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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000343-MR

THEODORE LEE FISK — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE BRIAN K. PRIVETT, JUDGE
ACTION NO. 13-CI-00112

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND DIXON, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

BUCKINGHAM, SPECIAL JUDGE: Theodore Lee Fisk appeals from a summary judgment entered by the Scott Circuit Court in favor of Toyota Motor

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Manufacturing Kentucky, Inc. (Toyota), dismissing Fisk's several claims against Toyota, including his claim for disability discrimination. We affirm.

Fisk was employed by Toyota in Scott County from 1991 until his retirement on December 2, 2010. At the time of his retirement, he was a Group Leader, responsible for managing a team of production employees. Fisk suffers from degenerative disk disease of the lumbar spine, and he claimed during his employment he was unable to work due to back pain. In January 2010, a spinal surgeon recommended Fisk undergo a fusion surgery.

Fisk eventually stopped working and was granted short-term disability benefits beginning in January 2010. Those benefits were provided by Toyota and administered by Life Insurance of North America (LINA). In September 2010, Fisk's claim was closed, and further benefits were denied.

Fisk entered an early retirement on December 2, 2010. He claimed he was forced to retire and thus wrongfully terminated from his employment. He thereafter filed a complaint in federal court against Toyota and LINA. That action related to the short-term disability benefits, and it was settled and dismissed in 2011.

In November 2012, Fisk filed this action against Toyota and LINA in the Grant Circuit Court, the county where he resided. His complaint alleged 15

separate claims. The Grant Circuit Court ordered a change of venue to Scott County, the county where he had worked for Toyota.

In June 2013, the Scott Circuit Court entered an order dismissing claims (1)-(4) and (8)-(12) as barred by the settlement agreement in the federal court action. In May 2014, the court dismissed claim (13) of the complaint as being barred by the applicable statute of limitations. Fisk appealed to this Court from the June 2013 and May 2014 orders of the circuit court, and this Court affirmed. *Fisk v. Toyota Motor Mfg., Inc.*, No. 2014-CA-001262-MR, 2017 WL 244087, *5-7 (Ky. App. Jan. 20, 2017) at *5-7. Claims (5)-(7) and (14), all against Toyota, were left. These claims alleged disability discrimination, wrongful termination, breach of public policy, and punitive damages.

In an order entered on January 28, 2019, the circuit court granted summary judgment on all remaining claims. Fisk filed this appeal from that order and also the venue transfer order from February 2013.

CHANGE OF VENUE

Fisk's first argument is that the Grant Circuit Court erred in changing venue to Scott County. As explained earlier, Fisk was employed by Toyota in Scott County, and he resided in Grant County. Fisk asserts he was at home in Grant County recovering from back surgery when he was terminated by Toyota.[2]

[2] Fisk claims he was terminated from his employment, and Toyota claims he retired voluntarily.

He thus argues that the tort claims against Toyota, including the wrongful termination claim, arose from an injury committed in Grant County.

In support of his argument that the Grant Circuit Court erred in transferring venue to Scott County, Fisk first cites KRS[3] 452.450 which states in part as follows:

> [A]n action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, **if it be for a tort, in the first-named county, or the county in which the tort is committed.**

(Emphasis added.)

He then cites *Peaslee-Gaulbert Co. v. McMath's Adm'r*, 148 Ky. 265, 146 S.W. 770 (1912), wherein the appellate court stated, "we know of no reason why the venue of the action should not lie in the county where the overt act of wrongdoing, if we may so term it, is committed." *Id.*, 146 S.W. at 772. Fisk concludes his argument by asserting the tort occurred in Grant County because that was his location when the torts were committed.

Fisk's claim for disability discrimination lies in KRS 344.040(1) of the Kentucky Civil Rights Act. In *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589

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[3] Kentucky Revised Statutes.

(Ky. 2003), our Supreme Court held: "The Kentucky Civil Rights Act was modeled after federal law, and our courts have interpreted the Kentucky Act consistently therewith." *Id*. at 592 (footnote omitted).

Further, in *Hallahan v. The Courier-Journal*, 138 S.W.3d 699 (Ky. App. 2004), a case involving a claim of disability discrimination, this Court held:

> Given similar language and the stated purpose of KRS Chapter 344 to embody the federal civil rights statutes, including the Americans with Disabilities Act (ADA), this court may look to federal case law in interpreting the Kentucky Civil Rights Act with respect to Hallahan's claim of disability discrimination under KRS 344.040.

Id. at 705-06.

Federal case law indicates that "[o]rdinarily, Courts assume that the place where the allegedly unlawful employment practice was committed is simply the place where the aggrieved employee had been working or was seeking work." *Kennicott v. Sandia Corp.*, 314 F. Supp. 3d 1142, 1170 (D.N.M. 2018) (citation omitted). Further, "[i]nstead of looking to where the worker is located, when determining where an alleged unlawful employment practice was committed, the Court must look to the place where the decisions and actions concerning the employment practices occurred." *Id*. at 1171 (citation and internal quotation marks omitted). Also, "[i]n general, the effect of Title VII's venue provision is to allow suit in the judicial district in which the plaintiff worked or would have worked."

Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 504-05 (9th Cir. 2000).

We are unpersuaded by Fisk's reliance on the *Peaslee-Gaulbert* case. In that case the plaintiff, a house painter, was killed when a can exploded. *Peaslee-Gaulbert*, 146 S.W. at 770. A products liability action was brought by his estate in the county where the explosion and death occurred rather than in the county where the manufacturer was located. The appellate court there held that venue was proper in that county as that was where the overt act of wrongdoing occurred. *Id*. at 772.

First, *Peaslee-Gaulbert* is over 100 years old. More importantly, however, we conclude its facts are sufficiently distinguishable from those in this case. In *Peaslee-Gaulbert*, the action was brought in the county where the explosion and death occurred. There would have been no cause of action had the event not occurred in that county. Here, however, the alleged tort occurred at the location from which Fisk was allegedly terminated. The tortious action, if any, was the termination from his employment, and that employment was in Scott County. The federal case law on this issue persuades us to hold that venue was proper in Scott County. The Grant Circuit Court did not err in transferring venue there.

SUMMARY JUDGMENT

Fisk's second argument is that the circuit court erred in awarding summary judgment in favor of Toyota. He contends he had to return to work because he was not eligible for additional short-term disability benefits and he made a request for a reasonable accommodation that was denied. Fisk states he asked for assurances from Toyota that the medical restrictions from his surgery would be accommodated, and specifically he asked Toyota to keep him on light-duty work.

Fisk argues Toyota would not give written assurances that these reasonable accommodations would be provided and instead instructed him to return to work. Fisk states he could not return to work without these reasonable accommodations because to do so would risk reinjuring his back, which was still healing. Faced with that choice, he claims he was forced to retire rather than risk termination so that he could keep his health insurance.

Under CR[4] 56.03 "summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment."

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[4] Kentucky Rules of Civil Procedure.

Id. Where summary judgment has been granted, this Court's standard of review 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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)).

"Under KRS 344.040(1), it is unlawful for an employer to discharge or otherwise discriminate against an individual . . . because the person is a 'qualified individual with a disability.'" *Hallahan*, 138 S.W.3d at 706. Kentucky courts apply a burden-shifting analysis that places on the plaintiff "the initial burden of establishing a prima facie case of disability discrimination against the defendant." *Id*. (footnote omitted). To establish a prima facie case, the plaintiff must demonstrate that (1) he was disabled under the relevant statute; (2) he was "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation; and (3) the employer took an adverse employment action against the employee because of his disability. *Id*. at 706-07.

The circuit court in this case held that Fisk did not establish a prima facie case because he could not satisfy the second prong, that he was "'otherwise qualified' to perform the requirements of the job, with or without reasonable accommodation[.]" *Id*. at 706. The court noted Fisk had represented on several

occasions that he "was unable to return to work" in any capacity and that he was unable to perform the essential functions of his job.

The court stated Fisk had applied for and been awarded Social Security Disability Insurance (SSDI) benefits based on his representations that he "became unable to work because of his disabling condition on January 19, 2010" and that he was "still disabled." Further, the court found that in Fisk's application for long-term disability (LTD) benefits, he represented he "suffers from severe disc disease in his lumbar spine [which] prohibits him from performing the material duties of his 'Regular Occupation[.]'" Fisk also represented he "cannot return to work" and he is "considered permanently/totally disabled." Based on those representations, LINA awarded Fisk LTD benefits from January 19, 2011 to July 18, 2012. When LINA determined Fisk did not meet the definition of disability in July 2012, Fisk appealed and stated he "is unable to work at any occupation." The circuit court then succinctly stated Fisk

> cannot have it both ways. He cannot testify, as he has done in support of his federal lawsuit and his claims for LTD and SSDI benefits, to be completely disabled and unable to work, and yet still claim, as part of a prima facie disability discrimination claim under KRS 344, to be a qualified individual with a disability during the same period.

The circuit court also cited *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999), wherein the U.S. Supreme Court stated as follows:

> An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability"—that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. 42 U.S.C. § 12111(8). And a plaintiff's sworn assertion in an application for disability benefits that she is, for example, "unable to work" will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.

Id., 526 U.S. at 806, 119 S. Ct. at 1603. The circuit court here then concluded:

> Plaintiff's representations made in applying for and being awarded social security disability benefits directly negate his ADA claim for wrongful termination. Plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, he must proffer a sufficient explanation for the contradiction.

Fisk attacks the circuit court's summary judgment award to Toyota based on the portion of the court's order that held it "had not been provided with evidence of record indicating that Plaintiff did in fact ask for reasonable accommodation, or that Defendant was unwilling to provide reasonable accommodation." We agree with the argument made by Toyota in its brief that,

even if a fact issue existed concerning what accommodation Fisk requested and how Toyota responded, summary judgment in favor of Toyota was nevertheless proper because the circuit court correctly held that Fisk had not set forth a prima facie case for disability discrimination.[5]

We agree with the circuit court's analysis and award of summary judgment to Toyota on Fisk's claim (5) for disability discrimination.

Fisk did not address in his brief the circuit court's summary judgment award to Toyota on the remaining claims, (6), (7), and (14). We will not, therefore, review those portions of the judgment for error.[6,7]

The judgment of the Scott Circuit Court is affirmed.

ALL CONCUR.

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[5] In his brief Fisk did not challenge the circuit court's determination in its summary judgment award that he had not established a prima facie case for disability discrimination.

[6] "Questions decided by the trial court, but not argued in the briefs, will not be considered by the Court of Appeals." *Herrick v. Wills*, 333 S.W.2d 275, 276 (Ky. 1959).

[7] While we decline to specifically review those portions of the judgment for error because Fisk did not address them in his brief, we are inclined to agree with Toyota that claims (6) and (7) were preempted and subsumed by his KRS 344.040 claim for disability discrimination set forth in claim (5). *See Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985).

BRIEFS FOR APPELLANT:

Louis C. Schneider
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Gene Smallwood, Jr.
Mauritia G. Kamer
Lexington, Kentucky

Stephanie Sweitzer
Chicago, Illinois