RENDERED: November 22, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002542-MR

EDWARD J. GILMORE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 99-CI-006458

KENTUCKY LOTTERY CORPORATION — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, DYCHE, AND MILLER, JUDGES.

MILLER, JUDGE: Edward J. Gilmore brings this appeal from a July 12, 2001 order and an October 31, 2001 order of the Jefferson Circuit Court. We affirm.

Gilmore was employed by the Kentucky Lottery Corporation (the Lottery) in 1989. In February of 1990, he was moved to the position of "Tell Sell Representative" (TSR), which he held until his termination on November 11, 1998. As a TSR representative, it was Gilmore's duty to contact lottery ticket vendors by phone and determine their respective needs for lottery tickets. He would then see that the orders were processed and the merchandise shipped to the vendors. The process was computer

programmed so that the names of the retailers involved would periodically appear on the computer screen, indicating that on that particular day those retailers should be called to ascertain their needs. Failure to call a retailer might result in exhaustion of his supply of tickets. This necessitated a visit by an "outside sales representative" in order to rectify the situation and assure that sales would not be lost.

Gilmore claims that in 1996 he was determined to be "legally blind" as defined in Kentucky Revised Statutes (KRS) 344.010(4). He, perforce, argues that he was entitled to be treated as a qualified disabled individual within the purview of KRS 344.030(1).

In any event, in 1996 Gilmore began receiving disciplinary actions for failure to properly perform his job. In 1997, he received three weeks' suspension without pay and was placed on a 60-day Work Improvement Program (WIP). In 1998, he was again placed on a WIP as a result of failures in contacting the retail stores. The failures, of course, resulted in complaints from the retailers.

A special problem occurred in 1998 around the November election. Because liquor retailers are closed on election day, the procedure for contacting them was altered to provide for contacting either the day before or the day after the election. It appears Gilmore failed to make the adjustment. On November 11, 1998, Gilmore's supervisor met with him to discuss his failure to contact the liquor stores as directed. For this

failure and in view of Gilmore's past performance, he was terminated for insubordination/poor job performance.

On October 28, 1999, Gilmore filed the instant complaint claiming, *inter alia*, the Lottery had: denied him reasonable accommodation; failed to take affirmative steps to accommodate his disability as required in KRS Chapter 344; willfully attempted to force him to resign from his employment because of his disability; treated him with hostility and oppression; and wrongfully terminated him on the basis of his disability.

On January 31, 2001, the Lottery filed a motion for summary judgment. On March 22, 2001, two months after the Lottery had filed its motion for summary judgment, Gilmore served a second set of Interrogatories and Request for Production of Documents on the Lottery. The Lottery objected to the second set of Interrogatories and Request because they constituted an unreasonable number of questions. On May 10, 2001, the trial court entered an order denying Gilmore's motion to compel answers to the Interrogatories because Gilmore had not sought leave of the court to propound additional interrogatories, which contained such a large number of questions. On May 17, 2001, Gilmore filed a motion requesting permission to submit additional interrogatories. The interrogatories were reduced to six. On July 12, 2001, before action was taken upon the request, the circuit court entered summary judgment.

We observe that Gilmore filed a claim of discrimination with the Louisville & Jefferson County Human Relations Commission

(Commission) in June 1997. Therein, he alleged that the Lottery failed to reasonably accommodate him in his disability. In May 1998, the Commission dismissed the claim finding that there was no probable cause to substantiate same. As Gilmore had previously filed a claim with the Commission for alleged work-place discrimination, we are of the opinion that the claim before the Commission bars the instant action under the authority of Vaezkoroni v. Domino's Pizza, Ky., 914 S.W.2d 341 (1995)(holding that the election of an administrative remedy bars a subsequent court proceeding). In any event, we have examined the record herein and are of the opinion that summary judgment was properly entered.

On this appeal, Gilmore contends: (1) he was subjected to direct discrimination; (2) he was subjected to a hostile work environment; and (3) the circuit court erred in entering summary judgment before discovery was completed.

Our rule in reviewing summary judgment is governed by Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991)(holding that movant must demonstrate the non-existence of material fact and entitlement to judgment as a matter of law). It is not just any issue of fact, but a material fact that controls. See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Company, Ky., 814 S.W.2d 273 (1991); Bennett v. Southern Bell Telephone & Telegraph Company, Ky., 407 S.W.2d 403 (1966). We have examined the record and find no material issue of fact.

We therefore think disposition of this appeal revolves around a question of law. Gilmore buttresses his claim upon KRS Chapter 344 (Civil Rights Act) and KRS 207.150, which statutorily prohibit work-place discrimination against those with disability.

Generally, claims under our Civil Rights Act track those under Federal law and thus are disposed of by rules enunciated in Burdine and McDonnell[1]. In the case of disability discrimination, the plaintiff establishes a *prima facie* case by establishing: (1) his disability, (2) his ability to perform the job, and (3) that he has suffered adverse treatment. Cf. Monette v. Electronic Data Systems Corporation, 90 F.3d 1173 (6th Cir. 1996).

The overall burden of proving a case is, of course, always upon the claimant. However, when a *prima facie* case is established, the burden shifts to the employer to articulate a legitimate business reason for his action. See Kentucky Center for the Arts v. Handley, Ky. App., 827 S.W.2d 697 (1991). This reason can only be rebutted by the claimant showing that it was a pretext for his dismissal. See Turner v. Pendennis Club, Ky. App., 19 S.W.3d 117 (2000).

The record herein clearly reflects that Gilmore was afforded every opportunity to perform his job. He was provided with a voice-activated system, speech-enhanced, to read his computer screen. The Lottery also purchased an over-sized, high

[1]Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207, (1981); McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

contrast computer screen for his utilization. Gilmore further complains that he needed additional software, which the Lottery refused to provide. We are advised, however, that the Kentucky Department for the Blind purchased and installed the software for Gilmore. The Kentucky Department of Blind was of the opinion that the Lottery had fully complied with the Department's efforts to accommodate Gilmore. In fact, it appears that Gilmore made no further request for accommodation. We therefore must conclude that his claim of failure to accommodate is without merit.

Gilmore further complains that he was subjected to a hostile work environment. We also think this is without merit. He refers generally to comments by unnamed fellow employees. A single employee did opine that Gilmore was not as restricted in vision as might be indicated. We think this evidence insufficient to attach liability on the Lottery. In order to establish a hostile work environment, an employee must show that conduct was so severe or persuasive that it had the effect of creating an intimidating, hostile, or offensive work environment. Cf. Hall v. Transit Authority of Lexington-Fayette Urban County Government, Ky. App., 883 S.W.2d 884 (1994).

Finally, Gilmore contends that he was not given an opportunity to complete discovery before the entry of summary judgment. The record itself refutes this contention. This action was filed some two years previous. The record had already accumulated multiple volumes reflecting efforts by Gilmore to prove his case. The final delay was brought about by Gilmore's request for admissions, which were inordinate in length. We

perceive no abuse in entry of summary judgment before answers to the third set of interrogatories. To establish a right to summary judgment, it is not necessary to demonstrate that discovery is, in fact, completed, but only that there was an opportunity to do so. See Hartford Insurance Group v. Citizens Fidelity Bank & Trust Company, Ky. App., 579 S.W.2d 628 (1979). We think the record herein clearly demonstrates that Gilmore had an abundant opportunity to complete discovery.

Upon the whole, we are of the opinion the circuit court properly entered summary judgment.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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