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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001295-MR

SHIRLEY O'QUINN — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 96-CI-01267

LARRY LYNN, D.M.D. — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order of the Pike Circuit Court sustaining appellee's motion for judgment notwithstanding the verdict ("NOV"). Appellant argues the judgment NOV was rendered in error because she presented sufficient evidence that she was discharged in retaliation for exercising her rights under Kentucky's workers' compensation laws, in violation of KRS 342.197. After reviewing the record and applicable law, we reverse the judgment NOV and remand for a new trial.

Shirley O'Quinn, appellant, had begun working as a dental assistant for appellee, Dr. Larry Lynn, in 1986. Her duties included serving as a dental hygienist, as well as other dental office work. In 1987, appellant developed a skin condition caused by an allergic reaction she had to certain chemicals used in the office, particularly formo-cresol, a chemical used in processing dental x-ray's. Exposure to these chemicals caused appellant to suffer blisters, cracks, and sores on her hands. Her condition worsened after she spilled some formo-cresol on her hands. In addition to the skin condition, her allergic reaction to the office chemicals also caused appellant to suffer breathing problems. Appellant was treated by a doctor and a dermatologist, and had to take numerous medications to relieve her symptoms. The dermatologist also recommended that appellant wear gloves.

Appellant filed a worker's compensation claim in 1991. In an opinion and order dated March 16, 1993, the administrative law judge (ALJ) concluded that appellant was suffering an occupational disability of 25%. The ALJ determined that as a result of appellant's exposure to the chemicals in the dental office, she had developed asthma and dermatitis. In addition to the compensation awarded, which was apportioned 60/40 between Lynn and the Special Fund, the order stated that appellant "shall further recover of the Defendant Employer for the cure and relief from the effects of the injury such medical, surgical and hospital treatment including nursing, medical and surgical supplies and appliances as may reasonably be needed to treat her occupational disease and thereafter during disability." The

ALJ's order noted that Lynn contested the medical expenses award, but stated that he had failed to show that the medical expenses were not related to appellant's work injury.

After receiving the award, appellant continued to work for Lynn. Appellant had been advised by the dermatologist to wear gloves to protect her hands from the chemicals, but because she was allergic to latex, she eventually had to quit wearing the standard latex gloves used in the dental office. As a result, although appellant's skin condition was still causing her to have sores and cracks on her hands, she worked with no gloves, despite the fact that she worked around patients' bodily fluids. Therefore, in January, 1996, appellant was written a prescription by a physician for hypo-allergenic gloves. These special gloves, at $42.50 per box, were more expensive than the regular latex gloves normally used in the office. Lynn resisted buying the special gloves, stating, according to appellant, "I won't, I can't, and I don't see who will". Therefore, appellant, who made $6.00 an hour, bought the first box of gloves herself. Appellant submitted a claim to Lynn's insurance company, Wausau, but Wausau did not pay the claim.

Appellant bought the second box of gloves herself, and again, submitted the claim to Wausau. On May 30, 1996, Wausau sent a letter to appellant informing her that Wausau would not pay for the gloves, and that it was Dr. Lynn who was required to pay for the gloves. The letter stated, "Your employer already provides gloves for all employees, it should be the employer's responsibility to pay for special gloves if you require them due to your pre-existing condition of sensitive skin." Wausau sent a

copy of this letter to Lynn. Eventually, Lynn reimbursed appellant for the cost of the second box. Due to the difficulties appellant was having getting Wausau or Lynn to pay for the gloves, she had to try to make a box of gloves last as long as she could. She would use the same pair over and over, washing them herself in between patients. Appellant eventually ran out of gloves again, and had to work without gloves in the month of June, 1996. Finally, at the end of June, Lynn, after persistence by appellant, bought her another box of gloves.

On August 5, 1996, appellant had run out of the special gloves again. She had notified Lynn the week before that she was almost out of gloves. On the morning of August 5, appellant asked Lynn if he had obtained any gloves for her, and he replied that he had not. She was supposed to prepare a patient that morning for a crown, a procedure which would involve blood. Appellant had begun to fear for her health working as a dental assistant without gloves, and therefore told Lynn that she was going home, and to call her if he got some of her special gloves. Lynn then became angry at appellant, and appellant went home. When appellant came into work the next morning, August 6, 1996, Lynn fired her, stating the reason as "insubordination".

On September 3, 1996, appellant filed a complaint against Lynn in Pike Circuit Court, alleging that she was terminated by him in retaliation for attempting to exercise her rights under Kentucky's workers' compensation laws, and seeking compensatory and punitive damages. A jury trial was held on October 21-22, 1997. At the end of appellant's evidence, defense counsel made a motion for a directed verdict, arguing that

appellant did not have a cause of action under KRS 342.197, rather that this was a medical fee dispute governed by 803 KAR 25:012. The trial judge denied the motion. Defense counsel renewed the motion for directed verdict at the end of the trial. The judge denied the motion again, and allowed the case to go to the jury. After over four hours of deliberation, there was a hung jury, and the case ended in a mistrial. On October 31, 1997, defense counsel filed a motion for judgment notwithstanding the verdict, based upon the same arguments stated in both of his motions for directed verdict. In an order entered on May 7, 1998, the judge sustained the motion, finding that there was not a cause of action for wrongful discharge. We disagree.

KRS 342.197 states, in part:

> (1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.
>
> . . . .
>
> (3) Any individual injured by any act in violation of the provisions of subsection (1) or (2) of this section shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record.

The ALJ's order of March 16, 1993 stated that appellant was to recover from Dr. Lynn ". . . for the cure and relief from the effects of the injury . . . including nursing, medical and surgical supplies and appliances as may reasonably be needed to treat her occupational disease . . . ." The hypo-allergenic gloves which appellant required were prescribed by a doctor as a part of appellant's treatment and relief from her skin condition.

By insisting that the gloves be provided for her, either by Lynn or his insurance carrier, Wausau, appellant was pursuing a benefit she was entitled to under the order. In Overnite Transportation Company v. Gaddis, Ky. App., 793 S.W.2d 129 (1990), this Court held that ". . . the legislature's purpose in enacting KRS 342.197 was to protect persons who are entitled to benefits under the workers' compensation laws and to prevent them from being discharged for taking steps to collect such benefits." Therefore, appellant's pursuit of the gloves was protected by KRS 392.197.

The standard of review on a motion for judgment NOV is the same as that on a motion for a directed verdict, the test of which is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Commonwealth v. Runion, Ky. App., 873 S.W.2d 583 (1993).

Our review of the record indicates that there was sufficient evidence for a jury to reasonably find Lynn guilty of retaliatory discharge, and that therefore the trial court erred in sustaining Lynn's motion for a judgment NOV. The record clearly indicates that appellant's insistence on being provided with the more expensive hypo-allergenic gloves was a point of contention between appellant and Lynn. An employee is not required to prove that he was discharged "solely" because he filed or pursued a worker's compensation claim; rather, the employee need only prove that filing or pursuing the workers' compensation claim was a substantial and motivating factor in her

dismissal. First Property Management v. Zarebidaki, Ky., 867 S.W.2d 185 (1993).

The record indicates that appellant's need for the special gloves caused problems between appellant and Lynn. Lynn was reluctant to provide the hypo-allergenic gloves for her, yet expected her to continue performing her dental office duties, sometimes with no gloves or with gloves she was re-using. Appellant was fired the day after she argued with Lynn about the gloves. At trial, appellant testified that "The reason I was let go was because I asked for the gloves". Lynn claims that he fired appellant for insubordination. However, at trial Lynn stated that the argument that took place after appellant asked about the gloves on August 5, 1996 "was the straw that broke the camels back". The Kentucky Supreme Court has stated:

> [T]he employer is not free from liability simply because he offers proof he would have discharged the employee anyway, even absent the lawfully impermissible reason, so long as the jury believes the impermissible reason did in fact contribute to the discharge as one of the substantial motivating factors. . . .

Zarebidaki, 867 S.W.2d at 188.

For the aforementioned reasons, we adjudge that the evidence was sufficient for a jury to reasonably believe that appellant's pursuit of the hypo-allergenic gloves was a substantial motivating factor in her discharge, a violation of KRS 342.197. Therefore, we conclude that the trial judge erred in sustaining Lynn's motion for judgment notwithstanding the verdict. The order of the Pike Circuit Court is reversed and the case remanded for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

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