NO. 26734

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

SIMPLICIO B. SIQUIG, Plaintiff-Appellant,

vs.

DELLEW CORPORATION, Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10, Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-0407)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiff-Appellant Simplicio B. Siquig ("Siquig") appeals from the judgment of the Circuit Court of the First Circuit ("circuit court")[1] filed July 9, 2004 in favor of Defendant-Appellee Dellew Corp. ("Dellew"). The circuit court granted summary judgment for Dellew on all claims, which consisted of Siquig's age discrimination claim and intentional infliction of emotional distress ("IIED") claim.

On appeal, Siquig argues that the circuit court erred by (1) applying an incorrect burden of proof for establishing his prima facie case for his age discrimination claim brought under Hawai'i Revised Statutes ("HRS") §§ 378-1 (Supp. 2002)) (definitions statute) and 378-2 (Supp. 1999);[2] (2) granting

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[1] The Honorable Sabrina S. McKenna presided.

[2] HRS §§ 378-2 provides in pertinent part:

It shall be an unlawful discriminatory practice:

(1) Because of race, sex, sexual orientation, age,
(continued...)

summary judgment for Dellew on his age discrimination claim because he had adduced evidence of pretextual reasons for his termination; and (3) granting summary judgment for Dellew on his pendant IIED claim inasmuch as summary judgment on his primary (age discrimination) claim was inappropriate.

With respect to Siquig's second argument (as to the age discrimination claim), Siquig essentially argues that (1) Siquig was terminated on the basis of prior warnings that were either never given or could not have been given under the circumstances; (2) Siquig was not on notice by Dellew that issuance of a lawnmower (bearing black tape) to a store patron violated any work policy; (3) in any event, Dellew changed its rationale for terminating Siquig (citing reasons other than the lawnmower issuance) after Siquig filed his complaint; (4) Dellew Vice President Drucilla Lewis could not have terminated Siquig, because Timoteo was the true terminating party; (5) certain evidence by Dellew should have been excluded as "unauthenticated, inadmissible hearsay"; (6) Markle, a supervisor, sabotaged Siquig by intercepting his unfinished post-working shift paperwork instead of leaving it for the next shift's workers to complete; and (7) Markle and Timoteo, in a time period from December 2001

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[2](...continued)

> religion, color, ancestry, disability, marital status, or arrest and court record:
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> > (A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment
> >
> > . . . .

See also Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 378-89, 14 P.3d 1049, 1059-60 (2000); Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 101, 73 P.3d 46, 55 (2003)

until mid-July 2002, made, inter alia, seven and two remarks about Siquig's age, respectively.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

(1) We first observe that Siquig's points of error violate Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(b)(4)(ii) and (iii) (2004) due to Siquig's failure to point out "where in the record the alleged error occurred" and "where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency." As such, all of Siquig's points of error may properly be disregarded by this court. See e.g., HRAP Rule 28(b)(4). However, because of this court's longstanding policy of "affording litigants the opportunity to have their cases heard on the merits, where possible[,]" we accordingly address the merits of this appeal. See e.g., Morgan v. Planning Dep't, County of Kauai, 104 Hawai'i 173, 180-81, 86 P.3d 982, 989-90 (2004) (citation omitted) (internal quotation marks omitted).

(2) As to Siquig's first main argument, that the circuit court should not have applied a preponderance of the evidence burden of proof to an age discrimination claim in establishing his prima facie case for age discrimination, we note that both this court's caselaw and the United States Supreme Court expressly apply the preponderance of the evidence standard in this situation. See Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 378, 14 P.3d 1059, 1069 (2000); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Therefore, this argument is without merit.

(3) As to Siquig's second main argument (i.e., Siquig's seven subarguments comprising it), we hold as follows:

(a) Even assuming arguendo that Siquig's assertions that (1) his employee warning notice dated June 27, 2002 contained time discrepancies and (2) a prior, purported May 18, 2002 oral warning from Dellew employee Markle was never given are correct, the necessity of prior warnings in order to terminate Dellew employees is irrelevant to the question of whether Siquig suffered age discrimination. Per the plain language of Dellew's work policies, which Siquig received, employees engaging in "[u]nsatisfactory or careless work," "mistakes due to carelessness," or "failure to immediately report damage to . . . company equipment" may be subject to "possible immediate dismissal." Upon careful review, we hold that Siquig fails to raise a genuine issue of material fact against the evidence in the record that he had engaged in such proscribed conduct. Thus, Siquig's first subargument fails.

(b) Siquig argues that one of Dellew's rationales for terminating him, relating to his issuance of a lawnmower to a store customer, was pretextual because the item was in working condition, the customer did not complain, and no Dellew policy was violated in the transaction. However, Siquig, in his deposition testimony below, admitted that something was "wrong" with the lawnmower at the time he issued it, but that it was "still repairable." (Emphasis added.) As noted supra, Dellew's work policies specifically proscribed "failure to immediately report damage to . . . company equipment" under express penalty of "possible immediate dismissal." Thus, even when viewing the evidence in a light most favorable to Siquig, we hold that Siquig

has not a raised a genuine issue of material fact as to whether Dellew's reasons for terminating him were pretextual in this respect. See Shoppe, 94 Hawai'i at 379, 14 P.3d at 1060; Orthopedic Assocs. of Hawai'i, Inc. v. Hawaiian Ins. & Guar. Co., Ltd., 109 Hawai'i 185, 194, 124 P.3d 930, 939 (2005). Thus, his second subargument is without merit.

(c) Siquig argues, in the alternative, that Dellew terminated Siquig based on pretext due to its advancement of six new rationales for terminating him after the filing of his complaint, all of which were inconsistent with Dellew's pre-litigation reasons for terminating him. However, we observe that five of these rationales are disputed by Siquig for the first time on appeal. See Kemp v. State of Hawai'i Child Support Enforcement Agency, 111 Hawai'i 367, 391, 141 P.3d 1014, 1038 (2006). Thus, of the six challenged reasons advanced by Dellew post-litigation as to why Siquig was terminated, only one -- that Siquig "failed to input or properly enter data into [Dellew's] computerized inventory system" -- may be considered by this court. In the June 27, 2002 warning note issued to Siquig, this purportedly new, post-litigation reason for terminating him is directly mentioned (and is also referenced in Siquig's July 12, 2002 termination notice). Thus, Siquig's third subargument is without merit.

(d) As to the Siquig's argument that Lewis was not the decisionmaker in his termination, Dellew adduced evidence during summary judgment proceedings that Lewis, its Vice President, was the sole decisionmaker in terminating Siquig. At oral argument, Siquig, in response to the circuit court's questioning, expressly admitted having no evidence to refute Dellew's evidence. Thus,

assuming arguendo that the question of who terminated Siquig is relevant to this appeal, Siquig's fourth subargument must nonetheless fail because he did not set forth "specific facts" to counter Dellew's submitted evidence. Hawai'i Rules of Civil Procedure ("HRCP") Rule 56(e) (2000); see also Lee v. Puamana Cmty. Ass'n, 109 Hawai'i 561, 567, 128 P.3d 874, 880 (2006) (quoting French v. Hawai'i Pizza Hut, Inc., 105 Hawai'i 462, 99 P.3d 1046 (2004)).

(e) Siquig argues that certain exhibits appended to Dellew's motion for partial summary judgment as to the age discrimination issue constituted "unauthenticated, inadmissible hearsay" which should not have been considered by the circuit court. However, this argument is not supported by a predicate point of error preserving the evidentiary objection. We therefore hold that Siquig's fifth subargument is waived. See HRAP Rule 28(b)(4).

(f) Siquig argues that Markle would create paperwork discrepancies for Siquig's employment file by collecting his unfinished paperwork at the end of his shift and making notations on it, in alleged violation of the employee policy to simply leave the paperwork for the next shift's employees to complete. However, the deposition transcript excerpt cited by Siquig as support denotes only one incident involving one document. Thus, Siquig's apparent generalization that Markle sabotaged him by continually intercepting his incomplete paperwork before the next shift's workers could address it is flawed. Further, even when viewing the evidence of this single incident in the light most favorable to Siquig, there remains, inter alia, express findings from the State of Hawai'i Department of Labor and Industrial

Relations' Employment Security Appeals Referees' Office (made pursuant to an unemployment benefits appeals proceeding involving Dellew and Siquig)[3] that Siquig "made too many errors in recording the equipment loan transactions [from Dellew to its customers]." As such, we hold that Siquig could not meet his burden of persuasion to prove that Dellew's reasons for terminating him were "unworthy of credence" in this regard,[4] and accordingly hold that his sixth subargument is without merit.

(g) Finally, Siquig asserts that "age based animus" existed as evidenced by, inter alia, nine comments made to him about his age (seven by Markle, two by Timoteo) from "about December 2001 until his termination on July 12, 2002[.]" Siquig argues that Markle's and Timoteo's age-related statements

> demonstrated that the reasons given by [Dellew] for treating [Siquig] different than younger employees was [sic] his age - sixty seven (67). [Dellew's] explanations for its actions inactions [sic] were false and inconsistent and not to be believed. They were instead pretext for age discrimination, there is no other reasonable explanation.

However, these conclusory assertions do not demonstrate any nexus between Markle's and Timoteo's alleged taunting and any illegitimacy of Dellew's stated reasons for terminating him (i.e., pretext).[5] Thus, Siquig's seventh subargument is without merit.

(4) Upon careful review of the record, we hold that Siquig's remaining arguments as to his age discrimination claim

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[3] Siquig prevailed in this proceeding.

[4] See Shoppe, 94 Hawai'i at 379, 14 P.3d at 1060 (quoting Burdine, 450 U.S. at 256) (internal quotation marks omitted).

[5] Siquig's allegations of Markle's and Timoteo's comments about his age would appear in the abstract to be appropriately directed to a claim of age discrimination due to a hostile work environment. However, Siquig's counsel specifically disavowed any hostile work environment claim during oral argument on Dellew's motions for partial summary judgment.

are waived because they are raised for the first time on appeal. See Kemp, supra. Accordingly, we hold that the circuit court properly granted partial summary judgment in favor of Dellew as to Siquig's age discrimination claim.

(5) Because (a) Siquig has expressly noted that his IIED claim is pendant with his age discrimination claim, (b) Siquig does not advance independent argument as to why the circuit court's grant of partial summary judgment in favor of Dellew as to his IIED claim is inappropriate, and (c) we hold that the circuit court properly granted partial summary judgment in favor of Dellew as to Siquig's age discrimination claim, we therefore hold that the circuit court properly granted partial summary judgment in favor of Dellew as to his IIED claim.

IT IS HEREBY ORDERED that the July 9, 2004 judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, August 27, 2007.

On the briefs:

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