RENDERED: APRIL 6, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002056-MR

DIANET PLUCINSKI — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CI-03148

COMMUNITY ACTION COUNCIL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: In this discrimination and retaliation action, Dianet Plucinski has appealed from the October 18, 2010, final judgment of the Fayette Circuit Court entered following the return of a jury verdict in favor of her former employer, Community Action Council (CAC). After a review of the record and

the parties' arguments, we find no merit in Plucinski's arguments and therefore affirm.

Plucinski, a woman of Hispanic background, began working for CAC in 2003. She was employed as the Center Manager for the Fayette West Community Neighborhood Center. During her work for CAC, Plucinski claimed to have encountered problems with her supervisor, Ty Sturdivant, in that he ignored her request to discuss problems in the Center, raised his voice to her, and embarrassed her in front of co-workers. Ultimately, in February 2006, she filed a grievance against him due to this treatment but later withdrew it based upon advice she had received. On April 4, 2006, Plucinski was terminated after receiving a bad work evaluation.

On July 10, 2007, Plucinski filed a complaint against CAC alleging that she had been discriminated against by being subjected to disparate treatment due to her national origin and race in violation of Kentucky Revised Statutes (KRS) 344.040, retaliated against for filing a grievance in violation of KRS 344.280, and wrongfully discharged. In its answer, CAC stated that Plucinski had been terminated for cause.

CAC moved for summary judgment on all three causes of action. The circuit court denied the motion as to Plucinski's retaliation claim and dismissed her claim related to wrongful termination with prejudice after Plucinski withdrew that claim. However, the circuit court granted CAC's motion on Plucinski's disparate treatment claim. The basis of CAC's argument was that Plucinski failed to identify

a similarly situated person who had been treated differently; thus, she failed to establish a *prima facie* case.

Prior to trial, CAC filed a motion *in limine* related to the proposed testimony of Catherine Heath, a former manager of program support at CAC. CAC sought to exclude her testimony related to the typical practice of CAC to terminate employees who file grievances; Mr. Sturdivant's alleged racial and gender animus; and compliance reports. In support of the motion, CAC stated that Ms. Heath was unable to identify anyone who had been terminated for filing a grievance, that Mr. Sturdivant's racial and gender animus was irrelevant to Plucinski's retaliation claim, and that testimony regarding the compliance reports constituted hearsay and violated the best evidence rule. The court ultimately ruled that Ms. Heath could testify to retaliation against herself and to dismissals related to grievances for which she had personal knowledge, but could only testify about reports and Mr. Sturdivant's treatment of women and minorities if she had a foundation for that testimony and had concrete examples.

The matter went to trial by jury on October 4, 2010, on Plucinski's remaining claim of retaliation. At the conclusion of the trial, the jury returned a verdict in favor of CAC, finding that Plucinski's filing of a grievance did not bring about CAC's decision to discharge her from her employment. This appeal follows.

On appeal, Plucinski raises two issues. The first argument addresses the circuit court's decision to grant summary judgment in favor of CAC on her

disparate treatment claim. Her second argument addresses the jury instructions. We shall address each argument in turn.

Before we reach the merits of Plucinski's appeal, we must recognize that Plucinski failed to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) by including "ample references to the specific pages of the record" or of the videotaped record in the statement of the facts section of her brief. Although Plucinski did include references to several depositions, those depositions were not included in the certified record on appeal; only a few of the pages she cited were included as exhibits to filings below, but the specific pages where they appear in the record were not identified. Nevertheless, we shall decline to impose the penalty of striking Plucinski's brief at this time. CR 76.12(8)(a).

The first argument we shall address is whether the circuit court erred in granting summary judgment on Plucinski's disparate treatment claim. Plucinski contends that she presented direct evidence of discrimination when Mr. Sturdivant allegedly singled her out for their "cultural differences." She also argues that the circuit court's decision to exclude Ms. Heath's testimony of her observation of sexual harassment by Mr. Sturdivant as well as regarding compliance reports deprived her of the opportunity to present evidence of discriminatory conduct and pretext for her termination. CAC disputes Plucinski's arguments and argues that it was entitled to summary judgment on this cause of action as a matter of law.

Our standard of review in an appeal from a summary judgment is well-settled in this Commonwealth:

> The standard of review on appeal when a trial court grants a motion for 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. . . . Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (citations in footnotes omitted). The issue presented in this argument represents a pure issue of law, as there are no disputed issues of material fact. Rather, the issue before this Court is the legal effect of Mr. Sturdivant's use of the words "cultural differences" at the staff meeting.

KRS 344.040(1)(a) provides that it is unlawful for an employer to "discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, [or] age forty (40) and over[.]" In *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492 (Ky. 2005), a case involving age discrimination, the Supreme Court of Kentucky explained the process for establishing a claim for discrimination:

> There are two paths for a plaintiff seeking to establish an age discrimination case. One path consists of direct evidence of discriminatory animus. Absent direct evidence of discrimination, Plaintiff must satisfy the burden-shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The reasoning behind the *McDonnell Douglas* burden shifting approach is to allow a victim of discrimination to establish a case through inferential and

> circumstantial proof. As Justice O'Connor has noted, "the entire purpose of the *McDonnell Douglas prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S.Ct. 1775, 1802, 104 L.Ed.2d 268 (1989) (O'Connor, J. concurring); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 622, 83 L.Ed.2d 523 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'"). If a plaintiff attempts to prove its case using the *McDonnell Douglas* framework, then the plaintiff is not required to introduce direct evidence of discrimination. *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 349 (6th Cir. 1997).

Williams, 184 S.W.3d at 495-96.

Plucinski's primary argument is that she established direct evidence of disparate treatment through Mr. Sturdivant's comment regarding "cultural differences." She contends that this comment may be interpreted in many ways and could be direct proof of Mr. Sturdivant's discriminatory animus towards her. However, we agree with CAC that Plucinski has failed to establish any direct evidence of disparate treatment.

"Direct evidence is evidence, which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption." *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 135 (Ky. 2003), quoting *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001). "Direct evidence of an unlawful employment practice is evidence that directly reflects the alleged animus and that bears squarely on the contested employment decision. . . .

However, direct evidence does not include stray remarks in the workplace, statements by decision-makers unrelated to the decisional process itself, or statements by nondecision-makers." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 710 (Ky. App. 2004). Furthermore, the 11th Circuit Court of Appeals has held that, "courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination." *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989) (footnote omitted).

Plucinski admits in her brief that the phrase "cultural differences" may be interpreted in many ways. Certainly, a phrase that is open to interpretation cannot meet the definition of direct evidence to establish Plucinski's disparate treatment claim. Rather, the phrase constitutes no more than circumstantial evidence, at best. Therefore, we reject Plucinski's claim that she has established direct evidence of discrimination.

Turning to the *prima facie* analysis set forth in *McDonnell Douglas*, we also hold that Plucinski has failed to establish a case of disparate treatment because she has failed to prove all four elements. In *Murray v. Eastern Kentucky University*, 328 S.W.3d 679, 682 (Ky. App. 2009), this Court set forth the elements as follows: "(1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) 'similarly situated' non-protected employees were treated more favorably." Regarding the fourth element, the Court stated that "[w]hen determining what employees were

'similarly situated,' the plaintiff must find those that are similar to her in 'all relevant aspects.'" *Id*.

Plucinski contends that she should not have to meet the fourth element because she was the only Hispanic center manager employed by CAC. Accordingly, there were no similarly situated employees to compare herself to. CAC points out that Plucinski has misinterpreted this element; rather, Plucinski "needed to identify persons who were not in a protected class, but who were otherwise similarly situated, and who were treated more favorably than her." *Id*. In other words, Plucinski did not have to identify another Hispanic female manager in order to meet this element, as she asserts. Because Plucinski failed to identify a similarly situated person who was treated differently than she was, she has failed to establish a *prima facie* case of disparate treatment.

As a part of this argument, Plucinski contends that Ms. Heath's excluded testimony supports her claim of gender discrimination. However, we agree with CAC that Ms. Heath's testimony cannot be used to support her argument that the summary judgment was entered in error because her testimony was not offered until a year later and she had not been identified as a potential witness at the time the order was entered. Once the party moving for summary judgment meets its burden of showing that no genuine issues of material fact exist, "the burden shifts to the party opposing summary judgment to 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 (internal quotations omitted). When the court considers a motion

for summary judgment, "[t]he inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). Here, Plucinski did not offer Ms. Heath's testimony until well past the summary judgment stage of this case, nor did she seek reconsideration of the order granting summary judgment. Therefore, Plucinski is precluded from arguing that Ms. Heath's testimony entitles her to prevail on this issue on appeal.

Therefore, for the reasons expressed above, we hold that as a matter of law the circuit court properly entered a summary judgment in favor of CAC and dismissed the cause of action for disparate treatment.

For her second argument, Plucinski contends that the circuit court did not properly instruct the jury on her retaliation claim. CAC, on the other hand, contends that Plucinski failed to properly preserve this issue because she is now advocating a different proposed jury instruction rather than the one she proffered at the trial court level.

The record reflects that the trial court instructed the jury as follows:

INSTRUCTION NUMBER 1

> The Plaintiff, Dianet Plucinski, claimed that she was a victim of retaliation in her termination due to the fact she filed a grievance alleging that she was a victim of discrimination by her supervisor, Ty Sturdivant.

> The Defendant, Community Action Council, denies that the Plaintiff, Dianet Plucinski, was a victim of retaliation, and claims that she was terminated due to her work performance.
>
> You will find for the Plaintiff, Dianet Plucinski, if you are satisfied from the evidence that but for her filing of a grievance against her supervisor, Ty Sturdivant, Community Action Council's decision to discharge her would not have occurred.
>
> INTERROGATORY NUMBER 1
>
> Do you find that but for Dianet Plucinski's filing of a grievance alleging discrimination by her supervisor, Ty Sturdivant, the Community Action Council's decision to discharge Dianet Plucinski would not have occurred?

The jury returned a verdict in favor of CAC based upon this instruction.

In objecting to the standard of proof, Plucinski tendered the following proposed jury instruction, which substituted the phrase "substantial and motivating factor" for "but for":

> If you are satisfied from the evidence that the Plaintiff Dianet Plucinski filed a grievance against her supervisor, Ty Sturdivant, alleging that she was a victim of discrimination and the filing of the grievance was a substantial motivating factor in the Plaintiff's termination then you must find for the Plaintiff.
>
> We the jury find that the Plaintiff filing a grievance alleging discrimination and harassment by her supervisor was a substantial and motivating factor in the termination of the Plaintiff.

As CAC stated in its brief, CR 51(3) specifically addresses the preservation of error in the giving of jury instructions: "No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented

his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection." Addressing the application of this rule, the Supreme Court of Kentucky explained:

> The requirements of CR 51(3) are such that before a party may complain of error in the instructions, the party must accompany the objection with a fully correct instruction, or, at the least, must advise the court sufficiently so that the court can understand both the nature of the objection and what needs to be done to correct it.

Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 823-24 (Ky. 1992).

In her appellate brief, Plucinski continues to argue that the trial court should have instructed the jury using the "substantial and motivating factor" language rather than "but for," but now provides another proposed jury instruction. Plucinski identifies as the proper instruction the model instruction found in Palmore and Cetrulo, *Kentucky Instructions to Juries*, Civil § 45.07 (5th Ed., Release No. 4, June, 2009): "You will find for P if you are satisfied from the evidence that at least one of the following was a substantial and motivating factor in D's decision to discharge her, but for which he would not have been discharged." This is not the same instruction as the one tendered to the trial court and in fact contains the "but for" language Plucinski has argued should have been removed in her case. Therefore, we agree with CAC that Plucinski has failed to adequately preserve this issue for our review by failing to provide a valid argument that the court's instructions were made in error.

Furthermore, we decline to stray from our holding in *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697 (Ky. App. 1991), which sets forth the cause of action for retaliation claims pursuant to KRS 344.280 as well as the plaintiff's ultimate burden of persuasion:

> The *McDonnell–Douglas* scheme is, in a modified version, applicable to retaliation claims. The plaintiff, in making out a *prima facie* case, must show that 1) she engaged in a protected activity, 2) she was disadvantaged by an act of her employer, and 3) there was a causal connection between the activity engaged in and the employer's act. Again, if the employer articulates a legitimate, non-retaliatory reason for the decision, the employee must show that "but for" the protected activity, the adverse action would not have occurred.

Id. at 701, citing *De Anda v. St. Joseph Hospital*, 671 F.2d 850 (5th Cir. 1982).

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward E. Dove
Lexington, Kentucky

BRIEF FOR APPELLEE:

D. Barry Stilz
Adrian M. Mendiondo
Lexington, Kentucky