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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002412-MR

CYNTHIA WILSON APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 06-CI-00337

BRUSS NORTH AMERICA, INC. AND
BRUSS NORTH AMERICA-KENTUCKY, INC.
APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND WINE, JUDGES; HARRIS, SENIOR JUDGE.

WINE, JUDGE: Cynthia Wilson appeals from a summary judgment by the Russell Circuit Court which dismissed her employment-discrimination claim against Bruss North America ("BNA"). Wilson contends that there were genuine issues of material fact supporting her claim that BNA fired her because she was pregnant.

However, Wilson failed to present evidence showing that the decision-makers at BNA knew of her pregnancy or that the stated reasons for the termination were pretextual. Hence, we affirm.

Wilson was employed as a machine operator for BNA from November 17, 2003 until September 30, 2005. According to Wilson, she discovered that she was pregnant in late August 2005. BNA terminated her employment on September 30, 2005, citing poor work performance and insubordination. BNA denied her internal appeal from the termination.

Thereafter, on September 29, 2006, Wilson brought this action alleging that BNA had terminated her because of her pregnancy, in violation of Kentucky Revised Statutes 344.030(8) and 344.040, and 42 U.S.C. § 2000e(k). After a period of discovery, BNA moved for summary judgment, arguing that Wilson had failed to establish a *prima facie* case of discrimination. After considering Wilson's response, arguments of counsel, and the record, the trial court granted BNA's motion on November 26, 2008. Wilson now appeals.

The standard of review governing an appeal of a summary judgment is well settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "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." Kentucky Rules of Civil Procedure 56.03. In *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation 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." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

The central issue in this case concerns the sufficiency of Wilson's evidence showing that BNA terminated her because she was pregnant. KRS 344.040(1) provides, in pertinent part, that it is an unlawful employment practice for an employer, "otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's .... sex ..." KRS 344.030(8) defines the term discrimination "on the basis of sex" to include pregnancy, childbirth, and other related medical conditions. Likewise, the Federal Civil Rights Act, 42 U.S.C. 2000e(k), bars employment discrimination on the basis of sex, including pregnancy, childbirth, or related medical conditions.

BNA argues that Wilson failed to make a *prima facie* showing of discrimination required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). To establish a *prima facie* case of pregnancy discrimination, Wilson must show that (1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision. *Prebilich-Holland v. Gaylord Entertainment Co.*, 297 F.3d 438, 442 (6th Cir. 2002). Once Wilson establishes her *prima facie* case, the burden then shifts to BNA to demonstrate a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802, 93 S. Ct. at 1824. BNA's burden is merely one of production, not proof. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981). If BNA is able to articulate a legitimate reason, the burden shifts to Wilson to establish by a preponderance of the evidence that BNA's stated reasons for its actions are not the true reasons and are merely pretext. *Id.* at 256, 101 S. Ct. 1089.

BNA argues that Wilson failed to produce any evidence meeting the fourth element of her *prima facie* case: *that there was a nexus between her pregnancy and the adverse employment decision*. In cases involving discrimination based on pregnancy, the employee must prove that the employer had knowledge of the pregnancy at the time of the discharge. *Prebilich-Holland*, *supra* at 443. BNA contends that there was no evidence that any decision-maker at BNA knew Wilson was pregnant at the time of her termination.

Wilson testified that she had informed her immediate supervisor, Derek Stephens, that she was pregnant about two weeks before her termination. Stephens denies that he knew about Wilson's pregnancy before the termination. Regardless, BNA notes that Stephens had no authority to terminate employees. Rather, terminations at BNA were handled by the Human Resources Manager, Wendy Goff. In her deposition, Goff testified that she had not been informed of Wilson's pregnancy when Wilson was terminated. Since Goff never knew that Wilson was pregnant, BNA argues that Wilson cannot show that her pregnancy was a factor in the termination. *Id.* at 444.

In response, Wilson focuses on her allegation that she told Stephens about her pregnancy before she was terminated. She also testified that she was beginning to have pregnancy-related nausea. Wilson also stated that she suffered a miscarriage while employed with BNA. In addition, Goff had approved Wilson's request for family medical leave earlier in 2005. While the medical leave was not for pregnancy, it was for reproductive-health-related issues. Given these facts, Wilson contends that a jury could reasonably infer that the decision-makers at BNA knew of her pregnancy.

When a pregnancy is apparent, or where plaintiff alleges that she has disclosed it to the employer, then a question of the employer's knowledge will likely preclude summary judgment. *Geraci v. Moody-Tottrup, Intern., Inc.*, 82 F.3d 578, 581 (3d Cir. 1996). Here, Wilson's pregnancy had not yet become apparent and only a non-decision-making supervisor knew about the pregnancy.

Any inference that Goff learned about Wilson's pregnancy through Stephens is little more than speculation. *See O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006), stating that "speculation and supposition are insufficient to justify a submission of a case to the jury, and that the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation."

But even if Wilson presented sufficient evidence to create a genuine issue of material fact about when Goff became aware of her pregnancy, she still cannot show that BNA's stated reasons were a pretext for unlawful discrimination. BNA advanced a legitimate non-discriminatory reason for the termination. Goff testified that she fired Wilson after Stephens forwarded complaints from two of Wilson's co-workers, Vicki Maggard and Dustin Cochran. Maggard and Cochran accused Wilson of intentionally slowing down production by inserting bolts backward and skipping leak tests on certain machines. Maggard and Cochran also complained that Wilson was rude to co-workers, used profanity, and took excessively long breaks. Stephens also testified that he had previously warned Wilson about this behavior. Goff testified that she fired Wilson based on this conduct and her prior work history.

To prove pretext, Wilson must present facts that cast doubt on BNA's specific reasons for her termination. *Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1007 (7th Cir. 2001). She can demonstrate pretext in either of two ways: (1) by showing that defendant was more likely motivated by a discriminatory reason; or

(2) that the defendant's proffered reasons are unworthy of credence. *See Texas Dept. of Community Affairs v. Burdine*, *supra* at 253-54, 101 S.Ct. at 1093-94. Wilson has failed to present any such evidence.

Wilson contends that BNA's stated reasons for her termination were based on malicious fabrications by her co-workers, particularly Maggard and Cochran. But even if this is the case, she presents no evidence to support an inference that the complaints were a mere pretext for unlawful discrimination. Under the circumstances, the trial court properly granted summary judgment for BNA.

Accordingly, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Bertram
Jamestown, Kentucky

BRIEF FOR APPELLEE:

David A. Nunery
Steven C. Call
Campbellsville, Kentucky