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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000414-MR & 2001-CA-000456-MR

WAL-MART STORES, INC. — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM BARREN CIRCUIT COURT
v. HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 97-CI-00068

LINDA H. WILLIAMS — APPELLEE/CROSS-APPELLANT

AND NO. 2001-CA-000454-MR

LEE HUDDLESTON — APPELLANT

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 97-CI-00068

WAL-MART STORES, INC. — APPELLEE

OPINION

REVERSING

** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

DYCHE, JUDGE. This matter involves a claim by appellee Linda Williams that appellant Wal-Mart Stores, Inc. discriminated against her on the basis of age under the Kentucky Civil Rights Act, KRS Chapter 344. After a two-day jury trial, the jury returned a verdict in favor of Williams in the amount of $539,237.00.

Wal-Mart hired Williams in July of 1986, when Williams was forty-six years of age. She worked as a cashier for Wal-Mart for nearly ten years. The genesis of this case occurred on October 5, 1995, when Williams took a gallon of distilled water[1] from the front of the store and drank from it without first paying for it. Jennie Gray, the Customer Service Manager, saw Williams take the water. According to Williams's testimony, she believed that Gray had given her permission to take the water because Gray had seen her take it and then allowed her to go on break and take the water without paying for it. Gray denied at trial having given Williams permission because Gray did not have the authority to do so. Either way, Gray did not stop Williams from taking the water and did not immediately report this incident to any higher level managers. At the end of her shift, Williams paid for the water.

On October 6, 1995, Williams took another gallon of distilled water from the front of the store to the break room

[1] Williams needed to drink sodium-free water due to problems with high blood pressure.

before paying for it. Gray and Diane Smith, a Wal-Mart associate, witnessed this. Gray and Smith brought the situation to the attention of Joyce Bosse, an assistant manager at that time. Following the policy of Wal-Mart, Bosse called the area loss prevention supervisor, Joe Medina, to report the incident. Medina told her to watch the situation.

Williams was observed drinking the water in the break room. At the end of the day, Williams left the partly consumed gallon of water in the break room and left for the day without paying for it.

Again on the following day, October 7, 1995, after finishing the partly consumed gallon of water from the previous day and throwing away the empty container, Williams took another gallon of water from the front of the store. Smith reported this to Bosse, who called Medina a second time to see how she should proceed in handling the matter. At this time, Williams had not paid for October 6 or the October 7 gallons of water.

The evidence is undisputed that Medina was the decisionmaker regarding the situation. Medina told Bosse that if Williams could not produce receipts for the water, Bosse was to terminate Williams. Bosse was given no discretion in the matter. And, according to the consistent and undisputed evidence at trial, employees are not given a warning or coached in these situations.

The evidence was undisputed that Wal-Mart has a very strict policy against employees taking merchandise without first paying for it regardless of the price of the item. The evidence was likewise uncontroverted that violation of this policy would result in immediate termination of an employee and that all employees were aware of this. Wal-Mart also has stringent policies regarding when employees are permitted to pay for merchandise, including that no employee is allowed to pay for merchandise while on the clock. An employee is permitted to pay for merchandise prior to the beginning of her shift, at the end of her shift, or if she clocks out for lunch. Food and drink items may be purchased prior to consumption under these policies; however, an employee is required to keep receipts with such items. At any time an employee may be required to show her receipt for any Wal-Mart merchandise she has while in the store or while leaving the store. Williams was aware of these policies.

Following Medina's direction, Bosse called Williams into a meeting in which Jim Merkling and Margaret Baker, assistant managers, were also present. Much time was spent during the trial regarding how Williams was treated during this meeting and regarding her assertions that she did not "steal" anything. However, the main issue is whether Williams violated Wal-Mart's policy regarding consuming merchandise without first

paying for it and whether Wal-Mart treated her any differently from similarly situated individuals based on her age.

When asked if she could produce receipts for the water, Williams at first indicated that she could and began looking through her smock for them. However, it was undisputed that prior to the meeting, Williams had only paid for the October 5 gallon of water. Williams relentlessly contended that she did not and would not steal anything from Wal-Mart. Nonetheless, no matter how her actions were characterized, they were in clear violation of Wal-Mart's policies, of which Williams testified she was aware.

When Williams could not produce any receipts for the water, she was given the choice of voluntarily resigning or having the matter turned over to loss prevention. According to the trial testimony, to which Williams did not produce contrary evidence, once a matter is turned over to loss prevention, it is prosecuted if the employee has taken any merchandise without first paying for it. Although she alleges it was under the pressure of being threatened with jail, Williams voluntarily resigned.

After the meeting was over, Williams went through a register and paid for the two gallons of water for which she admitted she owed--the October 6 and October 7 gallons of water. Six Wal-Mart employees consistently testified at trial that

actions such as Williams would automatically result in termination regardless of the surrounding circumstances. In spite of how she characterized her actions, Williams herself testified that she knew the penalty for theft at Wal-Mart.

In applying the law to the facts of this case, Kentucky's Civil Rights statutes are modeled after federal ones, and accordingly federal standards are used to evaluate discrimination claims. See Stewart v. University of Louisville, Ky. App., 65 S.W.3d 536, 539 (2001); Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 821 (1992). In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793-94 (1973), the United States Supreme Court established "'the proper order and nature of proof in [discrimination] actions . . . .'" Jefferson County v. Zaring, Ky., 91 S.W.3d 583, 590 (2002). Under the McDonnell Douglas burden-shifting framework, the plaintiff first must establish a prima facie case of discrimination. To establish a prima facie case of age discrimination, a plaintiff bears the burden of establishing by a preponderance of the evidence that: (1) she was at least forty years old at the time of the alleged discrimination; (2) she was subjected to an adverse employment action; (3) she was qualified for the position involved; and (4) she was ultimately replaced by a younger individual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-43, (2000) (assuming the applicability of the four-part test established in

McDonnell Douglas to age discrimination cases lacking direct evidence of discrimination). If a prima facie case is made, the burden then shifts to the defendant to articulate a nondiscriminatory reason for its actions. The defendant bears only the burden of production; the burden of persuasion remains with the plaintiff at all times. Weigel v. Baptist Hosp. of East Tenn., 302 F.3d 367, 377-78 (6th Cir. 2002) (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Once the defendant has articulated a nondiscriminatory reason for its decision, the presumption of discrimination that arises from the plaintiff's prima facie case disappears. The plaintiff must then have the opportunity to show that the defendant's proffered explanation is merely a pretext for discrimination. Id. at 378 (citing Burdine, at 255-56). A plaintiff must present sufficient evidence to support her conclusion that the proffered reason was a pretext designed to hide discrimination. In order to show pretext, the Sixth Circuit recognizes three primary routes. A plaintiff may show "'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [her] discharge, or (3) that they were *insufficient* to motivate discharge.'" Id. (citing Manzer v. Diamond Shamrock Chemical Co., 29 F.3d 1078, 1084 (6th Cir. 1994)) (quotation omitted in Weigel; emphasis added in Manzer). "'[A] plaintiff's prima facie case, combined with

sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated,' although such a showing might not '*always* be adequate to sustain a jury's finding of liability.'" Id. (citing Reeves, at 148) (alteration in original).

Initially, we are troubled with whether Williams even met her prima facie case in this matter. She introduced into evidence a listing of employees hired after her which included younger employees and employees within the protected class. She did not, however, even attempt to establish which employee took over her specific job duties or whether her duties were assumed by a variety of individuals. Nonetheless, because there were younger employees hired after her and because Wal-Mart conceded in its motion for summary judgment that Williams had met her prima facie case, we will not reverse on this ground.

The burden thereafter shifts to Wal-Mart to articulate a legitimate nondiscriminatory reason for its termination of Williams. Wal-Mart clearly met this burden at trial; it has a zero tolerance policy against employees consuming or using any merchandise before it has been purchased. Further, Wal-Mart presented evidence, unrebutted by Williams, that any violation of this policy, regardless of cost or intent to pay at a later time, would result in termination. Exceptions to this policy

are only given in emergency situations wherein a manager gives prior approval. Wal-Mart presented unrefuted evidence that otherwise this policy is applied blindly across the board.

The burden shifts back to Williams to prove that the stated reason was pretextual. Williams offered no evidence whatsoever at trial to rebut the reason given by Wal-Mart. She did not show that it was not based in fact, that it did not actually motivate Wal-Mart or that it was insufficient to motivate her discharge. She offered nothing but her unsupported allegations that she believed she had done nothing wrong in taking the water because she intended to pay for it later. Based on her reasoning, she concluded that age *must* have played a factor in her termination. However, Williams is compelled to come forward with some evidence beyond her prima facie case other than her own subjective unsupported beliefs. She has failed to do so.

Williams tried to buttress her allegation of age discrimination by arguing that she did not get certain shifts of work or that she was not allowed to "zone" very often at Wal-Mart.[2] She offered only her unsupported allegations that younger employees were given this alleged preferential treatment, and she failed to show how other employees were in any way similarly

[2] Zoning involves going out on the floor to straighten merchandise and assist customers as necessary.

situated to her as explained in Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998).

Further, we are not convinced that her allegations even rise to being treated unfairly on the basis of age even if she could prove them. Pursuant to the Sixth Circuit's direction, a "materially adverse" employment action involves a:

> change in the terms and conditions of employment [and] must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.

Wilson v. Dana Corp., 210 F. Supp. 2d 867, 884 (W.D. Ky. 2002) (citing Hollins v. Atlantic Co., Inc., 188 F.3d 652, 662 (6th Cir. 1999)(quoting Crady v. Liberty Nat'l Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993))). "These factors are to be evaluated objectively, and not from the subjective interpretation of the complainant." Id. (citing Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 886 (6th Cir. 1996)).

First, it is not clear that the circumstances alleged by Williams were actionable under the above analysis. Instead, they are only *de minimis*. And, second, she offered no evidence whatsoever other than her own "subjective interpretation" of the situation. Hence, we find no reason to rely on these

allegations to buttress Williams's faltering discrimination case.

Even more problematic to Williams's case is the undisputed fact that Joe Medina was the sole decisionmaker, and there was no evidence he knew Williams or her age. Medina was the regional loss prevention supervisor and was only present at particular Wal-Mart stores sporadically. Bosse carried out Medina's instructions, which were to terminate Williams at the meeting if she could not produce receipts for the water. Bosse was given no discretion in the matter. The focus of the inquiry should be on the knowledge and motivation of the decisionmaker and not the knowledge of the employee or nondecisionmakers. Wrenn v. Gould, 808 F.2d 493, 502 (6th Cir. 1987). Because Medina, the sole decisionmaker, did not know Williams or her age, Williams's case must fail because she lacks any evidence of intentional discrimination.

In summary, Williams presented no evidence to rebut Wal-Mart's legitimate reason for its decision. While it may appear harsh to make such a decision based on the surrounding facts, Wal-Mart presented undisputed evidence that it applies its policies to all employees regardless of age or circumstances. It is neither for the courts nor for jurors to determine whether the decision was right or wrong, so long as a

business judgment decision was not made for a discriminatory reason.

We can only conclude that the jury was swayed by the unfortunate circumstances surrounding Williams's life at the time she was terminated. Her son was dying of cancer and she had had several illnesses herself. Based on the lack of evidence of pretext, we conclude that the jury's verdict was flagrantly against the evidence and that it was a result of passion. See, e.g., Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18 (1998) (citing NCAA v. Hornung, Ky., 754 S.W.2d 855 (1988)). Accordingly, there is no reason to review the remaining issues raised in this appeal, or the cross-appeal. The judgment of the trial court is hereby reversed, and the cross-appeal is moot.

SCHRODER, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. The Majority Opinion has invaded the province of the jury by weighing the evidence presented at trial. This case involves numerous issues of material fact which were properly submitted to the jury by the trial court.[3] On appeal the Majority has failed to consider the evidence in the light most favorable to the prevailing party;[4] instead, the Majority in many instances

[3] Rogers v. Kasdan, Ky., 612 S.W.2d 133, 135 (1981).

[4] Davis v. Graviss, Ky., 672 S.W.2d 928, 933 (1984).

has summarized the evidence pertaining to material issues of fact in the light most favorable to the appellant.

Williams testified that when she used the bottled water while at work she followed Wal-Mart's employment policy by obtaining permission from her supervisors to use the distilled water for medical purposes while she was working and by obtaining permission to pay for it at the end of her workshift. Thus, there was substantial evidence to support Williams's contention that she was in full compliance with her employer's policies and Wal-Mart's threats of criminal prosecution and termination of her employment were unjustified.

Williams claims that the position Wal-Mart took in accusing her of violating company policy by purchasing the bottled water while she was at work was merely a pretext for terminating her. Williams presented evidence which showed the extreme measures the members of Wal-Mart management went to in their attempt to catch her stealing the distilled water, and their efforts at coercing a confession and resignation from her under the threat of criminal prosecution and imprisonment. Thus, the jury was presented with evidence that Wal-Mart did not consistently enforce its alleged zero-tolerance policy of prohibiting the purchase of merchandise by employees while at work, but that Wal-Mart instead wrongfully accused Williams of theft. There was sufficient evidence for the jury to find that

these accusations of theft and threats of criminal prosecution by Wal-Mart were a mere pretext and that Wal-Mart's true purpose was to force Williams to resign her position.

The jurors heard the testimony of all the major participants and it was within their purview to judge the credibility and motives of the witnesses.[5] They were entitled to use their common sense in judging the credibility of the members of Wal-Mart's management in explaining the reasons for the actions they took. As Williams observed in her brief, after hearing the testimony concerning Williams taking the water and not paying for it, and the surveillance of her undertaken by the members of Wal-Mart's management, the jury was left with one of three conclusions: (1) Williams was stupid; (2) Wal-Mart's management was stupid; or (3) Wal-Mart's management had a hidden agenda. Obviously, the jury chose the latter conclusion. This conclusion was reasonable based upon the evidence and the reasonable inferences the jury could draw from that evidence. The Majority Opinion's summary of the evidence would be appropriate if the jury had found for Wal-Mart and the purpose of the opinion was to demonstrate that there was sufficient evidence to support a finding in favor of Wal-Mart. Unfortunately for Wal-Mart, the evidence was in dispute and the jury chose to accept Williams's version of the events. The

[5] Kentucky & West Virginia Power Co. v. Elliott, 310 Ky. 496, 499, 220 S.W.2d 964 (1949).

Majority Opinion inappropriately summarizes the evidence most favorable to Wal-Mart instead of the evidence most favorable to Williams.

The following is a summary of the evidence in the light most favorable to Williams: Williams told Gray, her supervisor at Wal-Mart, that she had a serious medical condition involving her heart rate and high blood pressure which required her to take medication that had been prescribed by her physician. Williams was required to take this medication during her workshift at rather precise intervals. Because of Williams's high blood pressure, her doctor told her to take the medication with sodium-free water. When Williams had previously brought sodium-free water to work and left it in the employees' break room, it was either drank or thrown out by other employees. Williams decided that she would purchase the distilled water from Wal-Mart on an as-needed basis so she would have the water when she needed to take her medicine. Williams was aware of Wal-Mart's policy which prohibited an employee from purchasing merchandise while on duty. Therefore, she asked for and received permission from her supervisor, Gray, to take a bottle of water off the shelf during her workshift, to use the water to take her medication, and to pay for the water at the end of her workshift. A written record that Gray made concerning the fact that Williams had spoken to her about her

need to purchase the distilled water was introduced as evidence. While Gray denied giving Williams such permission, it is worth noting that Gray also testified that she was not authorized by Wal-Mart to give Williams such permission. At the end of Williams's workshift on October 5, 1995, she took the empty bottle of water through a check-out line and paid $0.58 for it. Members of Wal-Mart's management watched Williams as she paid for the bottle of water because they suspected her of stealing the water. However, none of the members of Wal-Mart's management stopped Williams on October 5 to inform her that she was in violation of Wal-Mart's policy by using the bottle of water, that had not been purchased, while she was working. While members of Wal-Mart's management insisted in their testimony that (1) Wal-Mart had a very strict policy against an employee using any merchandise regardless of price without first paying for it; (2) that this zero-tolerance policy would result in immediate termination; and (3) that all employees were aware of this policy, some members of management failed to enforce the policy when they did not take any action against Williams for using the bottle of water on October 5 before it was purchased. It was reasonable for the jury to infer from this inaction by the members of Wal-Mart's management that either it did not have a zero-tolerance policy, Williams had been given permission to use the bottled water before it was purchased as a medical

exception to the policy, or Wal-Mart suspected Williams of the much more serious infraction of employee theft and its management team was waiting for the opportunity to catch Williams in a theft.

As should be evident from this brief summation of the evidence most favorable to Williams, there were contested issues of fact at trial that were properly left for the jury to decide. Based upon the evidence presented that was favorable to Williams, it was not unreasonable for the jury to determine that Wal-Mart's stated reason for asking for Williams's resignation was a mere pretext for a discriminatory motive. Williams presented sufficient evidence in support of her claims of disparate treatment due to her age which resulted in her receiving less desirable job assignments and lower paying positions with less opportunity for advancement. Accordingly, I would affirm the Barren Circuit Court's judgment in favor of Williams.

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ORAL ARGUMENT FOR APPELLANT/
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