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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001567-MR

JERRY BIHL — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 08-CI-01733

GRIFFIN INDUSTRIES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; HARRIS,[1] SENIOR JUDGE.

HARRIS, SENIOR JUDGE: This appeal is from the Campbell Circuit Court's award of summary judgment to Griffin Industries on Jerry Bihl's cause of action for workers' compensation retaliation. For the reasons stated herein, we affirm.

[1] Senior Judge William R. Harris 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.

Griffin employed Bihl as a grease route driver at its Butler, Kentucky facility. As an at-will employee, Bihl received a copy of the employee handbook, which provided:

> An accident or injury, no matter how slight, is to be reported to your supervisor no later than 24 hours after occurrence. Failure to report an accident or injury to your supervisor within 24 hours after it occurs shall be grounds for termination. An accident report form must be completed by the employee with the supervision of his/her foreman.

In August or early September 2007, Bihl cut his finger on a grease container at work. After the first of September, Bihl started experiencing swelling and discomfort in his left center finger, which intensified throughout the month.

Bihl experienced swelling and discomfort for approximately a month before he mentioned the cut to Griffin's management. Bihl testified that at some point in mid to later September, he mentioned to one of his supervisors that his finger was injured and was continuing to bother him. He stated that the supervisor told him to soak it in Epsom salt.

On October 15, 2007, Dave Dawson, Bihl's supervisor, rode on a route with Bihl. Bihl told Dawson that he had cut his finger at work and that his finger might have to be amputated. Dawson contacted Griffin's environmental and safety coordinator Kent Kelsch, and written reports were prepared about the situation. On Wednesday, October 18, 2007, Kelsch received the written reports from management. Meanwhile, Bihl left for the hospital later in the day on Monday, October 15 and did not return to Griffin until Wednesday, October 18.

Upon Bihl's arrival at the facility on October 18, he completed an accident/injury report with Kelsch. The report stated that Bihl first reported the injury on October 15 to Dawson, and that it had occurred "6 to 8 weeks ago." Bihl did not dispute the contents of the report and signed the paperwork as his report of the accident and injury.

Later that day, Griffin's management met with Bihl and presented him with a discipline form indicating that he had violated company policy by not reporting the workplace injury in a timely manner and was therefore being terminated. At no time did Bihl claim that he had previously reported the injury. Moreover, Bihl did not write any comments on the discipline form or indicate any other protest despite the opportunity provided on the form. The form also stated that "the absence of any statement on the part of the employee indicates his/her agreement with the report as stated."

Bihl filed an action against Griffin alleging workers' compensation retaliation.[2] The parties conducted discovery and the trial court set a trial schedule. Thereafter, Bihl filed a motion for partial summary judgment on May 22, 2009 on his retaliation claims. Griffin also filed a motion for summary judgment on May 26, 2009, the date of the trial court's deadline for summary judgment. The trial court granted Griffin's motion for summary judgment, and this appeal followed.

[2] Bihl also pled claims for common law wrongful discharge, conspiracy, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of express contract, breach of contract-bad faith, breach of implied contract, and promissory estoppel. However, Bihl only assigned error to the trial court's dismissal of his workers' compensation retaliation claim.

As a preliminary matter, Griffin argues that the Court should strike Bihl's brief for failure to comply with Kentucky Civil Rule (CR) 76.12(8)(a). CR 76.12(8)(a) provides that "[a] brief may be stricken for failure to comply with any substantial requirement of Rule 76.12." Griffin argues that Bihl failed to support his statement of the case and argument sections with "ample supportive references to the record" as required by CR 76.12(4)(c)(iv) and (v). We note that Bihl's brief is devoid of specific references and citations to the record as required by the rules. Although noncompliance with the provisions of CR 76.12 is not automatically fatal to a party's appeal, this Court would be well within its discretion to strike Bihl's brief for these omissions. We decline to do so, however, and choose to address Bihl's appeal on the merits.

Bihl first argues that the trial court erred in finding the matter ripe for summary judgment. Relying on *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010), Bihl asserts that the trial court did not provide him with adequate time to conclude discovery before ruling on the parties' motions for summary judgment. *Blankenship* provides that the trial court should rule on motions for summary judgment "only after the opposing party has been given ample opportunity to complete discovery." *Id.* at 668 (quoting *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988)). Appellate courts apply the abuse of discretion standard when reviewing a trial court's determination that the parties have been provided with enough time for discovery before ruling on motions for summary judgment. *Id.*

The question is not whether the parties have actually completed discovery, but rather whether they had the opportunity to complete discovery. *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979)(finding that six months between filing complaint and granting motion for summary judgment was a sufficient opportunity to complete discovery).

In this case, Bihl had almost nine months to complete discovery or to inform the court why judgment should not be entered or continued. Bihl never requested that the trial court delay the summary judgment rulings. Rather, Bihl filed his own motion for summary judgment on his retaliation claims, asserting the absence of disputed issues of material fact and further indicating the issue to be ready for summary judgment. Therefore, the trial court did not err in the timing of its ruling on the motions for summary judgment.

Bihl next argues that the trial court erred in granting summary judgment on his retaliation claims because the temporal proximity between his attempt to apply for workers' compensation and his termination was sufficient to raise the inference of a causal connection between the two activities.

When a trial court grants a motion for summary judgment, the relevant standard of review 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." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). The party opposing summary judgment must present "at least some

affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis*, 56 S.W.3d at 436 (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)). The trial court must "view the evidence in the light most favorable to the nonmoving party." *Id.* (quoting *Steelvest*, 807 S.W.2d at 480-82). Because summary judgment involves only legal issues, "an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436.

In Kentucky, an employer may ordinarily discharge an at-will employee for no cause. *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 198 (Ky. 2001). However, under KRS 342.197, the act of filing or pursuing a workers' compensation claim is specifically protected. Under Kentucky law, a plaintiff must first establish a prima facie case of retaliatory discharge by offering proof that "(1) he engaged in a protected activity; (2) the [employer] knew that the plaintiff had done so; (3) adverse employment action was taken; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 915 (Ky. App. 2006) (citing *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004)).

As the Court stated in *Upchurch*, in retaliation cases, "[b]ecause there is often a lack of direct evidence, proof of a causal connection can be difficult and requires reliance on inference." *Upchurch*, 214 S.W.3d at 915. This requires proof that "(1) the [employer] 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." *Id.*

If the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for taking the adverse action. *Upchurch*, 214 S.W.3d at 916. 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 merely a pretext for the retaliation. *Id.*

Appellant first argues that the trial court erred by concluding that Bihl had not proven a prima facie case of retaliatory discharge because he had not demonstrated a causal connection between his pursuit of a workers' compensation claim and his termination. The trial court found that, while the record revealed a close temporal proximity between Bihl's statement of intention of filing a workers' compensation claim and his termination, the close temporal proximity did not sufficiently raise the inference that the protected activity was the likely reason for Bihl's termination in this case.

We disagree with the trial court that Bihl did not prove a prima facie case of retaliatory discharge. In proving a prima facie case, the plaintiff's burden is "not onerous," and requires less than a typical preponderance of the evidence showing. *Dixon v. Gonzales,* 481 F.3d 324, 333 (6th Cir. 2007) ("The burden of proof at the prima facie stage is minimal; all the plaintiff must do is put forth some

credible evidence that enables the court to deduce that there [was] a causal connection between the retaliatory action and the protected activity").

However, once Bihl proved a prima facie case, the burden of production shifted to Griffin to offer a legitimate reason for Bihl's termination, which it did in producing evidence that they terminated Bihl for his failure to report the injury. Griffin bears only the burden of production, not persuasion. *See Upchurch*, 214 S.W.3d at 915 (stating that the employer must meet the minimal burden of stating a legitimate reason). The burden, therefore, shifted back to Bihl to show by a preponderance of the evidence that Griffin's termination for failure to report the injury was a pretext for retaliation.

The only evidence that Bihl has put forth in support of his claim of pretext is that there was temporal proximity between his request and his termination. While this might be enough to establish a prima facie case, it is not enough to defeat pretext or to create a genuine issue of material fact as to whether Griffin's reasons were pretext for retaliation. Bihl provides no other arguments and, in fact, defeats his argument with his own testimony. Bihl admitted during his deposition that he was terminated because he failed to report his accident or injury within 24 hours of its occurrence:

> Q. . . . Have you told me everything that you believe supports your claim that you were fired because you wanted to file a workers' comp claim?
>
> A. I was fired because I didn't report the injury.
>
> Q. Okay.

A. That's what I was told from Brian Griffin.

. . .

A. I believe I was made an example – used to make an example of, yes, sir.

Q. And how were you used to make an example of?

A. By not – by being fired for not reporting the injury.

Q. Okay. So you believe that the true reason for your termination is that you didn't timely report the injury?

A. That's what they told me, yes, sir.

Q. And you believe that to be true?

A. That's why they fired me, yes, sir.

Bihl signed a disclaimer acknowledging that he had read and understood the handbook, and the evidence clearly demonstrates that Bihl did not report his injury within 24 hours. Moreover, when completing job applications after his termination, Bihl listed "Failure to report injury" as the reason why he was no longer working at Griffin. Therefore, it was appropriate for the trial court to grant summary judgment based on the fact that Bihl did not provide sufficient evidence to prove that Griffin's reason for terminating him was pretext.

Although Bihl argues that a genuine issue exists as to whether or not Griffin used Bihl's failure to report the injury as a pretext to terminate him for attempting to file a workers' compensation claim, our review of the record does

not indicate such as issue. Appellant has not provided any proof that Griffin's explanation is pretext other than conjecture. Bihl signed an accident/injury form admitting to the offense, he signed a disciplinary form admitting to the offense, and he admitted at his deposition that Griffin fired him for the offense. While Bihl further argues that Griffin's policy requiring the immediate reporting of workplace injuries is contrary to Kentucky's anti-retaliation statute, this Court declines to so hold when the policy clearly promotes the correction of safety problems and timely medical treatment. The trial court correctly ruled that Bihl failed to create a genuine issue of material fact as to whether his workers' compensation report was a substantial and motivating factor in Griffin's decision to terminate his employment.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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