise or prejudice. *See generally First Nat'l Bank of Grayson v. Citizens Deposit Bank & Trust*, 735 S.W.2d 328 (Ky. App. 1987). However, as the *Oliver* court noted, a plaintiff claiming damages under Title VII cannot complain of unfair surprise, prejudice, or lack of opportunity to respond when confronted with the statutory limitation of damages, because such limitation is plainly part of the same statutory scheme under which the plaintiff has brought his or her claim. Accordingly, we conclude that Core Medical, LLC was not required to affirmatively plead the § 1981a(b)(3) statutory cap and did not waive its applicability herein.

Clearly, there remains a factual issue as to the number of Core Medical, LLC employees in the current or preceding calendar year. Schroeder states in her brief that Core Medical, LLC has locations throughout the country, while Core Medical, LLC maintains that it only employs forty-eight workers. Nevertheless, it is evident from the trial court's final judgment that it did not consider § 1981a(b)(3) in determining the amount of punitive damages, nor did it make any finding as to the number of Core Medical, LLC employees. As such, the matter must be remanded for further proceedings as to the amount of punitive damages.

Core Medical, LLC next argues that the $125,000.00 compensatory damage award is excessive and not supported by the evidence. Buttressing its position, Core Medical, LLC observes that Schroeder did not seek any medical treatment, was able to return to work in early March 2006, and found a full-time position as a radiation technologist in October 2006. Further, Core Medical maintains that a significant portion of the compensatory damage award related to emotional distress Schroeder suffered as a result of the litigation, which is non-compensable. *See Flowers v. First Hawaiian Bank,* 295 F.Supp.2d 1130 (D.C. Haw. 2003).

KRS 344.450 specifies that any person injured by any act in violation of the Kentucky Civil Rights Act "shall have a civil cause of action in circuit court . . . to recover the actual damages sustained by him." Actual damages include emotional distress, mental anguish, humiliation and personal indignity.

Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 819 (Ky. 1992). *See also* *McNeal v. Armour & Co.*, 660 S.W.2d 957, 958-59 (Ky. App. 1983).

The trial court made the following findings with respect to Schroeder's claim of emotional distress:

> The court found in its default judgment and in this final judgment that the plaintiff was fired without warning or cause. In addition, the uncontroverted evidence was that this dismissal occurred in the presence of other employees and not at the end of the work day so that she had to gather her things and leave in front of the other employees. Plaintiff testified that this caused her embarrassment and humiliation. She also testified that the suddenness of the situation caused stress and anguish not only because of the manner of termination but because of the financial hardship it caused. She was a pregnant woman just several weeks pre-delivery and not only was she not in a condition to seek employment her condition made her chances of finding new employment slim if non-existent.
>
> The plaintiff, Kenny Schroeder, her husband, Mary Jo Hardcorn, her mother and Shauna Vogelpohl, her neighbor, presented testimony of the emotional effect termination had upon the plaintiff. Plaintiff indicated the fact that the termination was targeted toward her pregnancy was devastating to her. She testified that she believed this condition (pregnancy) was protected from economic retaliation by society and that her core beliefs were [shaken] to find out that pregnancy was not protected by her employer. The testimony revealed that prior to the termination the plaintiff was outgoing, energetic and full of joy about the new child to be born. All of the plaintiff's witnesses testified that as a result of the termination the joy of the birth of the child was dramatically overshadowed by the plaintiff's depression, bouts of crying, loss of energy and withdrawal. The testimony indicated that the plaintiff spent more time in bed and did not complete the daily and ordinary tasks in the home. . . . Plaintiff testified that some of the residual

> emotions from the termination continue in the form of fear of dismissal if she should conceive again.
> . . .
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> The court finds that the plaintiff's emotional distress, including humiliation of dismissal, the anxiety, stress and personal indignity, was primarily caused by her termination. The court finds that any "litigation" anxiety and distress is secondary and was caused by the primary act of discrimination and thus is directly related. *Marchisotto v. City of New York*, 2007 WL 1098697 (2007). The Court also finds that the presentation of expert testimony or the requirement that the plaintiff sought professional help for the emotional distress is not required by law.

As previously noted, the trial court's findings of fact are reviewed under the clearly erroneous standard. *Owens-Corning Fiberglas Corp.,* 976 S.W. 2d at 414. The trial court, having heard the evidence and observed the witnesses, found that Schroeder proved by substantial evidence that she suffered emotional distress as a result of Core Medical, LLC's discriminatory conduct. Unless the verdict bears no relationship to the evidence, it should not be set aside. The assessment of damages is a matter left in the hands of the trial court, and its decision should be disturbed only in the most egregious circumstances. *Childers Oil Co., Inc. v. Adkins,* 256 S.W.3d 19, 28 (Ky. 2008). Bases upon the evidence as a whole, we simply cannot conclude that such circumstances exist. The trial court did not err in its award of compensatory damages.

The judgment of the Kenton Circuit Court is affirmed in part, and reversed in part. The matter is remanded for further proceedings to determine the appropriate award of punitive damages in light of 42 U.S.C. §1981a(b)(3).

ALL CONCUR.

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