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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001320-MR

SHERRI WALTHALL — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 07-CI-00245

CAVERNA MEMORIAL HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

DIXON, JUDGE: Sherri Walthall appeals an order of the Hart Circuit Court granting a directed verdict in favor of Walthall's former employer, Caverna Memorial Hospital. Finding no error, we affirm.

On September 20, 2006, Pam Cooper, the hospital's compliance officer, received notice of potential misconduct involving Walthall, the hospital's director of nursing. Walthall, a registered nurse, had been employed at the hospital for twenty-six years. Cooper initiated an internal investigation and discovered that Walthall and another nurse, Pam Hester, had used hospital resources to treat Walthall's mother, Jeannie Whiles, outside of the hospital. According to Whiles's medical records, on September 2, 2006, Dr. Todd Williams prescribed outpatient antibiotic therapy for Whiles. The records indicate that, on eight consecutive days, Walthall registered Whiles at the hospital for outpatient treatment and provided Whiles's Medicare card to the billing clerk.[2] Whiles, however, was never physically at the hospital. Instead, Walthall obtained medication from the hospital pharmacy, and Hester left the hospital to administer the intravenous medication to Whiles at Walthall's home. Following each IV treatment, Hester made the appropriate notation in Whiles's medical chart.

Cooper conducted several interviews with hospital employees, and on September 28, 2006, she and Alan Alexander, the hospital's CEO, interviewed

[2] Specifically, the admissions records indicate Whiles was classified as a "Medicare emergency room outpatient."

Walthall regarding Whiles's treatment. Since the hospital did not have a home health license or retail pharmacy license, all treatment had to occur at the hospital on an outpatient or inpatient basis. Nevertheless, Walthall admitted her involvement in Whiles's treatment, but denied she had done anything wrong. Thereafter, Walthall gave Alexander a personal check to pay for Whiles's medication, along with a note, which stated in pertinent part:

> Let me know what the other charges are[,] and I will take care of them. Change her account to self-pay. I certainly don't want to get anyone in trouble over this. Like I had told you, I'm not the only one that has done this practice[,] and I've tried to keep up with charges and be honest.

On October 4, 2006, Alexander terminated both Walthall and Hester for misappropriation of medication and falsification of medical records.

In July 2007, Walthall filed suit against the hospital, alleging retaliation based on age discrimination, in violation of the Kentucky Civil Rights Act. Following lengthy discovery, the case went to trial in May 2009. At the close of Walthall's proof, the trial court directed a verdict in favor of the hospital. Walthall unsuccessfully moved to vacate the court's judgment, and this appeal followed.

"On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion[,]" *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998), and the motion cannot be granted "unless there is a complete absence of proof on a material issue

or if no disputed issues of fact exist upon which reasonable minds could differ." *Id*. at 18-19. On appellate review of a directed verdict, we will not disturb the trial court's decision unless it was clearly erroneous. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992).

Walthall based her claim on KRS 344.280(1), the anti-retaliation provision of the Kentucky Civil Rights Act (KCRA). The statute states in relevant part:

> It shall be an unlawful practice for a person . . . [t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]

We interpret that the civil rights provisions of KRS Chapter 344 are consistent with federal anti-discrimination laws. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005). In *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, (Ky. 2004), the Court stated:

> A *prima facie* case of retaliation requires a plaintiff to demonstrate '(1) that plaintiff engaged in an activity protected by [the Act]; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.'

Id. at 803 (*quoting Christopher v. Stouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir. 1991)). "If and when a plaintiff has established a *prima facie* case, the

burden of production of evidence shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions." *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792-93 (6th Cir. 2000). Thereafter, "[t]he plaintiff . . . must demonstrate that the proffered reason was not the true reason for the employment decision." *Id*.

In the case at bar, Walthall contends a directed verdict was clearly erroneous because she met her burden of proof, and the court misapplied the law. After an exhaustive review of the record and relevant case law, we disagree.[3]

As the first element of her *prima facie* case, Walthall asserts that she engaged in a protected activity by opposing her own age-based termination. Walthall testified that it was an "acceptable practice for years" for hospital personnel to obtain medication for themselves or family members at the pharmacy, a contention supported by the testimony of three former employees. Prior to Walthall and Hester, no employee had been fired for taking medication to a family member; accordingly, Walthall infers that the hospital terminated her because she was the oldest full-time RN on staff. Walthall claims she opposed this discriminatory practice by offering to pay for the medicine and by telling Alexander she did not deserve to be fired after twenty-six years with the hospital. Essentially, Walthall argues the hospital terminated her in retaliation for opposing its practice of terminating her based on her age, and her opposition to being

[3] In her appellate brief, Walthall makes confusing and repetitive arguments, mischaracterizes trial testimony, and improperly cites unpublished cases. Because we are satisfied a directed verdict was appropriate, we will not separately address each of Walthall's arguments.

terminated constituted an activity protected by the anti-retaliation provision of the KCRA.

We are mindful that "an employee need not file a formal EEOC complaint to engage in protected activity - rather it is the assertion of statutory rights that triggers protection under the [Act]'s anti-retaliation provision." *Fox v. Eagle Distributing Co., Inc.*, 510 F.3d 587, 591 (6th Cir. 2007). In *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989), the Court explained:

> An employee may not invoke the protections of the Act by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employee inserting a charge of discrimination.

Even viewed most favorably to Walthall, we cannot conclude that her statements to Alexander were statements made in opposition to a discriminatory employment practice. Because Walthall was not engaged in an activity protected by the KCRA, she failed to establish a *prima facie* case of retaliation pursuant to KRS 344.280(1).

While Walthall was understandably dissatisfied with the decision to terminate her employment, the record simply did not indicate that the hospital fired her in retaliation for exercising her civil rights. It is well settled that "the jury may not be permitted to reach a verdict based on mere speculation or conjecture."

Gibbs v. Wickersham, 133 S.W.3d 494, 496 (Ky. App. 2004). Accordingly, we find no error in the trial court's directed verdict in favor of the hospital.

For the reasons stated herein, we affirm the judgment of the Hart Circuit Court.

ALL CONCUR.

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