

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002113-MR

SHANNON ELLIOTT

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CI-01032

LAUREL COOKIE FACTORY AND/OR
CONSOLIDATED BISCUIT COMPANY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Shannon Elliott filed a claim for wrongful termination against her former employer, Laurel Cookie Factory and/or Consolidated Biscuit Company, alleging that she was terminated in retaliation for her pursuit of a workers' compensation claim in violation of Kentucky Revised Statutes (KRS) 342.197. After a jury found that Elliott's pursuit of a workers' compensation claim

was not a substantial and contributing factor in Laurel Cookie Factory's decision to terminate her employment, a judgment was entered dismissing her claim.

On appeal, Elliott alleges the following errors: (1) that the trial court erred when it refused to allow her to present medical records from her workers' compensation proceeding; (2) that the trial court erred when it excluded the deposition of a witness; (3) that the trial court erred when it excluded testimony from a former Laurel Cookie Factory employee; and (4) that the trial court erred when it refused evidence regarding front pay to be presented to the jury and denied front pay without considering reinstatement. We conclude that Elliott's claims of error are without merit and affirm.

Elliott was employed by Laurel Cookie Factory, first as a packer and then as a machine operator. On August 11, 2003, during the course of her employment, she was burned by hot glue and, as result, filed a workers' compensation claim. After she was medically released to return to work on September 2, 2003, Elliott was informed that her employment was terminated for the following reasons: (1) violation of plant rules; (2) failing to follow safety rules; (3) being out of her assigned work area; and (4) using inappropriate gestures and making lewd comments.

We first address the evidentiary issues presented. Elliott argues that the trial court erred when it precluded the introduction of her workers' compensation records, including a report from Dr. Shraberg. Citing Kentucky Rules of Evidence (KRE) 201 pertaining to judicial notice of adjudicative facts and

our rules of evidence regarding the authentication of documents contained in KRE 1003, 1004 and 1005, she alleges that the medical records were admissible.

Elliott ignores the reason the trial court excluded the records was because it found that they were not relevant to the issues in controversy. “The relevancy of evidence is a matter that rests within the broad discretion of the trial court.” *Reece v. Nationwide Mutual Insurance Co.*, 217 S.W.3d 226, 232 (Ky. 2007). KRE 402 sets forth the general rule that all relevant evidence is admissible and evidence which is not relevant is inadmissible. KRE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

The issue was whether Elliott’s pursuit of her workers’ compensation claim was a substantial factor in her employment termination. Laurel Cookie Factory did not dispute that she was injured during the course of her employment and had filed a workers’ compensation claim. Thus, we conclude that the trial court did not abuse its discretion when it excluded the workers’ compensation records because the records would not aid the jury’s determination of whether it was more or less probable that Elliott was wrongfully terminated.

We also conclude that Elliott’s contention that the trial court erred when it refused her request to introduce the deposition of Freda Shepherd who was absent on the date of trial. The use of depositions at trial *in lieu* of live testimony is subject to Kentucky Rules of Civil Procedure (CR) 32.01, which permits the use

of a deposition of a witness if the court finds that “exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses in open court, to allow the depositions to be used.”

Elliott contends that “extraordinary circumstances” justified the use of Shepherd’s deposition because the Clay County Sheriff unsuccessfully attempted to serve Shepherd. However, no representative of that office testified regarding attempts to serve her and no evidence was introduced indicating that Shepherd was unavailable for trial. We conclude that the trial court did not err in refusing the admission of the deposition.

The trial court also excluded the testimony of Tracy Hobbs who was terminated in 2003 from Laurel Cookie Factory after she pursued a workers’ compensation claim. Generally, testimony that other employees were retaliated against after suffering a work-related injury and that the employer had a policy of retaliatory termination is relevant to the true motive for an employee's termination. *See Willoughby v. GenCorp, Inc.*, 809 S.W.2d 858 (Ky. 1990). However, relevancy is dependent upon a demonstration that the former employee was similarly situated and evidence that the filing of a workers’ compensation claim was a substantial factor in the employee’s termination. *See McBrearty v. Kentucky Community and Technical College System*, 262 S.W.3d 205 (Ky.App. 2008); *Commonwealth v. Solly*, 253 S.W.3d 537 (Ky. 2008).

Elliott fails to cite Hobbs's avowal testimony where she alleged that her termination was in retaliation for filing a workers' compensation claim or explained the circumstances of her employment and termination. She merely asserts that: "I would have shown that the Laurel Cookie Factory has a tendency to terminate employees who have a work related injury." Under the circumstances, we conclude that the trial court did not err.

We have refrained from discussing Elliott's contention regarding front pay until resolution of the evidentiary issues. Front pay is an element of damages. *See Ferry v. Cundiff Steel Erectors, Inc.*, 218 S.W.3d 390, 393 (Ky.App. 2006). Because we conclude there are no grounds for reversal on the issue of liability, the issue of front pay is moot.

Based on the foregoing, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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