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Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001868-MR

MICHAEL POWERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 14-CI-03827

KEENELAND ASSOCIATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

JONES, JUDGE: The Appellant, Michael Powers (“Powers”), appeals from the November 17, 2015, summary judgment and order of the Fayette Circuit Court dismissing his claim of an alleged violation of Kentucky's Civil Rights Act, Kentucky Revised Statutes (KRS) Chapter 344 (“KCRA”) against Appellee, Keeneland Association, Inc. (“Keeneland”). The trial court concluded that Powers

was not an employee of Keeneland, but rather an independent contractor, and therefore, unable to invoke the protections KCRA. For the reasons set forth below, we affirm.

I. Background

Powers began working for Keeneland as a chaplain in October of 1999. As a chaplain, Powers's job duties included ministering to the backside workers, performing Sunday services during race meets, giving devotionals during race meets, presiding over funerals, and performing blessings, when requested to do so, during meals. Keeneland did not dictate how Powers was to conduct his ministry. Powers created his own schedule and was permitted to carry out his ministry as he deemed appropriate.

Powers received a monthly salary from Keeneland and was given an annual raise every July.¹ Keeneland also reimbursed Powers for all business-related expenses, paid various membership dues, and paid for his monthly cell phone bill. Keeneland also provided Powers with an office, office supplies, business cards, letterhead, and stationary. According to Powers, he was also provided a truck² and a golf cart by Keeneland. Keeneland also provided Powers two designated parking spaces, one for the truck and the other for the golf cart. Powers also received an employee discount in the gift shop and free admission to the track on race days.

¹ Initially, Powers was paid by Keeneland through the Kentucky Race Track Chaplaincy. After several years under that arrangement, Keeneland began paying Powers directly.

² Based on the record, it would appear that Powers paid Keeneland \$1.00 for the truck.

Keeneland indicated that Powers was an employee on various documents it submitted to the Kentucky Racing Commission.³ Keeneland did not, however, offer Powers health insurance or pay any workers' compensation premiums on Powers's behalf. Moreover, Keeneland reported Powers's wages via a 1099 Form, as Powers was obligated to pay self-employment taxes on his own behalf. Powers did not participate in Keeneland's retirement plan. He also did not receive any sick leave or vacation time.

Powers continued working for Keeneland for approximately fourteen years. He was eventually terminated in September 2013. Following his termination, in October 2014, Powers filed suit in Fayette Circuit Court alleging Keeneland engaged in disability discrimination in violation of KCRA when it terminated him.⁴ After a period of discovery, on April 28, 2015, Powers filed a motion with the trial court for partial summary judgment on two issues: 1) a determination of whether he was an employee of Keeneland or an independent contractor; and 2) whether Keeneland discriminated against Powers due to his disability.

In response to Powers's motion, Keeneland submitted an affidavit from Vince Gabbert, Keeneland's Chief Financial Officer. This was the first time Keeneland had relied on the testimony of Gabbert, as it had previously only designated Gerald "Jerry" Hale, Keeneland's Director of Human Resources, as its

³ Based on the record, it appears that Powers actually completed the documents; he then provided them to Keeneland for submission.

⁴ In 2007, Powers was diagnosed with Parkinson's disease.

corporate representative. Powers filed a motion to strike Gabbert's affidavit since only Hale was ever identified as a corporate representative for Keeneland and Powers had not had the opportunity to depose Gabbert. Both parties briefed the motions and a hearing on the motions was held before the trial court on August 18, 2015.

On September 9, 2015, the trial court overruled Powers's motion for partial summary judgment regarding his claim that Keeneland discriminated against him because he is a qualified individual with a disability finding that genuine issues of material fact existed regarding Powers's claim. Concerning whether Powers was an employee of Keeneland or an independent contractor, the trial court ordered that it was taking that issue under advisement. The trial court stated that "[a]fter additional discovery, including the completion of Powers's deposition, the parties may, but are not required to, submit supplemental briefs that discuss: (1) how Powers became chaplain for Keeneland; and (2) how Powers was paid while serving as chaplain, whether directly or through a third-party." Neither party filed a supplemental brief.

Subsequently, by order rendered November 17, 2015, the trial court determined that Powers was not an employee of Keeneland, and therefore, could not bring a claim for employment discrimination based on the KCRA. In its findings, the trial court stated Powers had the discretion of how he would minister to the backside workers and was free to dictate his own schedule. Powers received no employee benefits and was free to travel on and off of Keeneland's property.

The trial court also noted that Powers was originally paid through the Kentucky Race Track Chaplaincy, received a 1099, and paid self-employment taxes. This appeal followed.

II. Analysis

The KCRA makes it “an unlawful practice for an employer: (a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because . . . the person is a qualified individual with a disability.” KRS 344.040(1)(a). The KCRA’s protection from job-related discrimination extends only to employees, not to independent contractors. *See Steilberg v. C2 Facility Sols., LLC*, 275 S.W.3d 732, 735 (Ky. App. 2008). Powers asserts that he was unlawfully terminated because of his disability, Parkinson’s disease. Therefore, to prevail, Powers must first demonstrate that he is an employee, not an independent contractor. The KCRA defines an employee simply as “an individual employed by an employer.” KRS 344.030(5).

In *Steilberg*, we adopted the Sixth Circuit’s use of the common-law agency test to determine whether an individual is an agent or an independent contractor under the KCRA. *Id.* (citing *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996)). In Kentucky, our common-law agency law is based primarily on the Restatement (Second) of Agency § 220(2) (1958). *See Kentucky Unemployment Ins. Comm’n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 580 (Ky. 2002). We consider the following factors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2).

Provided there are no disputed issues of material fact, the question of whether workers are employees or independent contractors is a question of law that the trial judge may decide as part of summary judgment. *Steilberg*, 275 S.W.3d at 736. While the parties disagree as to the significance of the facts before us, they are in agreement with respect to the basic material facts, including Powers's duties, method of pay, benefits, schedule, and the like. Therefore, it was appropriate for the trial court to decide the employee/independent contractor issue as part of summary judgement.

Citing only Sixth Circuit case law, the trial court stated that it was affording more weight to the control factor than to the other factors. While the Sixth Circuit may place greater weight on the control element, the Kentucky

Supreme Court has been clear that the factors are to be given equal weight with no one factor being determinative.

The ability to control the specific details of the work is an important factor for a court or administrative agency to consider. However, we do not believe this factor is of greater importance than the others. Accordingly, we hold that not one of the aforementioned factors is determinative, and every case, where it must be determined whether an individual is an employee or an independent contractor . . . needs to be resolved on its own facts.

Landmark, 91 S.W.3d at 579–80.⁵

While we may disagree with the trial court’s application of the factors, we do not disagree with its ultimate result. Having closely examined the factors, we are convinced that the trial court correctly determined that Powers was an independent contractor.

1. Control Over Details of the Work

As detailed by the trial court, this factor weighs more heavily in favor of Keeneland. While Keeneland required Powers to perform certain tasks, it largely left the “how” and “when” up to Powers. It did not require him to use any specific materials, deliver scripted addresses, or follow any other sort of protocols in relation to his ministry. While it may have requested Powers to perform blessings at mealtimes, there is no indication that Keeneland instructed him on how

⁵ The *Landmark* court noted that in so holding it was attempting to clear up prior inconsistencies in Kentucky law where the court had incorrectly indicated that it was proper to place greater weight on the element of control.

to deliver the blessings or any indication that it controlled any other specific aspect of his ministry.

2. Distinct Occupation

This factor also weighs in Keeneland's favor. Powers is a chaplain. This is a distinct and specialized occupation.

3. Kind of Occupation

This factor also favors Keeneland. Regardless of location, chaplains and ministers usually work on their own without oversight by employers (at least not earthly ones).

4. Skill Level

Serving as a chaplain requires specialized education and skill. This factor also weighs in favor of Keeneland.

5. Supplies

On the balance, this factor weighs in Powers's favor. Keeneland supplied Powers with materials such as office stationary and business cards, a telephone, and a golf cart. Powers performed the majority of his work on Keeneland's grounds.

6. Length of Time

This factor also weighs in Powers's favor. Powers served as Keeneland's chaplain for 14 years. His term there appears to have been an indefinite one as opposed to one of short duration to perform a specific task.

7. Payment

Powers was paid a salary as opposed to being paid per meet or per engagement. Likewise, for the last years of his employment Powers was paid directly by Keeneland. This factor weighs in Powers's favor.

8. Employer's Business

Keeneland is a racetrack. It is not a ministry. Keeneland could function without a chaplain. This factor favors Keeneland.

9. Parties' Beliefs

Powers now claims that he believed he was employed by Keeneland. Certainly, some things Keeneland did during the relevant time period could have contributed to his belief. However, other things about the relationship are inconsistent with this belief, such as Keeneland's not giving Powers regular employee benefits and not originally paying him directly. Keeneland reported Powers as an employee on some forms, but treated him like an independent contractor for tax purposes. This factor does not completely favor either side.

10. Principal in Business

Keeneland is a large business that could be expected to hire a number of different individuals to perform different tasks. While not of great relevance, this factor weighs in Powers's favor more than it does in Keeneland's favor.

After considering all of the factors in conjunction with one another, we agree with the trial court's ultimate conclusion that Powers was an independent contractor. Factors 1, 2, 3, 4, and 8 weigh in Keeneland's favor. Factors 5, 6, 7,

and 10 weigh in Powers's favor. Factor 9 does not clearly weigh in either party's favor. While Powers may have received some benefits traditionally associated with being an employee, the freedom he enjoyed over his schedule, duties, and general work life is more typical of an independent contractor. While Keeneland may have submitted some paperwork that listed Powers as an employee, no one at Keeneland appears to have treated Powers as an employee. He was not expected to attend any sort of regular meetings. He did not receive benefits that other employees customarily received. He came and went as he pleased. He performed ministry work for others for which he was paid in addition to the work he performed at Keeneland. No one at Keeneland evaluated his performance or gave him any specific directions concerning how he was to perform his duties. Moreover, those duties, while desired by Keeneland, are not a part of its regular business activities.

We have carefully considered Powers's argument that the trial court cut short his ability to complete discovery. Powers asserts that he personally needed to have his deposition taken again to fill in certain details related to his hiring and pay. Powers could have submitted this information by affidavit at any time. Nothing the trial court did prevented him from supplementing the record with his own affidavit. Powers also argues he needed to take the deposition of Vince Gabbart, Keeneland's current Chief Financial Officer, because Mr. Gabbart hired Powers's replacement, Bobby Aldridge. According to Powers, Keeneland admits that it hired Aldridge as an employee. He wants to use this fact to establish

that he too was an employee. We do not believe that Aldridge's current status is relevant. Finally, we would be remiss if we did not point out that Powers is the party who moved for summary judgment in the first instance. Apparently, at the time he did so, Powers believed he had a sufficient amount of discovery to prevail on the employee/independent contractor issue. We find it hard to fault the trial court for taking up an issue that Powers represented was sufficiently developed to allow the trial court to make a ruling as a matter of law.

“It is not necessary that litigants be allowed to complete discovery but only that they be granted sufficient time to complete discovery and then fail to produce any evidence to create a genuine issue of material fact.” *Id.*; *Martin v. Pack's Inc.*, 358 S.W.3d 481, 485 (Ky. App. 2011). The trial court provided the parties with a sufficient amount of time to complete discovery as related to the pertinent issues. Powers has failed to identify any relevant discovery that he was prevented from completing. The trial court's actions in deciding the issues when it did were not an abuse of its discretion.

III. Conclusion

For the reasons set forth above, we affirm the Fayette Circuit Court's November 17, 2015, Opinion and Order.

ALL CONCUR.

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