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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001519-MR

DELORES JOHNSON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 93-CI-01506

CITY OF COVINGTON — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GARDNER, AND HUDDLESTON, JUDGES.

DYCHE, JUDGE. This is a termination of employment case in which Delores L. Johnson appeals from a decision of the trial court granting summary judgment in favor of the City of Covington on her claim for handicap discrimination under the Kentucky Equal Opportunities Act, KRS 207.130-260. Johnson also appeals the trial court's decision to instruct the jury, as a matter of law, that the city's personnel policy manual did not apply to Johnson.

On November 1, 1990, Johnson began working as an employee of the City of Covington as an Administrative Assistant to the mayor. Johnson testified that at the beginning of her employment she spent 90 per cent of her time typing, while toward

the end of her employment that function decreased to 50 to 60 percent of her work time. Johnson developed carpal tunnel syndrome in her right hand, and eventually filed a workers' compensation claim for the injury.

On July 2, 1992, Johnson went on sick leave to have surgery for her carpal tunnel injury. She was initially expected to be off work for six to eight weeks. In the sixth week, the office began calling Johnson to ascertain when she could return to work. The city was anxious to have Johnson return to work, as no one was performing her duties.

On August 12, 1992, Johnson's treating physician, Dr. Sommerkamp, wrote a letter to the city indicating that Johnson could return to light duty in 2 weeks, but that now she was complaining of carpal tunnel symptoms in her left hand. The letter further indicated that it would be very helpful in returning Johnson to the workplace if she could be placed in a position of light duty with minimal typing. On September 1, 1992, Dr. Sommerkamp wrote a letter to the city indicating that Johnson was released to return to work on September 8, 1992, so long as she worked no more than four hours per day with minimal repetitive motion with her right hand. The letter stated that Johnson would need to follow this restricted duty regimen for an estimated minimum of 4-8 weeks before converting to full duty. However, the city instructed Johnson not to return to work because it did not have a light duty policy and needed someone who could work full time and perform the full-duty job functions.

On September 10, 1992, the city sent a certified letter to Johnson telling her that she was going to be terminated on September 22, 1992, by an official vote of the Commissioners, because of excessive absenteeism. Prior to September 22, Johnson went to Sommerkamp and asked him to release her back to work full duty. According to Johnson, she was released to full duty effective September 21, 1992, and immediately contacted Assistant City Manager Robert Horne and informed him that she could return to work. Johnson contends that Horne told her that it was too late and that the city was going to proceed with her termination. Johnson was terminated on September 22, 1992, by vote of the City Commissioners.

On September 22, 1993, Johnson filed a lawsuit against the City of Covington for violation of KRS 342.197 (retaliation for filing a workers' compensation claim); outrageous conduct; wrongful discharge; and for violation of the Kentucky Equal Opportunities Act. On January 15, 1998, Covington filed a motion to dismiss Johnson's claims of outrageous conduct and wrongful discharge. On February 9, 1998, the trial court ruled that those claims were preempted by Johnson's retaliatory discharge claim under KRS 342.197.

On March 11, 1998, Covington moved to dismiss Johnson's claims for retaliatory discharge and handicap discrimination. On April 6, 1998, the first day of trial, the trial court dismissed Johnson's claim for handicap discrimination. The case proceeded to trial on the retaliatory discharge count. The jury returned a verdict finding that the City of Covington was not liable for

retaliation under KRS 342.197. The trial court denied Johnson's motion for a new trial. This appeal followed.

Johnson first contends that the trial court erred in its decision to grant summary judgment to Covington on her Equal Opportunities Act claim.

In order to qualify for summary judgment, the movant must "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. "The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991)(citations omitted). Summary judgment should only be used "'when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" Id. at 483, citing Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255 (1985).

Johnson advances four reasons that summary judgment was improperly granted by the trial court. In the first of these, Johnson argues that the trial court erred in its determination that the definition of "handicapped"[1] under the Equal Opportunities Act is the same as the definition of "disability" under the Americans with Disabilities Act (ADA). However, this is a misrepresentation of the trial court's order. The trial

[1]The Equal Opportunities Act does not use the term "handicapped." We construe Johnson's argument to refer to the Equal Opportunities Act's definition of "physical disability."

court in its order granting summary judgment, quoted the applicable section of the Equal Opportunities Act, KRS 207.130(2), which defines "physical disability" for purposes of the act. KRS 207.130 defines a physical disability as follows:

> "Physical disability" means the physical condition of a person whether congenital or acquired, which constitutes a substantial disability to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques.[2]

The trial court continued, "[b]ased upon the entire record of the case, Plaintiff has failed to establish under the deposition of Dr. Sommerkamp that her carpal tunnel disease constituted a substantial disability as required under statute." (emphasis added). Hence, the trial court explicitly applied the proper statute, KRS 207.130(2).

In order to further explain its reasoning, however, the trial court further stated that, "[t]he Court is persuaded that the logic of [the] ADA demonstrates that a disability is a physical or mental impairment that substantially limits one or more of the major life activities of an individual and the logic of the Equal Opportunity [sic] Act demonstrates that a substantial disability requires more than a short term injury; otherwise, the power of these acts are deluded [sic]." The

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[2] In this proceeding, Johnson has argued that the phrase "to that person" is intended to establish a subjective standard to the effect that the relevant test is whether the physical condition constitutes a substantial disability in the mind of the person alleging a physical disability. While it is possible to read the sentence that way, we disagree with Johnson's interpretation of the statute. Under our interpretation, "to that person" merely relates back to "a person" and does not establish a subjective test in determining whether a person has a physical disability.

inclusion of this reference to the ADA in its order does not, as Johnson contends, mean that the trial court concluded "that the definition of 'handicapped' under KRS 207 . . . is the same as the definition of disability under the ADA."

Johnson's second, third, and fourth arguments that the trial court improperly granted summary judgment, are, respectively, that the trial court erred in determining that a short term injury caused by work and capable of healing can never constitute a handicap under KRS 207; that the trial court erred in failing to consider the issue of whether Johnson was handicapped at the time the decision to terminate her was made by the appellee; and that there are genuine issues of material fact relating to whether Johnson was discriminated against.

It is not necessary to address these arguments individually because, under the Equal Opportunities Act, it is clear that the trial court properly granted summary judgment. We conclude that the Equal Opportunities Act does not cover Johnson's situation.

KRS 207.150(1) provides, in pertinent part, that

> No employer shall fail or refuse to hire, discharge, or discriminate against any individual with a disability with respect to wages, rates of pay, hours, or other terms and conditions of employment because of the person's physical disability unless the disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible, or unless otherwise provided by law. . . . This subsection shall not be construed to require any employer to modify his physical facilities or grounds in any way, or exercise a higher degree of caution for an individual with a disability than for any person who is not an individual with a disability.

(Our emphasis.)

Assuming, arguendo, that Johnson was physically disabled under the Act from July 2, 1992, the day she went out on sick leave, until she was discharged on September 22, 1992, the appellee was permitted to discharge her under the Act because she was incapable of performing her duties during this time. KRS 207.150 provides an exception to an employer's duties under the Act toward a disabled person if "the disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible[.]" The particular job for which Johnson was eligible was the job of Administrative Assistant to the mayor. Johnson's presumed "handicap" prevented her from performing this job as evidenced by her absence from work from July 2 until the day of her discharge. Therefore, under the statute, the appellee was not prevented from discharging her.

On the other hand, assuming that Johnson could perform her Administrative Assistant duties during the relevant period, then Johnson did not have a "substantial disability" so as to qualify her as having a physical disability under the definition provided in KRS 207.130(2). The alleged disability related to carpal tunnel syndrome. According to her testimony, Johnson's duties included typing 50 to 60 percent of the time. If Johnson were capable of typing twenty to twenty four hours per week, i.e., four to five hours per day, then beyond doubt she did not have a "substantial disability" associated with her carpal tunnel syndrome injury.

The Equal Opportunities Act, by its structure, is clearly aimed at preventing a physically disabled person who is able to perform his or her duties from being discriminated against. The Act was not intended to cover this situation, and the trial court properly granted the appellee summary judgment.

Jury Instruction II stated, "[y]ou are instructed that under the law of Kentucky, the Plaintiff, Delores Johnson, was an employee at[-]will, and the City of Covington's personnel policy did not apply to her. In other words, her employment could be terminated for just cause, no cause, or even for an unfair reason but not an unlawful reason." Johnson argues that the trial court erred when it instructed the jury that, as a matter of law, the City of Covington's personnel policy did not apply to her. We disagree.

Section 34.50 of the City of Covington's personnel guidelines identifies the position of Administrative Assistant to the Mayor as a nonuniformed, non-civil service position. As such, Johnson was an at-will employee not subject to the special protections available to a civil service employee. See KRS 90.360. "[O]rdinarily an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows, Ky., 666 S.W.2d 730, 731 (1983); Production Oil Co. v. Johnson, Ky., 313 S.W.2d 411 (1958); Scroghan v. Kraftco Corp., Ky. App., 551 S.W.2d 811 (1977).

The personnel guidelines do not specify which sections of the guidelines, if any, apply to non-civil service, at-will, employees. It appears that some of the broader sections, for example § 34.13, "Holidays," apply to all nonuniformed employees. However, it seems that the point of Instruction II was to inform the jury of Johnson's at-will status. Johnson argues that, despite her status as an at-will employee, she nevertheless was entitled, based upon the employment guidelines, to certain protections an at-will employee would not normally have. While perhaps, technically, certain portions of the guidelines may have applied to Johnson, we conclude that those portions that would confer Johnson with any more protections than an everyday at-will employee did not. We therefore cannot say that the trial court abused its discretion in its drafting of Instruction II. To the extent that certain portions of the guidelines may have applied to nonuniformed, non-civil service employees, the trial court's generalization that the personnel policy did not apply to Johnson at all was harmless error. CR 61.01.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Florence, Kentucky

BRIEF FOR APPELLEE:

Stephen T. McMurtry
Covington, Kentucky