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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001021-MR

STELLA FAYE KEGLEY APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 03-CI-90253

MOREHEAD STATE UNIVERSITY
AND ROGER BARKER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

ABRAMSON, JUDGE. Stella Faye Kegley appeals from an April 21, 2005, summary judgment of the Rowen Circuit Court dismissing her claims for compensatory and punitive damages against Morehead State University and Roger Barker, the University's Director of Human Resources. Kegley contends that the defendants unlawfully terminated her from her employment as a custodian in violation of KRS 344.040, a section of the Kentucky Civil Rights Act;

retaliated against her in violation of KRS 344.280 and KRS 342.197 for having asserted her civil and workers' compensation rights; and caused her to suffer extreme emotional distress. Finding insufficient grounds for all of Kegley's contentions, we affirm the trial court's judgment.

This Court reviews summary judgments by considering, as did the trial court, whether "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. Although reasonable doubts must be resolved in her favor, the "party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

Construed favorably to Kegley, the record indicates that she began working as a building services technician for the University in 1990, and that through the years her duties regularly included such tasks as cleaning and supplying dormitory restrooms and unclogging commodes and showers. On September 10, 2002, Kegley suffered a workplace injury when she was replacing a container of caustic cleaner on an overhead

shelf and spilled some of the liquid on her face and in her left eye. She received prompt medical attention and fortunately suffered no loss of vision, but she claims that her eyes were rendered painfully sensitive to the chemical fumes produced by bleach and other common cleaning agents. The University notified its workers' compensation carrier of Kegley's accident and eventually Kegley was awarded temporary total disability benefits for the period from October 1, 2002, to October 24, 2002. Kegley filed a workers' compensation claim for permanent disability benefits in August 2003, and apparently that claim was settled in 2004 for $5,000.00.

In the meantime, Kegley's doctor released her to return to work by letter dated September 27, 2002. He noted that her eyes remained sensitive and recommended that she avoid working with chemicals; work in well ventilated areas; and, to prevent accidental splashes of chemicals into her eyes, that she wear safety goggles. Given these restrictions and in hopes that her unusual sensitivity would resolve, Kegley was permitted to return to a thirty-day period of light duty work, commencing October 7, 2002, during which she was excused from cleaning tasks involving chemicals. The University made it clear, however, that at the end of that period she would be expected to resume the full scope of her usual duties or face termination. On October 21, 2002, Kegley walked into a janitor's closet that

was full of drain cleaner fumes and, despite the fact that she was wearing safety goggles, immediately suffered a severe reaction. Her eyes reddened, teared, and became sore and itchy, and her left eye swelled shut. This incident, too, was reported to the University's workers' compensation carrier.

Before the end of her thirty-day light duty period, Kegley requested and was granted leave from her job pursuant to the Family Medical Leave Act. She remained away from work until that leave was exhausted in January 2003. In a January 20, 2003 letter, Kegley's eye doctor informed Kegley's supervisors that Kegley could return to work "but she should limit her exposure to irritant chemicals and fumes due to the sensitivity of her corneas. She may return to her normal duties as tolerated." Given this release and the exhaustion of Kegley's leave, on January 23, 2003, Appellee Barker notified Kegley through her workers' compensation attorney that the University expected her to resume her regular duties or be deemed to have abandoned her employment. Kegley returned to work on January 28, 2003, and was assigned to clean showers in one of the dorms. Kegley refused to use bleach to clean the showers, as was the University's standard practice, but instead used Triad, which Kegley claims is a disinfectant that does not produce irritating fumes.

That afternoon Kegley met with Barker in his office. Apparently he reiterated the University's position that if she was not able to resume her full duties her employment would be terminated and told her that he deemed goggles adequate protection against fumes. He also, according to Kegley, told her that she would need to waive any future claim against the University for her alleged eye condition, including her as yet unfiled workers' compensation claim. When Kegley refused to sign the waiver and asked Barker "Why are you discriminating against me?" Barker allegedly became upset and told her that she did not understand what discrimination was. The next day, when Kegley again refused to use bleach to clean the showers, the University terminated her employment. Kegley maintains that her discharge violated the Kentucky Civil Rights Act's provisions prohibiting discrimination and retaliation, as well as the Workers' Compensation Act's provision prohibiting retaliation. She also asserts an extreme emotional distress claim against the University and Barker.

Initially, Kegley contends that even though her eye condition prevented her from using caustic cleaning chemicals, she could still perform all of her cleaning duties by substituting nonirritating cleaners. She maintains the University discriminated against her in violation of the Kentucky Civil Rights Act, when it failed to accommodate her

perceived disability by permitting her to make that substitution. KRS 344.040 provides in pertinent part that "[i]t is an unlawful practice for an employer: (1) . . . to discharge any individual, . . . because the person is a qualified individual with a disability." As Kegley notes, under this statute covered employers are obliged to make reasonable accommodations to retain employees with qualifying disabilities. *Noel v. Elk Brand Manufacturing Company,* 53 S.W.3d 95 (Ky. 2000). We agree with the University, however, that Kegley is not entitled to the protections of the Act because she is not disabled.

As our Supreme Court recently reiterated, the Kentucky Civil Rights Act was modeled after federal law (including particularly, for the purposes of this case, the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.),* and our courts interpret the Kentucky Act consistently with its federal counterpart. *Howard Baer, Inc. v. Schave,* 127 S.W.3d 589 (Ky. 2003). Under both statutes, "disability" is defined as

> (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
> (b) A record of such an impairment; or
> (c) Being regarded as having such an impairment.

42 U.S.C. § 12102(2); KRS 344.010(4). To be considered disabled under part (a) of this definition,

> an individual must initially prove that he or she has a physical or mental impairment. Yet having an impairment does not alone make one disabled for purposes of the Act. An individual claimant must also prove that the impairment limits a major life activity, and this limitation must be substantial.

Howard Baer, Inc. v. Schave, 127 S.W.3d at 592 (citations and internal quotation marks omitted). Kegley concedes that even if her eye condition could be deemed an impairment, it does not substantially limit any of her major life activities, and thus she is not actually disabled. She contends, however, that she is "disabled" for the purposes of the statute under part (c) of the definition because the University regarded her as disabled.

To be "regarded as" disabled a plaintiff must prove that

> (1) A covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or
> (2) A covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.

Howard Baer, Inc. v. Schave, 127 S.W.3d at 594. Kegley maintains that the University mistakenly believed that her non-limiting eye impairment substantially limited her ability to work and thus that it regarded her as disabled. To establish this claim, however, Kegley must "demonstrate that [the University] thought [she] was disabled and that [it] thought

that [her] disability would prevent [her] from performing a broad class of jobs," not just the particular job at issue. *Id.* (quoting from *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999)). Moreover, the United States Supreme Court has explained that an employer does not run afoul of the antidiscrimination laws when it "decide[s] that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job." *Sutton v. United Airlines, Inc.,* 527 U.S. at 490-91, 119 S.Ct. at 2150. Accordingly, "employers [are] at liberty to establish reasonable job standards that disqualify applicants who [can] not meet those standards." *Howard Baer, Inc. v. Schave,* 127 S.W.3d at 594.

We agree with the University that Kegley has failed to offer proof that the University regarded her eye condition as a substantial impairment that excluded her from a broad class of jobs. Even assuming that Kegley's age and work experience limited her to custodial type work, there are many such jobs that do not require the use of harsh chemicals. There is no evidence that the University considered her unfit for that broad class of jobs. Rather, the University's insistence that she be

able to work with its preferred custodial chemicals was no more than a reasonable job standard Kegley could not meet. It was reasonable not only because the University had a right to insist on those cleaners it thought best, but also because, as Kegley's October 21, 2002, encounter with the drain opener fumes demonstrates, occasional exposure to fumes was virtually unavoidable in Kegley's University position. The University could therefore reasonably insist that its custodial employees not be subject to potential injury any time such an exposure occurred. The trial court did not err, therefore, by dismissing Kegley's discrimination claim.

Against this result, Kegley argues that the University must have regarded her as disabled because it offered to "accommodate" her condition by providing her with goggles, as though it were attempting to comply with the disability statutes. As the United States District Court for the Western District of Kentucky has noted, however, the fact that an employer offers to accommodate one of its employees "does not necessarily mean [the employer] regarded her as having a substantially limiting impairment." *Summers v. Middleton and Reutlinger, P.S.C.,* 214 F. Supp. 2d 751, 754 (W.D.Ky. 2002). Otherwise, as the Court noted, employers would be unnecessarily inhibited from inquiring about employees' conditions and from attempting to relieve their situations. We are not persuaded

that the proffer of goggles in this case would permit a rational juror to find that the University regarded Kegley as disabled.

Kegley next contends that the University dismissed her in retaliation for complaining about what she believed was its disability discrimination and for her refusal to waive her workers' compensation rights. She bases these claims on her January 28, 2003, meeting with Barker when he allegedly sought her waiver, and she responded by accusing him of discrimination. A jury could find, she insists, that it was either her refusal to waive her workers' compensation rights or her accusation that prompted the University to dismiss her the next day.

As Kegley correctly notes KRS 342.197 and KRS 344.280 prohibit, respectively, retaliation "for filing and pursuing" a lawful claim for Workers' Compensation benefits, or for "oppos[ing] a practice declared unlawful by" the Civil Rights Act. To establish a claim for retaliation under either statute Kegley must first show that

> (1) she engaged in a protected activity,
> (2) she was disadvantaged by an act of her employer, and
> (3) there was a causal connection between the activity engaged in and the [defendant] employer's act.

Kentucky Department of Corrections v. McCullough, 123 S.W.3d 130, 134 (Ky. 2003) (civil rights). *See also First Property Management v. Zarebidaki,* 867 S.W.2d 185 (Ky. 1993) (workers'

compensation). To establish a causal connection, the claimant must prove, either directly or indirectly, that the protected activity "was a substantial and motivating factor but for which the employee would not have been discharged." *First Property Management v. Zarebidaki,* 867 S.W.2d at 188 (citation and internal quotation marks omitted). As the United States Supreme Court has noted, moreover, "[e]mployers need not suspend previously planned [actions] upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark County School District v. Breeden,* 532 U.S. 268, 272, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001).

Here, even assuming that Kegley has offered proof of protected acts under both statutes during her January 28, 2003 meeting with Barker, she has failed to offer proof that her discharge resulted from those acts. The University had decided long before that meeting (in October 2002, prior to Kegley's leave of absence) to discharge Kegley if she was unable to resume her duties without restriction. Kegley has offered no evidence that the University ever deviated from that position, so her eventual termination under those very circumstances is "no evidence whatever" that her discharge resulted from her

alleged refusal to waive her workers' compensation claim or her alleged protest against disability discrimination.

Finally, Kegley contends that by discharging her, the University inflicted severe emotional distress. As she notes, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 788 (Ky. 2004) (quoting from the *Restatement (Second) of Torts* § 46(1)). To be entitled to recovery, a claimant must establish each of the following elements:

> 1) the wrongdoer's conduct must be intentional or reckless;
> 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
> 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
> 4) the emotional distress must be severe.

Id. at 788 (citation omitted).

Kegley has not proffered sufficient evidence to meet this burden. Although we do not doubt that Kegley found the loss of her job distressing, as we have explained, her termination was not wrongful and so cannot be deemed either outrageous or intolerable. Kegley, moreover, has offered no proof of emotional distress beyond that ordinarily associated

with the loss of a job. Even the distress inflicted in the case of a wrongful termination has been found insufficient to sustain an intentional infliction of emotional distress claim. *Id.; Bednarek v. Local Union,* 780 S.W.2d 630 (Ky. App. 1989). The trial court did not err, therefore, by dismissing Kegley's severe emotional distress claim.

In sum, the University neither discriminated against Kegley, who is not disabled, nor retaliated against her for pursuing workers' compensation benefits or for asserting her right to be treated in a non-discriminatory manner. Instead, it lawfully discharged her when she could no longer safely perform all of her duties. Although Kegley's accident was unfortunate, the University's eventual termination decision was not unreasonable and certainly did not amount to an outrageous infliction of emotional distress. Accordingly, we affirm the April 21, 2005, summary judgment of the Rowan Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andrew J. Ruzicho
Lexington, Kentucky

BRIEF FOR APPELLEES:

Kevin G. Henry
Andrew DeSimone
Sturgill, Turner, Barker & Moloney, PLLC
Lexington, Kentucky