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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001210-MR

WILLIAM E. TAYLOR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CI-000479

UNITED PARCEL SERVICE, INC.;
AND JACK ARNOLD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

ACREE, CHIEF JUDGE: William Taylor appeals the Jefferson Circuit Court's entry of summary judgment in favor of his former employer, United Parcel Service (UPS), disposing of his claim that UPS had violated the Kentucky Civil Rights Act

(KCRA), Kentucky Revised Statutes (KRS) 334.280, by retaliating against him for filing a sexual harassment and retaliation complaint in federal court. We affirm.

I. Facts and procedure

The following facts are undisputed.

Taylor began employment with UPS in 1982. Over the years, he worked his way up in seniority, which allowed him to work considerable overtime and take desirable shifts. He took advantage of this opportunity, working nearly 3,200 hours in 2005.

Taylor filed a complaint in federal district court in May 2006 alleging his employer had permitted him to be sexually harassed and had retaliated against him for complaining. The claim did not survive the employer's motion for summary judgment, which was entered in January 2008.

In October 2007, while the federal action was still pending, UPS began receiving complaints from Taylor's co-workers that he had violated certain workplace policies. Most notably, he was reported to have stated an intention to physically harm Kathy Denham, a fellow UPS employee. Taylor was suspended from his position pending an investigation; he then was discharged ten days from the date he allegedly made the threatening statements. UPS has always identified those statements as the reason for his discharge. Taylor fervently denied all his co-workers' allegations.

Taylor filed a union grievance and took the matter before a grievance board composed of an equal number of members from Taylor's union and from UPS.

The board upheld his discharge and declined to reinstate him, an action authorized by UPS's agreement with the union.

Taylor then brought suit in Jefferson Circuit Court, claiming he had been discharged for filing the 2006 federal sexual harassment and retaliation complaint and not due to any misbehavior on his part. UPS moved for entry of summary judgment and was successful. In disposing of his claim, the circuit court found Taylor could not establish a *prima facie* case of retaliatory discharge because there was no causal connection between the filing of his federal suit and his discharge; and, even if the *prima facie* case were assumed, he had not raised evidence which would show the employer's stated reason for Taylor's discharge was merely a pretext for retaliation.

This appeal followed. Taylor contends both grounds of the circuit court's entry of summary judgment were erroneous.

Additional facts will be recounted as necessary for our analysis.

II. Analysis

A motion for summary judgment must be sustained "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." CR 56.03. Because the questions on appeal are purely matters of law, our review is *de novo*. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

KRS 344.280(1) forbids any person or persons

> To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter . . . .

Taylor's 2006 filing of his federal lawsuit was indisputably protected by this statutory provision.

Unless a plaintiff can present direct evidence of behavior prohibited by the KCRA, the burden-shifting analysis articulated in *McDonnell Douglas Corp. v. Green,* 441 U.S. 792, 804, 93 S. Ct. 1817, 1825, 36 L. Ed. 2d 668 (1973), governs claims of retaliatory discharge. *Bryson v. Regis Corp.,* 498 F.3d 561, 577 (6th Cir. 2007); *Williams v. Wal-Mart Stores, Inc.,* 184 S.W.3d 492, 495 (Ky. 2005). Such a claim cannot survive the employer's motion for summary judgment unless the plaintiff can make a *prima facie* showing that: "(1) he engaged in a protected activity; (2) the [employer] knew that the [former employee] had done so; (3) adverse employment action was taken; and (4) . . . 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). If the plaintiff makes such a showing, the burden then shifts to the employer to state a legitimate, nondiscriminatory reason for the discharge. *Williams,* 184 S.W.3d at 497 (citations omitted).

Once the employer has stated such a reason, then the burden shifts back to the employee to show that the reason given was merely a pretext for the actual, statutorily prohibited reason for the discharge. *Id.*

a. *Prima facie* case

The parties agree that the first three elements of a *prima facie* case of retaliatory discharge have been met, and the circuit court found as much. The only question, then, is whether Taylor has shown a causal connection between the filing of his federal suit and his discharge.

To meet the causation element, "[t]he plaintiff is not required to demonstrate that the sole or even the primary reason for the termination was related to the protected activity[,] but only that its pursuit was a 'substantial and motivating factor' in the decision to terminate." *Dollar General Partners v. Upchurch,* 214 S.W.3d 910, 915 (Ky. App. 2006) (citing *First Property Management v. Zarebidaki*, 867 S.W.2d 185 (Ky. 1993)).

> In cases where there is no direct evidence of a causal connection, the causal connection of a prima facie case of retaliation must be established through circumstantial evidence. Circumstantial evidence of a causal connection is evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action. In most cases, this requires proof that (1) the decision maker responsible for making the adverse decision 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.

Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 804 (Ky. 2004) (citations and quotation marks omitted).

Having no direct evidence his federal lawsuit was the reason for his discharge, Taylor must rely upon circumstantial evidence to show causation. Again, there is no dispute that the employer was aware of Taylor's federal lawsuit, so our discussion will focus only on temporal proximity.

We conclude the circuit court erred when it determined there was insufficient temporal proximity for Taylor to make a *prima facie case.* It is true that he filed his first complaint in federal court in May of 2006 and was not discharged until October of 2007; however, his federal claim was still pending before his discharge and was not dismissed until January of 2008. It is not only the filing of a complaint which is protected by KRS 344.280(1), but also "testif[ying], assist[ing], or participat[ing] *in any manner* in any investigation, proceeding, or hearing under [KRS Chapter 344.]" (emphasis added). His continued participation in the action against his employer, and not merely the filing of his complaint, is the relevant activity for purposes of this analysis. Viewed in that light, temporal proximity is obvious. He was discharged simultaneously with protected activity and, therefore, made a *prima facie* showing of retaliatory discharge.

b. Legitimate nondiscriminatory reason

Taylor has not challenged the circuit court's finding that UPS successfully stated a "legitimate nondiscriminatory" reason for his discharge. *Brooks* at 797. We will briefly discuss the reasons the employer gave the circuit court, however,

because we must next determine whether these reasons were mere pretext. UPS maintains it discharged Taylor from his employment because of a report it received from one of Taylor's co-workers, Kevin Botner. Botner reported that on October 20, 2007, Taylor stated that he should have head-butted another co-worker, Kathy Denham, following a disagreement between the two. According to Botner, Taylor also threatened to "go through [Denham] like a hot knife through cold butter[,]" stated his desire to "mess her up," and made mention of two handguns he owned. Botner also reported that Taylor had referred to two other co-workers in derogatory terms. Taylor has always denied making these statements, but agrees that such statements would be violations of UPS's policy prohibiting employees from threatening one another.

c. Pretext

The final step in the *McDonnell Douglas* burden-shifting analysis is the employee's burden to show the employer's decision to take a negative employment action was motivated by the desire to retaliate against him. 441 U.S. at 804, 93 S. Ct. at 1825, 36 L. Ed. 2d 668. When direct proof is unavailable, this requirement

> may be satisfied . . . by alleging or proving discriminatory conduct, practices, or the existence of significant . . . disproportionate conduct. While intentional discrimination may be inferred from circumstantial evidence, there must be cold[,] hard facts presented from which the inference can be drawn that [retaliation] was a determining factor [in the employer's decision to take a negative employment action].

Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 700 (Ky. App. 1991).

We turn first to Taylor's argument that the circumstantial evidence, generally, supports an inference that UPS's stated reasons for firing him were mere pretext. He relies on the following assertions to support this argument:

- On the day of the incident for which Taylor was later fired, he was assigned to work – for the first time – with an employee named Kevin Botner. It was Botner who would later report that Taylor had threatened to physically harm another coworker.

- Botner waited three days to formally report the threat. Taylor takes this to mean Botner himself was not actually concerned about a threat of harm to Denham; alternatively, he seems to believe this delay attenuates the likelihood that Botner's accusations were true.

- Representatives from UPS's human resources department conducted only a very brief investigation, which revealed complaints about a single incident, before deciding to discharge Taylor. Actually, however, it is apparent from the record that the investigation was fairly extensive. Before and after suspending Taylor, human resources personnel conducted an interview with Taylor himself and gathered written statements from at least eight other employees prior to the end of Taylor's employment.

- Much of the evidence relied upon in UPS's arguments were not gathered until after Taylor had been fired. In particular, Taylor identifies memos to file dated October 21, 2007, through October 29, 2007, as post-discharge evidence the employer gathered. This allegation is not supported by the record. The incident allegedly occurred on October 20, 2007, and was generally known among Taylor's co-workers by the next day. Taylor was suspended on October 26, 2007, pending further investigation, but was not actually fired until October 30, 2007. All the evidence-gathering to which Taylor protests actually occurred before he was fired – the negative employment action upon which his claim is based.

- There is no evidence Taylor was ever previously disciplined for a physical altercation.

None of this evidence supports an inference that UPS's decision to terminate Taylor was retaliatory. In fact, the only evidence is that several employees complained about Taylor's threatening comments, UPS conducted an investigation

and found consistency among the employees' statements, and the employer made the decision to fire Taylor because of his conduct. That Taylor has consistently denied having made the threatening statements alleged does not undermine the fact that UPS received multiple, consistent statements from his co-workers to the contrary. There is, furthermore, nothing about the sequence of events in the human resources investigation which makes Taylor's firing suspicious.

Taylor next argues that certain irregular procedures of the grievance panel constitute evidence of pretext. The circuit court found, however, that the grievance panel was not subject to the control of the employer, and we can find no evidence to the contrary. Certainly, Taylor has identified none. Furthermore, this argument is not supported by any legal authority, entitling us to disregard it entirely. *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005).

Finally, Taylor contends that similarly situated employees committed acts akin to those of which he is accused, but that they received less severe discipline. An employee alleging violation of the KCRA may demonstrate that the employer's purported reason for firing the employee was pretextual by presenting evidence that similarly situated employees received disparate treatment for similar violations of company policy. *Kirkwood v. Courier-Journal*, 858 S.W.2d 194, 198 (Ky. App. 1993). "In order to show that a plaintiff is similarly situated to another, the plaintiff is required to prove that all of the relevant aspects of their employment situation were nearly identical to those of the similarly situated employee."

McBrearty v. Kentucky Community and Technical College System, 262 S.W.3d 205, 214 (Ky. App. 2008).

Taylor believes he has identified two such co-workers. In one incident, an employee threatened to harm another employee outside of the workplace and possibly in the victim's home. In conveying these threats, the employee also used foul language. The second incident involves an employee slapping a co-worker in the face. In both instances, UPS discharged the employee, but upon appeal to the grievance board (a body not controlled by UPS, as previously noted), were reinstated in accordance with the union's collective bargaining agreement.

Although the circuit court found these employees were similarly situated to Taylor and had received disparate treatment, at least by the grievance board if not the employer, we must disagree. Our review of the record does not reveal any details about these employees – their job titles or responsibilities, the history of discipline or complaints filed by co-workers, or any other details necessary to determine whether they were similarly situated to Taylor, aside from their violations of UPS's policies. Taylor had not identified any other similarly situated employees who received more favorable treatment than he.

The circuit court did not err in determining Taylor failed to assert evidence supporting his contention that UPS's given reason for firing him was a pretext for a retaliatory purpose.[1]

III. Conclusion

[1] We are permitted to affirm on grounds not relied upon by the circuit court. *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008)

The circuit court incorrectly found Taylor failed to make a *prima facie* case in support of his claim for retaliatory discharge; however, it correctly concluded that, after the employer raised a legitimate, nondiscriminatory reason for Taylor's firing, he failed to show that that reason was only a pretext for a retaliatory motive. We affirm entry of summary judgment in favor of the employer.

ALL CONCUR.

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