

RENDERED: MAY 4, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000762-MR

CHARLENE D. BURD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-007161

EMBRY'S CUSTOM CABINETS, LLC,
A/K/A COMMONWEALTH KITCHENS

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,¹ SENIOR JUDGE.

DIXON, JUDGE: Charlene Burd appeals from a Jefferson Circuit Court order granting summary judgment in favor of her former employer, Embry's Custom Cabinets. After reviewing the record on appeal, we affirm.

Burd was hired by Embry's on November 10, 2003, to work in the company's warehouse. Embry's was a cabinet manufacturing business with approximately fifteen employees, including Burd's immediate supervisor, Darrell Pryor.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Burd, who was forty years old at the time, had prior work experience in the manufacturing industry. Burd worked on several different stages of the fabrication process including sanding unfinished cabinets, cutting raw materials, and using a clamp machine to construct cabinet frames. Shortly after she was hired, Burd recommended her friend, Tonya Geary, for a job in the warehouse. Geary was hired, and her primary task was sanding unfinished cabinets.

On December 23, 2003, Burd smashed her right hand in the clamp machine, severing her fingertip. Burd had emergency surgery on her finger, and missed one day of work because of the accident. Embry's workers' compensation insurance covered Burd's medical expenses.

Upon returning to work, Burd's physician recommended lifting restrictions due to her injury, and she was prescribed several physical therapy sessions. Pryor assigned Burd light duty work to accommodate her injured hand.

In February 2004, Burd spoke with Pryor about attending her scheduled physical therapy sessions. Pryor advised Burd he was concerned about the amount of physical therapy sessions she was expected to attend because her absence would negatively impact overall productivity in the warehouse. Shortly thereafter, on February 9, 2004, Pryor terminated both Burd and Geary, citing "work performance."

After her discharge, Burd filed a formal claim for workers' compensation benefits and received a \$16,000.00 settlement. Thereafter, Burd received unemployment insurance benefits as a result of her termination from Embry's.

On August 24, 2004, Burd filed a verified complaint in Jefferson Circuit Court alleging Embry's wrongfully terminated her in retaliation for pursuing a workers' compensation claim.² Burd also alleged Embry's engaged in age and disability discrimination by terminating her employment.³ Burd later filed a first amended complaint to assert wrongful termination pursuant to the Kentucky Equal Opportunities Act.⁴ Embry's filed an answer on October 8, 2004, denying Burd's claims.

After a period of discovery, Embry's moved for summary judgment on October 28, 2005. The trial court issued a lengthy opinion and order granting summary judgment in favor of Embry's on March 10, 2006.

Burd now contends the court erred by granting summary judgment because genuine issues of material fact existed regarding her retaliation and discrimination claims.

Standard of Review

To prevail on a motion 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.” Ky. R. Civ. P. (CR) 56.03; *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). “Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). “Because summary judgment involves only legal questions

² Kentucky Revised Statutes (KRS) 342.197.

³ KRS 344.040.

⁴ KRS 207.150.

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).

I. Workers' Compensation Retaliation

KRS 342.197(1) states: “No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under [the workers' compensation] chapter.” Our Court has interpreted this provision as protecting an injured worker whether he files a formal compensation claim, or if he pursues other benefits available under the statute. *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 132 (Ky. App. 1990). Additionally, to establish a claim for retaliation, the movant must prove that “filing or pursuing a workers' compensation claim was a substantial motivating factor in causing his discharge.” *First Property Mgmt. Corp. v. Zarebidaki*, 867 S.W.2d 185, 189 (Ky. 1993).

Burd argues that, under the reasoning of *Gaddis, supra*, she was pursuing a lawful workers' compensation claim by accepting payment of her medical expenses.

The *Gaddis* Court emphasized that the purpose of the anti-retaliation provision is to protect injured workers who are entitled to statutory benefits. *Gaddis*, 793 S.W.2d at 130. The claimant in *Gaddis* accepted temporary disability compensation payments voluntarily paid by his employer, but had not filed a formal claim for statutory benefits prior to his discharge. *Id.* The Court concluded the claimant was protected by the anti-retaliation provision because he accepted compensation payments provided in

accordance with the Workers' Compensation Act, thereby “pursuing a lawful claim.” *Id.* at 132.

In the case at bar, Burd admitted she had not intended to file a formal workers' compensation claim prior to her termination. However, we disagree that, as Embry's opines, Burd's subjective intent is dispositive of the issue. Burd, like the claimant in *Gaddis*, merely gave notice of her injury to Embry's and accepted one of the benefits mandated under the Act - payment of her medical expenses.⁵ Furthermore, Burd testified that she was aware workers' compensation paid for her medical expenses. As such, and in light of *Gaddis, supra*, we find the evidence shows Burd was pursuing a lawful claim for workers' compensation benefits at the time of her discharge.

However, we are not persuaded Burd can establish that her workers' compensation claim was a “substantial motivating factor” causing her termination. After thoroughly reviewing the record before us, we are compelled to find there are no unresolved issues of fact regarding her termination from Embry's, making summary judgment appropriate as a matter of law.

Burd argues that Pryor terminated her because she was attending physical therapy at the expense of Embry's workers' compensation insurance. In his deposition, Pryor admitted he questioned Burd regarding why she needed numerous therapy sessions; however, Pryor insisted his main concern was having enough employees to cover for Burd when she attended therapy. Indeed, several times in his deposition Pryor noted the

⁵ KRS 342.020(1) provides in part: [T]he employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, . . . as may reasonably be required at the time of the injury and thereafter during disability

importance of keeping production schedules consistent because he had only six or seven employees in the warehouse. Pryor also testified that Burd did not excel in her position as he had expected based on her manufacturing experience. Pryor specifically explained, even before her injury, Burd was unable to complete tasks without the assistance of others which decreased overall productivity. After reviewing the record, we conclude Pryor had a legitimate reason for dismissing Burd, and she failed to establish, beyond her own subjective belief, that her pursuit of benefits was a substantial factor in her discharge.

In viewing all of the evidence in the light most favorable to Burd, we do not find any material issues of fact exist to overcome summary judgment on the issue of retaliation.

II. Disability and Age Discrimination

Burd next contends her termination constituted impermissible disability and age discrimination. Embry's contends, however, that summary judgment was proper as to these claims because Burd was unable to establish a *prima facie* case of discrimination.

Under the Kentucky Civil Rights Act, it is unlawful for an employer to terminate an employee when he is forty or older or to discharge an employee “because the person is a qualified individual with a disability. . . .” KRS 344.040(1). We note that the Kentucky Act is based upon federal law, and our courts interpret the Act in accordance with federal precedent. *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 593 (Ky. 2003).

Disability Discrimination

To establish a *prima facie* case of disability discrimination, the movant must show: “(1) that he had a disability as that term is used under the statute (i.e., the Kentucky Civil Rights Act in this case); (2) that he was 'otherwise qualified' to perform the requirements of the job, with or without reasonable accommodation; and (3) that he suffered an adverse employment decision because of the disability.” *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 706 (Ky. App. 2004). KRS 344.010(4)(a) defines “disability” as: “[a] physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual[.]” Furthermore, “[w]hether the plaintiff has an impairment and whether the conduct affected by the impairment is a major life activity under the statute are legal questions.” *Id.* at 707.

In this case, we find that Burd's injury could be considered an impairment within the meaning of the statute. The pivotal inquiry, then, is whether her impairment limits a major life activity. Burd contends her impairment adversely affects the major life activity of employment because she cannot securely grip objects or lift a significant amount of weight with her right hand. However, Embry's argues Burd is not precluded from employment as a major life activity because she is able to perform a wide variety of jobs.

We must consider “whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with [a] particular job.” *Howard Baer, Inc.*, 127 S.W.3d at 593

quoting *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 196, 122 S. Ct. 681, 691, 151 L. Ed. 2d 615 (2002). Additionally, the movant “must also show that his impairment significantly restricts his ability to perform either a class of jobs or a broad range of jobs, and not just his current or a single job.” *Hallahan*, 138 S.W.3d at 709.

Burd testified she has constant pain in her finger and that many tasks require more time and effort than before her injury. Specifically, Burd noted she cannot climb a ladder, and she cannot go bowling with her son. Further, because Burd is right-handed, she is forced to do many tasks with her left hand as a result of the injury.

Following her termination from Embry's, Burd applied for twenty-three jobs before being hired as a temporary worker at a commercial food service company. Burd voluntarily left that position because of inflexible work hours. She testified that the job required cleaning, food preparation, and lifting light pots and pans. Shortly thereafter, Burd was hired in the maintenance department of Oxmoor Country Club. She has been able to satisfactorily complete her tasks, including vacuuming, landscaping, banquet set-up, and cleaning.

Even considering all of the evidence as favorable to Burd, it is clear that her impairment does not prevent her from performing major life activities, including employment; therefore, she is not disabled for the purposes of the Act. As Burd is not disabled, she is unable to prove Embry's unlawfully discriminated against her. Thus, summary judgment was appropriate on the issue of disability discrimination.

Age Discrimination

To establish a *prima facie* case of discrimination, the movant must show she: “(1) was a member of a protected class, (2) was discharged, (3) was qualified for the position from which they were discharged, and (4) was replaced by a person outside the protected class.” *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 496 (Ky. 2005). Under the Kentucky Civil Rights Act, Burd was a member of a protected class because she was forty years old at the time of her discharge. KRS 344.040. To satisfy the fourth element of the *prima facie* case, Burd must show Embry's replaced her with “a significantly younger person.” *Williams*, 184 S.W.3d at 496.

The evidence is undisputed that Pryor hired fifty-one-year-old Kathy Huffman to replace Burd. However, Burd argues that since both she and Geary were fired at the same time, Huffman could have replaced Geary. We disagree with this logic and find Burd unable to show she was replaced with someone younger. We also note Burd did not otherwise establish any “cold hard facts” she was fired because of her age. *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226, 229 (Ky. 1984). Because Burd cannot establish a *prima facie* case of discrimination, we will not further address the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). We affirm the court's summary judgment on this issue.

For the reasons stated herein, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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