Third District Court of Appeal

State of Florida, July Term, A.D. 2010

Opinion filed January 5, 2011.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D10-1596 & 3D09-3520
Lower Tribunal No. 05-13257

Miami-Dade County,
Appellant,

vs.

Mansour Eghbal,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

R.A. Cuevas, Jr., Miami-Dade County Attorney, and William X. Candela, Assistant County Attorney, for appellant.

Gary A. Costales, for appellee.

Before GERSTEN and SUAREZ, JJ., and SCHWARTZ, Senior Judge.

PER CURIAM.

Miami-Dade County ("the County") appeals the trial court's order denying the County's motion for directed verdict and for judgment notwithstanding the

verdict ("the motion"), and final judgment on age discrimination and retaliation claims. We affirm.

Mansour Eghbal ("Eghbal"), a sixty-nine-year-old County employee, applied for a promotion four times, but the County did not promote him. Thereafter, Eghbal sued for age discrimination and retaliation under the Florida Civil Rights Act ("the FCRA"), sections 760.01-760.11 and 509.902, Florida Statutes, claiming the County failed to select him for a promotion because of his age and because he filed an Equal Employment Opportunity Commission ("EEOC") complaint.

At trial, the jury found age discrimination in one of the four promotion applications and retaliation in another promotion application. The County moved for directed verdict and for judgment notwithstanding the verdict. The trial court denied the motion. Thereafter, the trial court entered a final judgment in Eghbal's favor on the two claims. The County appealed.

On appeal, the County contends that the trial court erred in denying its motion because Eghbal did not establish a prima facie case of age discrimination and retaliation. Eghbal asserts that the trial court did not err in denying the motion because it presented a prima facie case of age discrimination and retaliation for a jury determination. We agree with Eghbal.

The standard of review on appeal of the trial court's ruling on a motion for directed verdict and for judgment notwithstanding the verdict is de novo. See Martin Cnty. v. Polivka Paving, Inc., 44 So. 3d 126 (Fla. 4th DCA 2010). An appellate court must evaluate the evidence in the light most favorable to the non-moving party, drawing every reasonable inference flowing from the evidence in the non-moving party's favor. See Floyd v. Video Barn, Inc., 538 So. 2d 1322 (Fla. 1st DCA 1989). If there is conflicting evidence or if different reasonable inferences may be drawn from the evidence, then the issue is factual and should be submitted to the jury for resolution. See Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 925 (Fla. 5th DCA 2009).

To establish a prima facie case of age discrimination, Eghbal had to prove that: (1) he was a member of a protected class, i.e., at least forty years of age; (2) he was otherwise qualified for the positions sought; (3) he was rejected for the position; and (4) the position was filled by a worker who was substantially younger than the plaintiff.

Here, Eghbal proved that: (1) he was sixty-nine years old; (2) he was qualified for the position sought; (3) he was rejected for the position, and (4) the position was filled by a substantially younger worker. Therefore, because Eghbal proved a prima facie case of age discrimination, the trial court properly denied the motion.

Next, turning to retaliation under the FCRA, an employee must demonstrate: (1) that he or she engaged in statutorily protected activity, (2) that he or she suffered adverse employment action, and (3) that the adverse employment action was causally related to the protected activity. Blizzard, 16 So. 3d at 926.

Here, there was evidence to prove retaliation, to-wit, (1) Eghbal was engaged in a statutorily protected activity, filing the EEOC charges; (2) Eghbal's adverse employment action was that he was denied the promotion; and (3) causal relation was established when Eghbal testified that the promotion decision makers knew of his lawsuit because "when something happens like that this, my case, it spreads around immediately in the County." This became apparent when one of the promotion decision makers stated in his notes that Eghbal thought he was, "extremely unfairly treated with county." Therefore, since there was evidence concerning the retaliation, the trial court correctly denied the motion and allowed the jury to make the factual determination.

Accordingly, we affirm the trial court's order denying the County's motion and the final judgment.

Affirmed.

GERSTEN and SUAREZ, JJ., concur.

SCHWARTZ, Senior Judge (dissenting).

I do not believe the evidence is sufficient to demonstrate an indispensible element of a retaliation claim: that is, that the decision makers actually knew of the employee's complaint so that their adverse action could have been causally related to that protected activity. See Gibbons v. State Pub. Emps. Relations Comm'n, 702 So. 2d 536, 537 (Fla. 2d DCA 1997) ("The plaintiff, at a minimum, must establish that the employer was aware of the protected expression when it took the adverse employment action."); see also Johnson v. State of Florida, Dep't of Elder Affairs, 2010 WL 1328995, 2 (N.D.Fla. 2010) ("A court will not presume that a decisionmaker was motivated to retaliate by something unknown to him or her."); Brown v. Sybase, Inc., 287 F.Supp.2d 1330, 1347 (S.D.Fla. 2003).

In this regard, it is undisputed that (a) Eghbal never told any of the three panel members, either specifically or impliedly, that he had made such a complaint and (b) two of the three stated, in unimpeached and uncontradicted testimony, that they were not aware of it. We have previously held that mere circumstantial evidence cannot overcome uncontradicted direct evidence to the contrary. See Alan & Alan, Inc. v. Gulfstream Car Wash, Inc., 385 So. 2d 121, 123 (Fla. 3d DCA 1980) ("[A] fact cannot be established by circumstantial evidence which is perfectly consistent with direct, uncontradicted, reasonable and unimpeached

testimony that the fact does not exist."). This rule is applicable in spades to this case in which the only even circumstantial evidence to which Eghbal and the majority can point approaches if it does not reach the non-existent:

1. The panelist's note that Eghbal considered himself "unfairly treated" by the County is a wildly uncertain observation which does not speak to the existence of a prior complaint at all and indeed more clearly referred to the claim of age discrimination which he had insisted upon but was rejected by the jury.

2. Eghbal's statement that "when something happens like this, my case, it spreads around immediately in the County. . .[a]nd almost everybody knows about it" is likewise too speculative to warrant any consideration. Simply put, a statement that everyone must know something is no evidence that anyone in particular actually does. see also Morris v. New York Dep't of Correctional Servs., No. 91-CV-634, 1995 WL 21647, at 9-10 (N.D.N.Y. Jan.17, 1995) (claim that plaintiff's support of co-worker's discrimination claim was "common knowledge" insufficient to prove defendant's knowledge of protected activity); Long v. AT & T Information Systems, Inc., 733 F.Supp. 188, 205, 205 (S.D.N.Y. 1990) (claim that retaliating employees knew of protected activity from "familiarity with office gossip" insufficient to create an issue of fact as to their knowledge)); Hayden v. Atlanta Newspapers, 534 F.Supp. 1166 (N.D.Ga. 1982) (summary judgment granted where plaintiff merely alleged that it was logical to

assume that person who took adverse action had knowledge of protected activity); see generally Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. 3d DCA 2004) ("the plaintiff must show a defendant's awareness with more evidence than mere curious timing coupled with speculative possibilities").

These items, taken individually or collectively, did not justify the verdict and judgment below. See Alan & Alan, Inc., 385 So. 2d at 123.