Cite as 2012 Ark. App. 590

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-143

JANANN JOHNSON
APPELLANT

V.

WINDSTREAM COMMUNICATIONS, INC.
APPELLEE

Opinion Delivered October 24, 2012

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRD DIVISION
[NO. CV-2009-7248]

HONORABLE JAY MOODY, JUDGE

REVERSED AND REMANDED

RITA W. GRUBER, Judge

Janann Johnson appeals from the summary judgment entered against her in her lawsuit against her former employer, appellee Windstream Communications, Inc. After appellee terminated her employment, she sued appellee under the Americans with Disabilities Act (ADA) and the Arkansas Civil Rights Act (ACRA). Appellee filed a motion for summary judgment, arguing that (1) appellant was not "disabled" under either statute; (2) she was not a "qualified individual" for her position; (3) she could not show that appellee failed to reasonably accommodate her alleged disability; (4) she could not show that its stated reason for terminating her employment—continued poor performance—was a pretext for discrimination or retaliation; and (5) she could not show actionable harassment based upon her alleged disability. For the reasons expressed below, we reverse the summary judgment awarded to appellee and remand.

When appellee came into existence in 2006 from the land-line business previously

owned by Alltel Corporation, appellant left Alltel to work for appellee as a staff manager. Appellant's March 2008 performance evaluation noted that she was a "solid performer," but had not met all of the deadlines, and instructed her on ways that she needed to improve. In her semiannual review in September 2008, appellee apprised appellant of a number of areas in which her performance was deficient and suggested how she could improve. The review concluded: "Janann currently is not meeting the expectations of a Staff Manager. Without immediate and sustained improvement she will be placed on a Performance Improvement Plan [PIP]." In October 2008, appellee offered appellant the option of being demoted to a nonsupervisory position (at nearly the same salary) or entering into a PIP. Appellant chose the PIP; took two days off work; and met with Dr. Bob Gale (a psychiatrist and attorney) at her attorney's office.

Appellee presented appellant with the PIP in early November 2008. Appellant responded in writing, disputing appellee's evaluation of the areas in which she needed to improve and asking for intermittent Family Medical Leave Act (FMLA) leave and other forms of accommodation because she was "substantially limited" in her ability to "think and concentrate" as a result of the "extremely stressful" past few weeks. On November 26, 2008, Dr. Gale completed appellant's FMLA application, stating that, since September 2008, she had "generalized anxiety disorder with associated depressive and obsessive-compulsive elements. This disorder creates a substantial limitation of her ability to think and concentrate which may create episodic periods of incapacity." He stated that her condition "would continue into the future"; that she would "need intermittent FMLA leave"; that she was "substantially limited

in her ability to think and concentrate"; and suggested that she "be given specific goals for success, an agenda to promote communication, and should avoid stressful situations."

Appellant's supervisor issued appellant a Final Written Warning on December 19, 2008, which detailed numerous continued problems with her work. In her January 6, 2009 response to the final warning, appellant alleged that she had a disability "caused by the stress related to this unwarranted PIP and Final Written Warning" and asserted that her supervisor had set her up for failure. She asked for extended short-term disability or FMLA leave. Appellant took time off from work in early January 2009 and returned mid-month. On January 21, 2009, appellee's human resources department gave appellant an ADA questionnaire to submit to her medical provider. Appellee terminated appellant's employment for unsatisfactory performance on January 30, 2009. Appellant filed this action in November 2009. Appellee supported its motion for summary judgment with numerous documents, including appellant's deposition and her supervisor's affidavit. In response, appellant submitted documents that included her affidavit, her March 2008 performance evaluation, her written response to her PIP, her FMLA request, and Dr. Gale's interview notes. The circuit court ruled that the motion was "well-taken" and granted summary judgment to appellee.

Appellant then pursued this appeal, raising the following points: (1) that the circuit court erred in applying federal legal standards to decide appellee's motion for summary judgment; (2) that it erred in failing to rule on each issue; (3) that it "erred if it found that [she] did not have a disability," that she was not qualified for her job, that she did not request accommodation, that such a request was not a protected activity, or that appellee met its

accommodation obligations; and (4) that she raised a genuine issue of material fact on the issues of discriminatory and retaliatory intent at the prima facie and pretext stages of her case. We reject appellant's first argument; as explained below, our supreme court has decided that federal standards provide the analytical framework for cases such as this. We agree with appellant, however, that the circuit court erred in failing to expressly rule on each issue. Because it is impossible to determine the basis for the circuit court's decision, we must reverse and remand without addressing the remaining points.

Summary judgment may be granted by a trial court only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, clearly show that there are no genuine issues of material fact to be litigated and the party is entitled to judgment as a matter of law. *Watkins v. Ark. Elder Outreach of Little Rock, Inc.*, 2012 Ark. App. 301, ___ S.W.3d ___. When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Id.* On appeal, we need only decide if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Id.* In making this decision, we view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Summary judgment is improper when there are genuine issues of material fact as to a party's intent. *Id.* Summary judgment should be denied if reasonable minds might reach different conclusions from the undisputed facts. *Id.* When there is no material dispute as to the facts, the court will determine whether reasonable minds

could draw reasonable inconsistent hypotheses; if so, summary judgment is not appropriate. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

The ADA prohibits employers from discriminating against a disabled individual qualified for a job because of the disability of such individual. 42 U.S.C.A. § 12112(a) (West 2012). To establish a prima facie case of disability discrimination, a plaintiff must show (1) that she was disabled; (2) that she was qualified to do the essential job functions with or without reasonable accommodation; and (3) that she suffered an adverse action due to her disability. *Buboltz v. Residential Advantages, Inc.*, 523 F.3d 864 (8th Cir. 2008). The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C.A. § 12102(1)(A) (West 2012). Equal Employment Opportunity Commission regulations interpreting the ADA define the phrase "major life activities" to include functions such as reading, concentrating, thinking, communicating, interacting with others, learning, and working. 29 C.F.R. § 1630.2(i) (2012). An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a particular major life activity, as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii) (2012); *see Weiler v. Household Fin. Corp.*, 101 F.3d 519 (7th Cir. 1996). To be a qualified individual within the meaning of the ADA, an employee must (1) possess the requisite skill, education, experience, and training for her position; and (2) be able to perform the essential job functions, with or without a reasonable accommodation. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007); 42 U.S.C.A. § 12111(8) (West 2012).

The Arkansas Civil Rights Act provides citizens of this state legal redress for civil-rights violations of state constitutional or statutory provisions, hate offenses, and discrimination offenses. *See Greenlee v. J.B. Hunt Transp. Servs., Inc.*, 2009 Ark. 506, at 3–4, 342 S.W.3d 274, 277; Ark. Code Ann. §§ 16-123-101 to -108 (Repl. 2006). The Act also seeks to prevent retaliatory conduct against those seeking its protection. *Id.* ACRA defines "disability" as a physical or mental impairment that substantially limits a major life function. Ark. Code Ann. § 16-123-102(3) (Repl. 2006). Courts evaluate disability claims presented under ACRA by using the same principles employed in analyzing claims under the ADA. *Huber*, *supra*. The Eighth Circuit Court of Appeals interprets ACRA disability claims in identical fashion to its federal corollary, the ADA. *Land v. Baptist Med. Ctr.*, 164 F.3d 423 (8th Cir. 1999).

In *Greenlee*, our supreme court explained that, under federal law, a court can review a discrimination case under two alternative theories—a "mixed-motive" analysis or a shifting-burdens test. *Greenlee*, 2009 Ark. 506, at 4, 342 S.W.3d at 277. Under the three-stage, burden-shifting standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Greenlee*, 2009 Ark. 506, at 5, 342 S.W.3d at 278. Once a prima facie case is established, a rebuttable presumption shifts the burden to the employer to articulate a legitimate, nondiscriminatory reason for discharging the employee. *Id.* If the employer articulates such a reason, the presumption disappears and the plaintiff bears the burden of proving that the employer's proffered reason is merely a pretext for discrimination. *Id.*

Appellee's brief in support of its motion for summary judgment urged the circuit court

to apply the *McDonnell Douglas* burden-shifting analysis used in federal and state courts, asserting, in detail and with supporting documents, appellant's inability to establish any element of a prima facie case or that appellee's reasons for termination were a pretext for discrimination or retaliation. In response, appellant argued that the *McDonnell Douglas* framework is not applicable in the context of a motion for summary judgment or to claims brought under ACRA. At the conclusion of the hearing on the motion, the circuit court granted the motion without explanation. Appellant objected to the precedent submitted by appellee and asked for rulings on all issues. The written order did not, however, do so and simply stated that appellee's motion for summary judgment was "well-taken."

Our supreme court recently made it clear in *Brodie v. City of Jonesboro*, 2012 Ark. 5, that, even in summary-judgment cases, the circuit court must evaluate ACRA cases using the *McDonnell Douglas* framework, and that it must explain its findings. *Brodie*, 2012 Ark. 5, at 3–4. The court rejected Brodie's argument that the *McDonnell Douglas* framework was incompatible with Arkansas law and inappropriate at the summary-judgment stage of proceedings. *Id*. The court concluded, stating:

> Having said that, we cannot conclude that the circuit court properly evaluated this case under *McDonnell Douglas*. There is no mention in the circuit court's findings about a prima facie case of discrimination, a legitimate, nondiscriminatory reason for the rejection, or pretext for discrimination. Accordingly, we must reverse and remand this case to the circuit court.

Id., 2012 Ark. 5, at 4.

As in *Brodie*, we must reverse and remand for the circuit court to explain its ruling on each issue.

Reversed and remanded.

WYNNE, J., agrees.

VAUGHT, C.J., concurs.

LARRY D. VAUGHT, Chief Judge, concurring. I agree with the majority's decision to reverse and remand this case, and I agree that the three-stage, burden-shifting standard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is applicable to summary-judgment proceedings in this type of case. I write separately to emphasize that the *McDonnell Douglas* test does not abrogate the trial court's duty to deny summary judgment if there are material facts left to be decided.

The *McDonnell Douglas* test was found to apply to summary-judgment cases by our supreme court in *Brodie v. City of Jonesboro*, 2012 Ark. 5. However, the test was not a substitute for our state standard of review. An analysis under *McDonnell Douglas* must be applied to the facts as found by a trier of fact at trial, or established as uncontroverted in a summary-judgment proceeding. The trial court may not weigh evidence at the summary-judgment stage of a civil rights case any more than it may in any other civil case.

On remand, the trial court should look carefully at the elements of Ms. Johnson's claim. The appellee presented facts that it argues proves she had no disability. Ms. Johnson presented evidence from Dr. Gale that she did. If this presents a material fact that is still in issue, then summary judgment is not appropriate and the *McDonnell Douglas* test is never reached.

Harrill & Sutter, PLLC, by: *Luther Oneal Sutter* and *Lucien Gillham*, for appellants.

Wright, Lindsey & Jennings, LLP, by: *Troy A. Price* and *William Stuart Jackson*, for appellee.