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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002354-MR

NANCY DICKSON — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 00-CI-00664

COMAIR, INC.; LINDA NOBLE;
AND RALPH LEE — APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDNG IN PART

** ** ** ** **

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Nancy Dickson ("Dickson"), seeks review of a summary judgment of the Boone Circuit Court dismissing her claims against her former employer, Comair, Inc. and two Comair employees, Linda E. Noble, and Ralph Lee, Appellees herein. In her complaint, Dickson alleged, *inter alia,* age discrimination in violation of KRS 344.040, wrongful/constructive discharge, and promissory estoppel. As

outlined below, we conclude that summary judgment was improperly granted on the promissory estoppel claim and reverse in part. In all other respects, we affirm.

By order entered October 4, 2001, the trial court granted Appellees' motion for summary judgment. The order, in its entirety, states:

> This matter came before the Court on the motion for summary judgment filed by Defendants Comair, Inc., Linda E. Noble and Ralph O. Lee ("Defendants") on all claims asserted against them by Plaintiff Nancy Dickson ("Plaintiff") in this action. Based on the pleadings, the evidence, arguments of counsel and the entire record, this Court is fully advised in the premises and finds Defendants' motion well taken.
>
> IT IS THEREFORE ORDERED THAT summary judgment is GRANTED in favor of Defendants on all claims asserted against them by Plaintiff. The claims against Defendants shall and hereby are dismissed, with prejudice. Each party to bear their own costs, if any.

On October 19, 2001, Dickson filed a notice of appeal to this Court. The standard of review on appeal of a summary judgment 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. There is no requirement that we defer to the trial court because factual findings are not at issue.[1]

[1] *Scifres v. Kraft,* Ky.App., 916 S.W.2d 779, 781 (1996).

Dickson first argues that the trial court erred in granting summary judgment on her promissory estoppel claim. In 1997, Comair advised that it was considering a policy change to require employees to relinquish seniority earned as flight attendants upon taking positions as in-flight supervisors. If an in-flight supervisor chose to return to a flight attendant position, all seniority would be lost. Current in-flight supervisors, as was Dickson at the time, were told they would have to agree to the new policy to remain supervisors.

Dickson was concerned about forfeiting her 12 years of seniority. In response to her concerns, she claims she was told that she would not lose her seniority if she returned to a flight attendant position, in the event Comair effectively eliminated her position as a supervisor.

In 1999, Comair reorganized its in-flight department. Dickson alleges that after the reorganization, her responsibilities were reduced to essentially “menial” tasks and her workspace was moved upstairs, away from the mainstream of flight attendant activity. Dickson claims that these drastic changes effectively eliminated her job as a supervisor.

Unhappy, Dickson explains that she applied for a position as a flight attendant instructor in late 1999, believing that her seniority would be reinstated under these circumstances, based upon earlier assurances from Linda Noble and Lorain

DeLotell. However, after she accepted the new position, she was informed there might be a problem reinstating her seniority. Dickson claims that she took the position "under protest," with the understanding that the seniority issue remained under consideration. Ultimately, Comair decided that Dickson would lose all of her seniority for bidding purposes, but her salary would be that of a flight attendant with half Dickson's actual seniority. Dickson says that "she could no longer bear to work under those circumstances and was forced to leave."

In response, Appellees argue that Dickson cannot prevail on her promissory estoppel claim because she has failed to establish (1) a sufficiently clear and definite promise and (2) detrimental reliance upon that promise. Further, "even accepting" her version of events, Dickson's job did not so dramatically change that it was effectively eliminated. Appellees characterize the changes in Dickson's supervisory position as "missing two meetings, the computerization of some paperwork, a new office location, and other minor adjustments."

In reviewing a summary judgment, our function is to determine whether there are genuine issues to be tried, not to resolve them, viewing the record in a light most favorable to

Dickson and resolving all doubts in her favor.[2] A promissory estoppel, as set forth in the *Restatement (Second) of Contracts* § 90 (1965), is:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
>
> . . . .
>
> The whole theory of a promissory estoppel action is that detrimental reliance becomes a substitute for consideration under the facts of a given case. Calamari and Perillo, *The Law of Contracts,* Hornbook Series § 105 (1970). Numerous oral and gratuitous promises have been enforced on this basis. *Id.* at Chapter 6, § 99-105. Promises by employers to provide certain fringe benefits are generally found to be supported by consideration but will, at least, give rise to the elements of a promissory estoppel. *Weesner v. Elec. Power Bd. of Chattanooga,* 48 Tenn.App. 178, 344 S.W.2d 766 (1961); *The Law of Contracts, supra,* at § 109. The employer can reasonably foresee that continuation in employment has been induced and injustice can be avoided only by giving effect to the promise.[3]

Lorain DeLotell, vice president of in-flight service for Comair from June 1- December 20, 1997, testified by deposition. She read from a document she had prepared for

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[2] *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991)

[3] *McCarthy v. Louisville Cartage Co., Inc.*, Ky.App. 796 S.W.2d 10, 11-12 (1990)

flight attendant personnel meetings in November and December 1997:

> We removed supervisors from the in-flight service seniority list to ensure their commitment to the position. There is, however, one exception and that is should we ever reduce the number of supervisors or eliminate a particular position, they will be returned to their original position on the list in order that they may maintain their employment with Comair as a flight attendant.

DeLotell did not tell everyone this was a "proposed policy," but that this was the policy. DeLotell explained that "we were going to implement the policy, okay, and whether it was that particular group of supervisors or whomever replaced them, there would be a policy about seniority." At the time DeLotell met with the individual supervisors, a policy had not yet been adopted; however, "[I]t was our intent to put this policy in place in writing to the supervisors, and most probably to the flight attendant group as well. That was the intent going forward, to put it in place. This is what we were going to do."

When questioned about when this policy went beyond the "proposal" stage, DeLotell responded, "Well, I think we're getting into a semantics thing here versus proposed versus policy. When I presented this to the supervisors, it wasn't a question of whether or not we were going to do it, we were going to do it. The question was whether they were going to stay."

DeLotell recalled meeting with Dickson, who "had great concerns that it [seniority] was something that was going to be hard for her to give up." DeLotell recalled that Dickson voiced concerns about what would happen to her if they were not happy with her job performance or if they changed her job. At the time, Dickson was moving into a new job – a "meet and greet" supervisor on the concourse, a troubleshooter. According to DeLotell, Dickson "was the perfect candidate for that position because that's what she loved doing and she was very good at that."

DeLotell recalled having discussions "using examples of talking about eliminating positions or changing jobs or things like that." DeLotell testified:

> I said things like, Hey, you know, what if we told you you had to go out there and fly as a supervisor five days a week and as a flight line attendant you'd only have to work two or three, that's a significant enough job change, it's not – it does not reflect what you're doing today. Then you would have the right to go back to flying.
>
> If I told you from now on you've got to . . . scrub the toilets in the ladies' rest room, that is a significant enough job change that you should be able to go back to flight status.
>
> What I'm saying to you is that you are giving up your seniority to maintain the job that we have described to you now and what your duties are as a supervisor. If we change that so dramatically that it's not even recognizable anymore, then that is eliminating your job.

DeLotell was asked whether she gave that speech in the "one-on-one" meetings with the supervisors. Although she could not identify the particular meeting, DeLotell explained that she gave that speech to certain individuals who had concerns about giving up their seniority. "I can tell you that I know that I had those kinds of discussions with at least one or more supervisors." DeLotell testified, "I know Nancy Dickson had concerns." DeLotell "would say" that she had two meetings with Dickson about the seniority issue and other discussions with her as well.

> I only know it came up. I only know she [Dickson] was reluctant, because I could see some of her facial expressions . . . asking me, again, what will happen, you know, if you all don't want me any longer, and I have to really think about this, and I just need to make sure I'm doing the right thing. I can't tell you any more than that about the discussion.

DeLotell testified that she called Dickson after hearing she had left Comair. DeLotell was "very surprised" by what had happened, because "the intent would never have been, at least if I had been the one writing the policy, to change the supervisors' jobs so dramatically and then not allow them to return to flight status."

The Appellee, Linda Noble, senior vice president of human resources for Comair, testified by deposition. According to Noble's recollection, she attended a meeting with Dickson and

DeLotell in August 1997, in which Dickson "said that she would relinquish her seniority number." Noble did not recall anything else Dickson said at that meeting. Noble only recalled "that the conversation about if a job were eliminated, you know, as a result of downsizing, that a supervisor would be able to recapture her seniority in that regard." Noble confirmed that the policy verbalized to the supervisors in 1997 had not been written down anyplace before December 1999. When asked why, Noble responded, "It's always appropriate to have written policies, for every company, I believe. However, the pace which some companies, such as Comair, operate, there are times when there is a lag in getting policies in writing."

Noble was asked about a meeting she had with Dickson:

> Q. Do you remember learning from Nancy, in the December 1999 meeting, why she had left her management position and gone to the part-time instructor position?
> A. I recall that Nancy expressed a tremendous amount of frustration. I recall that she didn't feel valued as a member of the management team.
> Q. Do you recall that she complained that her job functions had changed?
> A. She did say that.
> Q. Do you recall her giving any examples to you of how her job functions have changed?
> A. She mentioned to me a meeting that was held with the ATS. And I believe that Nancy normally chaired that meeting. And there was a meeting held that she did not participate in. However, apparently, her manager, Anna Marie Stucker, had – had chaired the meeting. And I recall Nancy saying to me, frustration [sic], that she didn't know there was a meeting and she wasn't included. And also I believe Nancy said that members of the

> ATS group had approached her before the meeting, and maybe after the meeting, as well.
> Q. And asked why she wasn't there?
> A. Something like that.
> Q. Do you remember Nancy bringing up her prior participation at the nine o'clock conference call that she was no longer participating in?
> A. I don't recall that.
> Q. Do you recall any specifics that she told you as examples of her job change, other than the ATS meeting that you just mentioned?
> A. There may have been other things. I don't recall what they are.

Anne Marie Stucker also testified by deposition. In August 1999, she was promoted to in-flight manager of operations support. Stucker testified about her understanding of Dickson's various responsibilities before she [Stucker] became manager. Stucker agreed that Dickson, as an in-flight supervisor, had been a support person for the flight attendant group. According to Stucker, Dickson had been a liaison with the commissary department, met with them regularly, and tried to resolve issues. Dickson had also worked with the uniform sales rep, setting up fittings, and had supervised the liquor sales clerk. Stucker acknowledged that in the summer of 1999, Dickson was the only person qualified to train ATS trainers. Dickson had also participated in a mentoring program for the new flight attendants.

Stucker also testified about changes in Dickson's responsibilities. She explained that Dickson's involvement in the mentoring program ended after the manager of the employee

services department, Joel Kuplack, decided the program should be moved to his department. Stucker was not aware that anyone had informed Dickson that she would no longer be involved in the mentoring program.

Stucker believed that Ralph Lee had made the decision that Dickson no longer be involved in the morning conference calls; according to Stucker, "It really didn't fall under her job responsibilities as a – it was an operational call." According to Stucker, Ralph Lee knew that Dickson had been involved in the morning conference call up to that point. Stucker did not know "how she [Dickson] was told she was not doing it [anymore]." However, Dickson stopped participating in those calls.

Stucker was questioned about Dickson's office being moved upstairs. Stucker testified that Dickson "said she just felt uncomfortable being up on the second floor and she would rather be downstairs by the flight attendant lounge." Stucker "understood how she felt as far as not being downstairs. When I first moved upstairs, it was much more quiet than the environment was downstairs. . . ."

Having reviewed the record, we believe that genuine issues of fact exist, and conclude that the trial court's entry of summary judgment on Dickson's promissory estoppel claim was

improper. Accordingly, we reverse and remand for further proceedings in that regard.

Next, Dickson maintains that the trial court erred in entering summary judgment for Appellees on her age discrimination claim, for violation of KRS 344.040.[4] In *Turner v. Pendennis Club,*[5] this Court held:

> There are three critical sequences of occurrences in an employment discrimination action. First, the plaintiff must establish a *prima facie* case of discrimination by showing: (1) that she is a member of a protected class; (2) that she was qualified for and applied for an available position; (3) that she did not receive the job; and (4) that the position remained open and the employer sought other applicants. *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Next, if plaintiff succeeds in demonstrating those four criteria and thus establishing a *prima facie* case of discrimination, the burden then shifts to the employer to articulate a "legitimate nondiscriminatory" reason for its action. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Finally, should the employer be able to provide a "legitimate nondiscriminatory" reason for not hiring the plaintiff, the plaintiff bears the burden of showing by a preponderance of the evidence that the "legitimate reason" propounded

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[4] KRS 344.040 provides:

> It is an unlawful practice for an employer:
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> 1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, ...

[5] 19 S.W.3d 117, 119-20 (2000).

> by the employer is merely a pretext to camouflage the true discriminatory reason underlying its actions.

In *Harker v. Federal Land Bank of Louisville,* the Kentucky Supreme Court explained that "[t]he Federal law has a different standard for a summary judgment in age discrimination cases. . . .the special rule for age discrimination summary judgments is whether the plaintiff has proof of 'cold hard facts creating an inference showing age discrimination was a determining factor' in the discharge."[6] The Court was "persuaded that the approach used by the Sixth Circuit Court of Appeals which incorporates *McDonnell Douglas* is applicable here. The Sixth Circuit makes a but/for test or the equivalent of a third stage pretext analysis without regard to whether the initial two stages of the *McDonnell Douglas* test have been met. In the absence of specific evidence of age discrimination, a summary judgment is proper."[7]

Dickson complains that Comair did not explain its adverse employment action in its memorandum in support of summary judgment, but waited until its reply to justify its decision to promote Stucker. Dickson asserts this was "patently unfair," depriving her of the opportunity to present rebuttal

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[6] Ky., 679 S.W.2d 226, 229 (1984)

[7] *Id.,* at 230.

evidence of pretext. Dickson does not state whether she brought the matter to the attention of the trial court. CR 76.12(4)(c)(v). Our review of the record does not indicate that she moved to strike portions of Comair's reply, or requested any other relief, after it was filed.

Moreover, in its memorandum in support of summary judgment, Comair mentions its decision to promote Stucker, as well as Dickson's testimony that she did not believe the decision had anything to do with age at the time it was made. As Comair notes, Ken Marshall had testified about the reason for promoting Stucker, ten months before the motion for summary judgment was filed. Marshall, vice president of in-flight and corporate safety, chose Stucker based upon her overall performance.

Our review of the record does not show any "cold hard facts" that age was a determining factor in Comair's decision to promote Stucker. We conclude no genuine issue exists as to any material fact and that Comair was entitled to judgment as a matter of law on Dickson's age discrimination claim. Accordingly, we do not reach the issue of individual liability under KRS Chapter 344.

The remaining issue is whether Dickson should have been permitted to present her constructive discharge claim to a jury. According to the complaint, Dickson alleged age

discrimination as the underpinning of her wrongful/constructive discharge claim. In her memorandum filed in the trial court, Dickson states that "[t]he constructive discharge was the result of age discrimination . . . ."

In Kentucky, an employer may discharge an at-will employee for good cause, no cause, or one that some might view as morally indefensible.[8] The limitations to the wrongful discharge exception to the terminable-at-will doctrine are:

> 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
> 2) That policy must be evidenced by a constitutional or statutory provision.
> 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.[9]

Kentucky law holds that:

> [A] claim of sex discrimination would not qualify as providing the necessary underpinning for a wrongful discharge suit because the same statute that enunciates the public policy prohibiting employment discrimination because of "sex" also provides the structure for pursuing a claim for discriminatory acts in contravention of its terms. *See* KRS Chapter 344, Civil Rights.
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> KRS 344.040 provides that it is "unlawful practice for an employer ... to discharge any individual ... because of such individual's race, color, religion, national origin, sex, or age between forty (40) and seventy (70)." The Kentucky Commission on Human Rights is structured

[8] Grzyb v. Evans, Ky., 700 S.W.2d 399 (1985)
[9] *Id.,* at 401.

> in KRS Chapter 344 to adjudicate complaints of discrimination on these grounds. Thus, the same statute which would provide the necessary underpinning for a wrongful discharge suit where there is sufficient evidence to prove sex discrimination in employment practices also structures the remedy. The statute not only creates the public policy but preempts the field of its application.

We conclude that Comair was entitled to judgment as a matter of law on Dickson's constructive discharge claim.

The summary judgment of the Boone Circuit Court, entered October 9, 2001, is reversed in part, as it relates to Dickson's promissory estoppel claim. We remand for further proceedings in that regard. In all other respects, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert A. Klingler
Michael J. Trapp
Cincinnati, Ohio

BRIEF FOR APPELLEE:

W. Keith Noel
Paul D. Dorger
Cincinnati, Ohio