

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000240-MR

EARL JONES

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 05-CI-00159

LEXINGTON-FAYETTE URBAN COUNTY  
GOVERNMENT, EX REL. LEXINGTON-FAYETTE  
URBAN COUNTY GOVERNMENT CIVIL SERVICE  
COMMISSION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

CLAYTON, JUDGE: Earl Jones appeals from the January 8, 2010, opinion and order of the Fayette Circuit Court. In that order, the court granted the Lexington-

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<sup>1</sup> 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 Kentucky Revised Statutes (KRS) 21.580.

Fayette Urban County Government's (hereinafter "LFUCG") motion for summary judgment. The court concluded that Jones is unable to prove a prima facie case of discrimination and did not establish that LFUCG's "light duty" employment practice has a disparate impact on disabled workers. After careful review, we affirm the decision.

#### FACTUAL AND PROCEDURAL BACKGROUND

Jones began working with LFUCG in 1998 as a public service worker, a classified civil service job, in the Division of Solid Waste. He was employed as a sanitation worker on a garbage truck. In the position, Jones was required to lift up to roughly 50 pounds. On September 8, 2000, he was injured when he fell off a garbage truck. Jones, after recuperating from his injuries, returned to work in late 2000. Jones, however, discovered that he was unable to perform his previous duties on the sanitation truck. As a result, in early 2001 LFUCG assigned him to "light duty" jobs. During 2001, 2002, and early 2003, Jones worked intermittently and, when working, was assigned to "light duty" jobs.

During this time period, the government's policy regarding disability leave and "light duty" status was that a full-time employee, who sustained a work-related injury and was medically required to be off work, was entitled to a maximum of twelve months of disability leave. Further, if it was determined during the twelve-month time period that the employee could perform substitute or "light duty" work, the employee was required to work in that capacity. In addition,

the disability leave policy limited the employee's "light duty" status to a period not to exceed six months.

On February 14, 2003, LFUCG Human Resources Department sent Jones a letter. The letter stated that their records showed that he had reached maximum medical improvement, was permanently unable to return to his original position, and had received a monetary settlement from Workers' Compensation. Also, Jones had reached the maximum six-month time period for "light duty" employment. Jones was asked to resign, or, if he did not do so, face dismissal charges before the Civil Services Commission. Because he was a civil service employee, Jones could only be terminated following a hearing by the Commission.

On February 17, 2003, the Director of the Division of Solid Waste sent Jones a letter. The letter informed Jones that he had used all his "light duty" and disability leave and, therefore, could no longer work in "light duty" positions. Then, on March 6, 2003, Jones was informed that charges for dismissal had been filed with the Civil Service Commission and that he was suspended, without pay, pending a hearing before the Commission. The Civil Service Commission conducted an evidentiary hearing on May 14, 2003. Not only was Jones represented by counsel but witnesses also testified under oath for both sides. Following the hearing, the Civil Service Commission issued an opinion and order, effective on May 14, 2003, that the LFUCG decision to dismiss Jones was reasonable and granted the agency's request to dismiss Jones from his employment with LFUCG.

Thereafter, Jones appealed the Civil Service Commission's decision to the Fayette Circuit Court. The trial court affirmed the Civil Service Commission's decision on September 30, 2005. In its opinion, the court noted that Jones stipulated that he could not return to his original job. Moreover, the court held that Jones's claims did not demonstrate discrimination under the Americans with Disabilities Act (hereinafter "ADA") and KRS 344.030.

Interestingly, Jones filed the current action in Fayette Circuit Court in January 2005, which was approximately nine months before the court rendered its decision on his appeal of the Civil Service Commission order regarding his dismissal. The crux of Jones's claims are that he was dismissed in violation of KRS Chapter 344, the Kentucky Civil Rights Act, because he is a qualified individual with a disability and that LFUCG's "light duty" policy violates KRS Chapter 344 because it has a disparate impact on disabled workers.

After a period of discovery, LFUCG filed a motion for summary judgment, which the court granted determining that Jones did not have a disability as defined under the pertinent statutes and that Jones is not able to establish that the LFUCG's "light duty" policy has a disparate impact on the disabled. Jones appeals from this decision.

#### STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to

judgment as a matter of law.” *Stewart v. University of Louisville*, 65 S.W.3d 536, 540 (Ky. App. 2001); Kentucky Rules of Civil Procedure (CR) 56.03. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Further, “[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.” *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). But the court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. *Com. v. Whitworth*, 74 S.W.3d 695, 698 (Ky. 2002). Lastly, an appellate court need not defer to the trial court’s decision on summary judgment and will review the issue de novo because only legal questions and no factual findings are involved. *See Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Keeping this standard in mind, we review the parties’ arguments.

#### ANALYSIS

Here, Jones alleges first that he was a qualified individual with a disability and as such was protected under the ADA and KRS Chapter 344, and second that the LFUCG’s policy of “light duty” has a disparate impact on disabled individuals. LFUCG counters that the court was correct in its grant of judgment to

them because Jones did not establish a prima facie case of disability discrimination nor that their employment policy has a disparate impact on the disabled.

The Kentucky Civil Rights Act, KRS Chapter 344, provides that it is unlawful practice for an employer to “to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . because the person is a qualified individual with a disability[.]” KRS 344.040(1a). Furthermore, since the Kentucky Civil Rights Act is modeled after federal law and the ADA, it is proper to analyze this claim consistently with the ADA. *Howard Baer, Inc., v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003).

Our Court instructed in *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706-07 (Ky. App. 2004), to establish a cause of action for disability discrimination, a plaintiff 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.

In sum, Jones must establish each of these elements in order to have a prima facie case of disability discrimination.

It is undisputed that Jones had medical restrictions that prevented him from being able to perform the essential functions of the civil service position of a sanitation worker. But, inability to perform the functions of a sanitation worker as

outlined in the original position does not necessarily make him a disabled person under the statute nor prevent him from seeking alternate employment.

Disability, with respect to an individual, is defined in the Kentucky Civil Rights Disability Act as:

- (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
- (b) A record of such an impairment; or
- (c) Being regarded as having such an impairment.

KRS 344.010(4). Therefore, to prevail, Jones must prove that he has a physical impairment and that the impairment substantially limits one or more major life activities. In *Toyota Motor Mfg., Kentucky, Inc. v. Williams*,<sup>2</sup> 534 U.S. 184, 197, 122 S. Ct. 681, 691, 151 L. Ed. 2d 615 (2002), the Supreme Court defined “major life activities” other than working as “those activities that are of central importance to daily life.” The Court also held that to be substantially limiting, impairment must do more than interfere with the activity in a minor way or for a temporary period. “[A]n individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term.” *Id.*, 534 U.S. at 198, 122 S. Ct. at 691. So that, having an impairment does not alone make one disabled for purposes of the Kentucky Civil Rights Act.

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<sup>2</sup> Although this case has been overturned due to legislative action in U.S. Pub.L. 110-325 (2009), the express language of the ADA Amendments Act of 2008 directed that these amendments would not take effect until January 9, 2009. *Young v. Precision Metal Products, Inc.*, 599 F.Supp.2d 216 (D.Conn. 2009). The Court normally must apply the laws and interpretations that were in force when the complained-of acts occurred. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1522, 128 L. Ed. 2d 229 (1994). Thus, *Toyota* was relevant at the time of Jones’s complaint.

An individual claimant must also prove that the impairment “limits a major life activity,” and this limitation is “substantial.” *Howard Baer, Inc.*, 127 S.W.3d at 592. Moreover, *Howard Baer, Inc.* corroborates that “[m]ajor life activities include . . . walking, seeing, hearing, performing manual tasks, caring for oneself, speaking, breathing, learning, and working.” *Id.* And “substantial” in this context has been defined as “considerable” or “specified to a large degree.” *Hallahan*, 138 S.W.3d at 708.

In the situation herein, Jones has failed to provide any evidence that he is not able to perform a “major life activity,” including employment. Rather, he has merely shown that he is unable to perform the lifting tasks associated with the position of a sanitation worker for LFUCG and that he has discomfort with certain life tasks. Notwithstanding his inability to lift the required pounds, Jones’s limitation does rise to the level of a disability as defined under the Act. He has not shown that the inability to lift restricts him from performing a broad range of other jobs. Moreover, in *Howard Baer, Inc.*, the Court decided that a permanent restriction on a person’s ability to perform heavy lifting tasks did not constitute a substantial impairment of a major life activity. *Howard Baer, Inc.*, 127 S.W.3d at 593-594. Therefore, we conclude that Jones is not disabled, and since he has not established that he is disabled, he has not met his initial burden of proving a prima facie case of disability discrimination. Thus, summary judgment was appropriate.

With regard to Jones’s second claim that LFUCG’s “light duty” policy has a disparate impact on disabled employees, it, too, fails as a matter of law.

First, no disability discrimination has been implicated. To succeed with a disparate-impact claim, Jones must first “establish a prima facie case of discrimination-i.e., the plaintiff must establish that an adverse impact has occurred.” *Dunlap v. Tennessee Valley Authority*, 519 F.3d 626, 629 (6<sup>th</sup> Cir. 2008). We have ascertained that Jones did not do so. Since Jones only provides himself as an example of the policy’s disparate impact on disabled workers, and since he is not disabled under the Act, this argument is also without merit and we do not need to go further in our analysis.

### CONCLUSION

In the current case, Jones established that he suffered a back injury that restricted his lifting and rendered him unable to perform the tasks required in his previous employment as a sanitation worker with LFUCG. Viewing the evidence favorably to him, Jones failed to present evidence that he had a major life impairment as defined under the Kentucky Civil Rights Act, that he was precluded from a broad range of jobs, or that he was severely restricted from performing essential life tasks. As a result, Jones failed to create a genuine issue of material fact that he was “disabled” or that LFUCG’s “light duty” policy had a disparate impact on the disabled. Thus, we concur with the trial court that there are no genuine issues of material fact in dispute and that LFUCG was entitled to summary judgment as a matter of law. For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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