

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001759-MR

PHILIP HISEL

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 01-CI-00303

TRIM MASTERS, INC.

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Philip Hisel ("Hisel") appeals from a summary judgment of the Jessamine Circuit Court in his action alleging that his former employer, Trim Masters, Inc. ("TMI"), unlawfully discriminated against him in violation of KRS 344.040 et. seq. when it failed to reasonably accommodate him and terminated his employment because of his disability. The circuit court found that Hisel failed to establish a prima facie case of disability

discrimination, and accordingly rendered a summary judgment in favor of TMI. We affirm the summary judgment.

Hisel began his employment with TMI in Jessamine County, Kentucky in 1996. Hisel's job duties consisted of working on an assembly line making seats for Toyota automobiles. On the production line, referred to as the left front assembly line, 9 employees each had specific duties. Under the system used at TMI, an employee would work at a particular position for two hours, then move to the next position in the line.

Hisel was injured during the course of his employment in December, 1998, when he was pulling a seat and felt his back pop. He was examined by the plant physician assistant the following day, who placed him on modified duty and limited the repetitive use of his back. The following month, Hisel was examined by a physician, Dr. John Allen ("Dr. Allen"), who diagnosed a lumbosacral strain and degenerative disc disease, and who recommended that Hisel remain on light duty.

Thereafter, Hisel's work assignment was limited to the two positions on the production line which placed the least amount of strain on his back. In April, 1999, orthopedic surgeon Dr. Thomas Menke ("Dr. Menke") diagnosed Hisel with a herniated lumbosacral disc, and later in the summer Hisel received chiropractic treatment.

All TMI employees were subject to an attendance policy, which provided that excessive unexcused absenteeism would result in the issuance of a reprimand referred to by TMI as a "corrective action." Two or more corrective actions could result in the termination of employment. Hisel received corrective actions on February 8, 1999, and June 1, 1999.

Hisel's vehicle was repossessed on July 14, 1999, and he failed to show up for work. Hisel contacted TMI employee David Ruggles ("Ruggles") and human resources administrator Virginia Rustay ("Rustay") regarding his absence, and told one or both of them that his car had broken down. The following day, he called again and stated that his doctor had advised him not to come to work.

On July 16, 1999, Hisel brought in a note from Dr. Menke requesting that Hisel be excused from work for back pain from July 14, 1999, to July 16, 1999. On July 16, 1999, human resource manager Larry Fletcher ("Fletcher") determined that Hisel had not been seen by Dr. Menke and had received the medical excuse after calling the doctor's office and speaking to an assistant.

Hisel received a third corrective action shortly thereafter. It stated that his employment was being terminated because he had lied about the basis for his July 14, 1999, absence (his car being broken down), and because he had not

actually seen Dr. Menke before getting the medical excuse. Hisel met with Fletcher on August 3, 1999, and Fletcher stated that Hisel was being suspended pending termination for submitting false information to obtain a leave of absence, and for providing false information on his employment application in violation of TMI policy. The false information on the employment application related to Hisel failing to note that he had been terminated from a prior job for absenteeism. Hisel's employment with TMI was terminated.

Hisel filed the instant action in Jessamine Circuit Court on May 16, 2001. He alleged therein that TMI unlawfully discriminated against him in violation of KRS Chapter 344 when it failed to reasonably accommodate him and terminated him because of his disability. After discovery was conducted, TMI filed a motion for summary judgment, arguing therein that Hisel was not a qualified individual with a disability and, even if he was, he could not establish that TMI's reason for terminating his employment was mere pretext for unlawful discrimination. On June 27, 2002, the circuit court sustained the motion and rendered a summary judgment in favor of TMI. Hisel's motion to amend the judgment was unsuccessful, and this appeal followed.

Hisel now argues that the circuit court committed reversible error in sustaining TMI's motion for summary judgment. He maintains that the court erred in failing to rule

that he was entitled to discovery materials relating to job descriptions which became open while he was on light duty at TMI, as well as the names and personal information of employees who received the open positions. He also argues that the court erred in granting summary judgment because issues of fact remained unresolved. As part of this second argument, he maintains that the court improperly ruled that an accommodation that requires an employer to violate a disability-neutral rule is not a reasonable accommodation, and claims that questions of fact exists as to whether TMI took part in an interactive process to address the issue of accommodation as required by statute. He also argues that an issue of fact exists as to whether TMI's reasons for terminating his employment were actually pretexts for unlawful discrimination. He seeks to have the summary judgment reversed, and the matter remanded for additional discovery and trial.

On Hisel's first argument, he asserts that he was entitled to discover all written job descriptions and all documents showing the job duties, educational qualifications and physical qualifications for the positions that came available when he was on light duty. He also claims that he was entitled to the names, home addresses, and other information relating to the 25 employees who received the open positions. Hisel apparently argues that he needed this discovery material in

order to show that the transfer policy was not consistently applied to disqualify individuals with active corrective actions.

We find no error. At issue is whether, as TMI maintains, it barred Hisel from receiving a transfer to these posted positions because he was subject to an active corrective action, or whether there existed an unlawful, discriminatory purpose for the action. In denying Hisel's motion to compel, the circuit court opined Hisel was not entitled to such discovery because his active corrective actions made him ineligible for transfers like any other employee who had the same number of active corrective actions. Nothing in the record refutes this conclusion. Hisel did receive discovery material on the 25 posted positions, as well as the identities of all persons who sought transfers and the persons who received them. The circuit court opined that he was entitled to no additional data as it related to this issue, and we find no basis in the record or the law for tampering with that conclusion.

Hisel's second argument, and the corpus of his appeal, is that the circuit court improperly sustained TMI's motion for summary judgment because issues of fact remain to be resolved. Having closely studied the record, the law, and the written arguments, we find no error on this issue.

One of the stated purposes of KRS Chapter 344 is to provide for execution within the Commonwealth of the policies embodied in various federal laws, including federal civil rights acts and the Americans with Disabilities Act. KRS 344.020(1)(a). As such, Kentucky courts look to federal law for guidance in interpreting the state statute. Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 229 (1984). United States Supreme Court decisions regarding the federal statutes "are most persuasive, if not controlling, in interpreting the Kentucky statute." Kentucky Comm'n on Human Rights v. Commonwealth, Dept. of Justice, Ky. App., 586 S.W.2d 270, 271 (1979). Therefore, any claim arising under KRS Chapter 344 is properly analyzed under both state and federal case law.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the United States Supreme Court established an allocation of proof framework which applies in discrimination cases. The court noted that the plaintiff has the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp., 411 U.S. at 802. If the plaintiff is successful, the burden of production then shifts to the employer. Id. It then becomes the duty of the employer to articulate some legitimate non-discriminatory reason for the employer's actions. Id. Assuming the employer meets its burden of proof, the plaintiff is then afforded the

opportunity to show that the employer's reasons are mere pretext. Id. at 804.

The first question on this issue is whether Hisel set forth a prima facie case of discrimination. In McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369 (6<sup>th</sup> Cir. 1997), the federal court described the elements necessary to establish a prima facie case of disability discrimination. The court stated that the claimant had to show (1) that he is a disabled person within the meaning of the Act, (2) that he is qualified to perform the essential functions of his job with or without reasonable accommodation, and (3) that he suffered an adverse employment decision because of his disability. Id. at 371. In St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), the Supreme Court noted that the "establishment of a prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." 590 U.S. at 506.

As TMI notes, Hisel stated in deposition that he agreed with his chiropractor's assessment that his back injury prohibited him from ever working again at the position he held at the time of the injury; that he was incapable of working at the wires position, which was among the easiest of the jobs; and, that "any positions in the plant on the lines themselves would have conflicted" with his doctors' recommendations against

using his injured back. (See Hisel deposition, pp. 193-200). He went on to state that all of the production, maintenance, and material handlings jobs in the plant required the type of repetitive lifting, bending and squatting from which he was restricted.

One may reasonably conclude from Hisel's own statements that he was unable to perform any production, maintenance, or material handling job in the plant. As such, it would be impossible for him to satisfy the second element of McKay, supra, to wit, that he was qualified to perform the essential functions of his job with or without reasonable accommodation. The failure to satisfy this element, taken alone, means that Hisel could not establish a prima facie case of discrimination, and it forms a basis upon which the trial court properly rendered summary judgment in favor of TMI. See generally, Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991).

Arguendo, even if Hisel could have established a prima facie case pursuant to McKay, TMI was able to offer rebuttal evidence that its reasons for terminating his employment were not a pretext for unlawful discrimination. See McDonnell Douglas Corp., supra, requiring the employer to articulate some legitimate non-discriminatory reason for the employer's actions.

Human resource manager Fletcher stated in deposition that Hisel failed to indicate on his employment application that he had been discharged from prior employment within the last three years for excessive absenteeism. This was especially relevant to TMI management in light of the fact that Hisel's February 9, 1999, and June 1, 1999 corrective actions resulted from absenteeism. TMI's Rules of Conduct manual provided that providing false information on any company document could result in the immediate termination of employment. Since TMI had a written employee policy in effect at the time of Hisel's termination, and as evidence exists in the record that Hisel violated that policy, TMI would have been able to rebut a prima facie case if one had been made. Again, this fact, taken alone, is a basis upon which we may affirm the circuit court's entry of summary judgment.

Lastly, Hisel argues that a question of fact exists as to whether TMI took part in an interactive process as required by statute for the purpose of determining if an accommodation can be reached. The record does not support this assertion. TMI and Hisel engaged in an ongoing process over several months in an attempt to accommodate Hisel's needs, resulting in Hisel's assignment to perform only two of the nine functions on the assembly line. Hisel continued in this capacity until his termination. It cannot reasonably be argued that TMI failed to

engage in an interactive process, and we find no error on this issue.

For the foregoing reasons, we affirm the summary judgment of the Jessamine Circuit Court.

ALL CONCUR.

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