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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000533-MR

GARY STAUBLE — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 08-CI-00209

MONTGOMERY IMPORTS, LLC, D/B/A THE KIA STORE-ELIZABETHTOWN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,[1] SENIOR JUDGE.

KELLER, JUDGE: Gary Stauble (Stauble) brings this appeal from the Summary Judgment of the Hardin Circuit Court dismissing his complaint of age discrimination. We affirm.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

FACTS

The following facts are not in dispute.

At all relevant times, Stauble was an at-will employee of Montgomery Imports, LLC (Montgomery). Montgomery terminated Stauble on September 28, 2007. Stauble, who was 49 years old at the time, alleged that his termination was the result of age discrimination.

Stauble first worked as an automotive technician for Montgomery beginning in 1983, but left in 1986 to seek other employment. In 1988, he returned to Montgomery as an assistant service manager and took over as service manager in 1989 when his predecessor retired.

For many years, Stephen Montgomery (Mr. Montgomery), as managing member of Montgomery, managed a number of car dealerships, including a Mazda-Volkswagen dealership in Radcliff, a Big M Chevrolet dealership in Radcliff, a KIA dealership in Radcliff, and a KIA dealership in Elizabethtown. In late 2006, Mazda requested a withdrawal from its smaller markets and offered to buy back the Radcliff Mazda franchise due to the struggling economy. When Mazda withdrew from Montgomery's Radcliff dealership, Volkswagen also withdrew. Upon Mazda and Volkswagen's withdrawals in 2006, Montgomery had to decide how to consolidate its existing employees into a smaller operation. At that time, Stauble served as the service manager for the Radcliff Mazda-Volkswagen dealership. As a result of the consolidation, Montgomery transferred Stauble to the Radcliff KIA dealership, where he continued as service manager.

During the same time period, Rodney Chancey (Chancey), who served as general manager at Montgomery's Big M Chevrolet dealership for six years, also became the general manager of the Elizabethtown KIA dealership.

Shortly thereafter, Montgomery decided to combine the Radcliff and Elizabethtown KIA dealerships. As a result of this consolidation, Montgomery again had to reduce its work force. During the restructuring, Stauble interviewed for and, largely as a result of Mr. Montgomery's recommendation, became the service manager for the newly consolidated Elizabethtown KIA dealership. On April 1, 2007, Chancey, who continued as general manager of the Elizabethtown KIA dealership, transferred Stauble to parts manager. Stauble replaced 43 year old Cliff Musik (Musik), and David Coomes (Coomes), who was in his late 20s or early 30s, replaced Stauble as service manager. Approximately six months later, Montgomery terminated Stauble, who was then 49 years old, and replaced him with 40 year old David Hall (Hall).

The following facts are in dispute.

In his deposition, Chancey testified that, while Stauble was working at the Elizabethtown KIA Dealership as service manager, Chancey received "an enormous" number of customer complaints about Stauble. One such complaint involved a customer who brought in a coupon for a $29.95 oil change. Because the customer's vehicle did not qualify for the discounted price, Stauble charged the customer $49.00 for the oil change. When the customer complained to Chancey, Chancey counseled Stauble that he should accept a customer coupon even if it had

an exclusion because "[t]here's no sense in losing a customer over $10 or $20." Chancey asserted that Stauble was not receptive to this policy, and Chancey continued to receive customer complaints about Stauble as service manager. According to Chancey, he transferred Stauble from service to parts manager because of these complaints.

Chancey further testified that, even though Stauble had fewer contacts with customers as parts manager, he continued to have difficulties with customer relations. By way of example, Chancey noted that Stauble refused to waive a 20% restocking fee for a customer who returned a part. Stauble and the customer argued, the customer threatened Stauble, and Stauble called the police. According to Chancey, these and other such incidents led to Stauble's termination.

In his deposition, Stauble admitted that these two incidents took place; however, he denied that there were numerous complaints. Furthermore, he testified that these incidents were not the actual reasons for his termination. Instead, Stauble testified that Montgomery brought Chancey into the dealership to remove the older workers from the dealership's work force. As support for this contention, Stauble testified that Tim French (age 46), Robert "Bob" Day (age 62 or 63), Gary D'Angelo (age 52), Paula Weaver (age 47), and Cliff Musik (age 43)[2] were removed from the dealership because of their age. We set forth additional facts regarding the termination of these five employees as necessary in our analysis.

[2] Stauble's brief lists six people instead of five. Two of the individuals listed by Stauble are Robert Day and Bob Day. These appear to be the same person. Further, Stauble lists "Chris" Musik. The record reflects that his name is actually "Cliff" Musik.

Following his termination, Stauble filed a complaint with the Hardin Circuit Court alleging age discrimination. After conducting discovery, Montgomery filed a motion for summary judgment, which the trial court granted. In doing so, the trial court held that, although Stauble met the elements of his prima facie case, he failed to prove that Montgomery's proffered reasons for his termination were pretextual. This appeal followed.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any 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). In *Steelvest*, the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). In ruling on a motion for summary judgment, the court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest, Inc.*, 807 S.W.2d at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative

evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481.

This age discrimination claim was brought pursuant to Kentucky Revised Statute (KRS) 344.040(1), which prohibits employers from taking discriminatory action against any individual over the age of 40. Because KRS 344.040 is modeled after the Federal law, "we must consider the way the Federal act has been interpreted." *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226, 229 (Ky. 1984).

ANALYSIS

We now turn to the question of whether an issue of material fact existed that precluded entry of summary judgment. At the outset, we note that Stauble alleged two claims of age discrimination: his demotion from service manager to parts manager and his termination. We address these separately.

A plaintiff may establish his claim of age discrimination "either by introducing direct evidence or by proffering circumstantial evidence that would support an inference of" age discrimination. *Imwalle v. Reliance Medical Products, Inc.*, 515 F.3d 531, 543 (6th Cir. 2008). Here, Stauble presented no direct evidence of age discrimination.

When a plaintiff presents only circumstantial evidence of discrimination, we analyze the claim under the three stage framework developed in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, the claimant has the burden of establishing a prima facie case of

discrimination. Second, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for" the employer's actions. *Id.* at 802-03; 93 S. Ct. at 1824. Third, the claimant must "be afforded a fair opportunity to demonstrate that petitioner's stated reason for [its actions] was in fact pretext." *Id.* at 804; 93 S. Ct. at 1825.

I. Prima Facie Case

Under the *McDonnell Douglas* framework, a claimant establishes a prima facie case for discrimination by proving the following: (i) that he was a member of a protected class; (ii) that he was discharged and/or demoted; (iii) that he was qualified for the position from which he was discharged and/or demoted; and (iv) that he was replaced by a person outside the protected class. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 496 (Ky. 2005). The fourth requirement is altered in age discrimination cases to require proof that the claimant was replaced by a substantially younger person. *Id*. As noted by the U.S. Supreme Court, "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996). We address Stauble's demotion and termination separately below.

a. Demotion

The parties do not dispute that Stauble, age 48 at the time of his transfer, met the first *McDonnell Douglas* requirement by being part of a protected class.

However, the parties dispute the second requirement - whether Stauble's transfer from service manager to parts manager was a demotion. We agree with the trial court that it is not clear whether the transfer was a demotion. However, viewing the facts in the light most favorable to Stauble, we accept, as did the trial court, that Stauble's transfer from service to parts manager was a demotion.

The parties also dispute the third requirement - whether Stauble was qualified for the position from which he was demoted. In support of its argument that Stauble was not qualified for the service manger position, Montgomery asserts that there were two to three customer complaints per year regarding Stauble's job performance. According to Mr. Montgomery, these complaints are indicative of Stauble's lack of qualifications. On the other hand, Stauble asserts that his nearly 22-year employment history with Montgomery, coupled with Mr. Montgomery's recommendation to keep him as service manager following the consolidation of the KIA dealerships, demonstrate that Stauble was qualified for the service manager position. Furthermore, Stauble notes that Montgomery could produce only one example of a customer complaint during the time Stauble served as service manager. Viewing the facts in the light most favorable to Stauble, we presume that he was qualified for the position from which he was demoted.

Finally, the parties dispute the fourth requirement. To establish the fourth requirement for an age discrimination case, the claimant must show that he was replaced by someone substantially, or significantly, younger. In *Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579, 588 (6th Cir. 2002), the United

States Sixth Circuit Court of Appeals held that deciding whether an age difference of seven and one-half years is significant is a question of fact for the jury. When Stauble was demoted to parts manager in 2007, he was 48 years old. His replacement, Coomes, was in his late 20s or early 30s. This age difference of roughly 20 years is significant. *See Grosjean v. First Energy Corp.*, 349 F.3d 332, 336 (6th Cir. 2003) (noting that "[a]ge differences of ten or more years have generally been held to be sufficiently substantial . . ."). Further, even if Coomes was in his early 30s at the time of Stauble's transfer, he was outside of the protected class and clearly falls within the fourth requirement. *See Williams*, 184 S.W.3d at 496. Accordingly, the trial court did not err in concluding that Stauble made a prima facie case for discrimination with regard to his demotion claim.

b. Termination

There is no dispute that Stauble, age 49 at the time of his termination, met the first requirement by being a member of a protected class. Additionally, there is no dispute that Stauble was terminated, thus meeting the second requirement. However, the parties dispute the third requirement - whether Stauble was qualified for the position from which he was terminated.

Montgomery asserts that it demoted Stauble from service manager to parts manager because of the number of customer complaints it received. However, according to Montgomery, it continued to receive customer complaints regarding Stauble and it cites these ongoing complaints as evidence that Stauble was not qualified for the position of parts manager.

Montgomery's argument, viewed in a light most favorable to Stauble, is not persuasive. First, we note that if Montgomery demoted Stauble because of his poor customer relations, placing him in a job that required ongoing direct customer contact was not logical. Second, Montgomery has not cited to any other shortcomings Stauble exhibited as parts manager. Third, and perhaps most important, if Montgomery did not believe Stauble was qualified to perform the job of parts manager it could have placed him in another position or simply terminated his employment. Therefore, we agree with the trial court that Stauble was qualified for the position of parts manager.

Finally, the parties dispute whether Stauble met the fourth requirement - whether he was replaced by someone substantially younger. When Stauble was terminated in September of 2007, he was 49 years old, and he was replaced by Hall. Because Hall was 40 years old, he was in Stauble's protected class. However, their age difference of 9 years is significant enough to present a question of fact for the jury. *Cicero*, 280 F.3d at 588. Consequently, in viewing this age difference in the light most favorable to Stauble, we conclude that nine years is, in fact, a significant or substantial age difference.

Montgomery also argued that Stauble did not meet the fourth element for his termination claim because he was not "replaced" by Hall. The Sixth Circuit held that a

> person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related

> work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.

Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990). Hall was a parts manager at the Louisville KIA dealership when he was transferred to serve as the parts manager at the Elizabethtown KIA dealership. Hall retained none of his duties at the Louisville dealership; he assumed all of Stauble's duties; and none of Stauble's duties were redistributed to any other employees. Therefore, Hall replaced Stauble as parts manager, and Stauble met the fourth and final requirement to make a prima facie case of discrimination with regard to his termination claim.

II. Legitimate Nondiscriminatory Reason

Because Stauble established a prima facie case of age discrimination for both his demotion and termination, the burden shifted to Montgomery to show that a legitimate nondiscriminatory reason motivated its adverse employment actions. Montgomery presents two justifications for demoting Stauble.

First, Montgomery asserts that Stauble was demoted because of a number of customer complaints. However, Montgomery only gave one example of a customer complaint during Stauble's time as service manager. That incident involved Stauble refusing to recognize a customer's oil change coupon because the coupon did not apply to the customer's vehicle. Although Montgomery offered only one example of a customer complaint, an employer may discharge an at-will employee for good cause or for no cause, so long as it is not for an impermissible reason under the law. *Benningsfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567,

570 (Ky. App. 2005). Therefore, that customer complaint is sufficient to support Montgomery's burden.

Second, Montgomery contends that Stauble's refusal to conform with Chancey's managerial style was a legitimate reason to demote Stauble. The Supreme Court of Kentucky has held that a differing managerial style is a legitimate, nondiscriminatory reason to terminate someone. "Even if [the complainant's] job performance had been satisfactory in every other way, his refusal to conform to his supervisor's managerial technique was a valid basis for his discharge." *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226, 231 (Ky. 1984). Although *Harker* involved a termination, we discern no reason why this holding should not apply equally to a demotion.

There is no dispute that Chancey's and Stauble's view of management differed. According to Stauble, Chancey thought that Montgomery should buy customer loyalty, believing that there was no reason to lose a customer over $10 or $20. Stauble, on the other hand, thought Montgomery should earn customer loyalty and believed that it had to weigh "the cost of the goodwill versus the effect of the goodwill" before giving away services and products. Based on the customer complaints regarding the coupon and the parties' obviously different views of management style, we conclude that Montgomery met its burden of proving a legitimate, nondiscriminatory reason for demoting Stauble.

Montgomery also asserts a legitimate, nondiscriminatory reason for Stauble's termination – ongoing customer complaints after it moved Stauble to the

position of parts manager. In support of this reason, Montgomery cites the incident where Stauble called the police regarding a customer dispute. We agree with Stauble that Montgomery produced only this one example of a dispute with a customer. However, because of its severity, that complaint provided a legitimate reason to discharge Stauble. As previously noted, an employer may discharge an at-will employee for good cause or for no cause, so long as it is not for an impermissible reason under the law. *Benningsfield*, 183 S.W.3d at 570. Therefore, Montgomery also met its burden of proving that Stauble's termination was the result of a legitimate, nondiscriminatory reason.

III. Pretext

Once Montgomery proved that a legitimate, nondiscriminatory reason motivated Stuable's demotion and termination, Stauble was required to prove that such purposes were a pretext and were not the true reasons for his demotion and termination. A claimant may demonstrate pretext by showing: "(1) the proffered reasons [were] false; (2) the proffered reasons did not actually motivate the decision; or (3) the . . . reasons given were insufficient to motivate the decision." *Williams*, 184 S.W.3d at 497.

Initially, we note that conclusory allegations and subjective beliefs are not enough to survive summary judgment. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990). Stauble first contends that the alleged customer complaints received by Chancey and Montgomery were either false or did not actually motivate Stauble's demotion. Stauble noted that, although both Chancey

and Mr. Montgomery testified that Montgomery received numerous complaints about Stauble, Montgomery offered only two examples of customer complaints in twenty-two years, one of which occurred after Stauble's demotion. However, Stauble did not offer any proof that this customer complaint did not motivate his demotion.

Furthermore, Stauble contends that Montgomery's assertion that it received numerous complaints about him as parts manager is false because Montgomery again produced only one example of a complaint after he was parts manager. While this is true, Stauble fails to note the gravity of that incident. Even if we were to assume that no other customer complaints existed, the situation between Stauble and a customer that necessitated police intervention is a legitimate reason for termination.

We note that Stauble asserts that the police incident was insufficient to justify his termination because the customer eventually paid the restocking fee that Stauble refused to waive. The fact that the customer eventually paid the restocking fee shows that the manager who subsequently handled the customer was able to get the desired result without having to call the police. It does not show that Stauble's handling of the customer was acceptable. Consequently, the fact that the customer did eventually pay the restocking fee fails to prove that this incident was insufficient to justify Stauble's termination and fails to prove that Stauble's managerial style did not differ from Chancey's.

Finally, Stauble attempted to show that the proffered reasons did not actually motivate Montgomery's decisions to demote and terminate him by asserting that other employees were also terminated because of age. Stauble alleged Tim French (age 46), Robert "Bob" Day (age 62 or 63), Gary D'Angelo (age 52), Paula Weaver (age 47), and Cliff Musik (age 43) were terminated because of age. However, Stauble's own testimony showed that at least three of these five people did not suffer an adverse employment action based on their age. Cliff Musik was the parts manager of the Elizabethtown KIA dealership before Stauble was demoted to that position. Musik was 43 at the time, and he was replaced by the then 47-year-old Stauble. Therefore, Musik's replacement was not age-related because he was replaced by an older employee. Neither Paula Weaver nor Bob Day suffered an adverse employment action by Montgomery because Paula Weaver resigned after being accused of falsifying financial documents, and Bob Day retired.

Furthermore, it is undisputed that Tim French was a former business partner and co-owner of Montgomery and that he and Mr. Montgomery parted ways. Thus, there is no evidence in the record that French suffered an adverse employment action based on his age by Montgomery.

The reasons for Gary D'Angelo's discharge are unclear. Montgomery testified that D'Angelo was terminated for cause and that his position was filled by another, younger employee. Chancey testified that D'Angelo's termination was simply part of the company's downsizing process and that D'Angelo's duties were

assumed by a younger co-employee. In either event, Montgomery has set forth legitimate reasons for D'Angelo's discharge. Stauble has not pointed to any evidence, other than his own conjecture, that points to age as a motivating factor for D'Angelo's discharge. Thus, the discharge of the five other employees does nothing to overcome the legitimate reasons offered by Montgomery for discharging Stauble. Consequently, without more than conclusory allegations and subjective beliefs, Stauble's claim cannot survive summary judgment. *Seitz*, 796 S.W.2d at 3; *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007).

CONCLUSION

For the foregoing reasons, the order of the Hardin Circuit Court granting summary judgment is affirmed.

ALL CONCUR.

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