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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001860-MR

BONNIE JEAN RIGDON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE A. WILSON, JUDGE
ACTION NO. 03-CI-00677

DOLLAR GENERAL CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

HENRY, SENIOR JUDGE: Bonnie Jean Rigdon appeals from the Warren Circuit Court's entry of a directed verdict in favor of Dollar General Corporation as to her Kentucky Revised Statutes (KRS) Chapter 344 discrimination and retaliation claims. She also raises a number of evidentiary issues in conjunction with her appeal. Upon review, we affirm.

[1] Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes ("KRS") 21.580.

BACKGROUND

Rigdon was employed by Dollar General from November 23, 1993 to August 12, 2002. Rigdon began working for Dollar General as a sales clerk, but over the next two years she was promoted to assistant manager and then manager of Dollar General Store No. 2120 in Bowling Green, Kentucky. As store manager, Rigdon was responsible for hiring decisions, stocking, running cash registers, supervising employees, deposits, inventories, and assisting other stores. Barbara Sosh was the district manager for the district that included Rigdon's store, and was Rigdon's direct supervisor from July 2002 until August 12, 2002. David Neale held the district manager position before Sosh. Rigdon apparently had a history of problems and confrontations with Neale and had been written up by him on a number of occasions for offenses ranging from poor control of payroll expenses to smoking on the sales floor.

On August 8, 2002, Sosh and Rosa Browning, another Dollar General store manager, were working in Store 2120 transferring inventory when Rigdon offered to drive the three of them to lunch in her truck. Later that day, Sosh reported to Dollar General Field Employee Relations Coach Sharon Hager that when she and Browning were stepping into Rigdon's truck, Rigdon made the statement, "Watch out. Don't step on my gun." Sosh also reported that both she and Browning saw the gun lying on

the floor in the back of the truck. Dollar General has a company policy that prohibits its employees from bringing weapons onto Dollar General property, including in a vehicle, a policy of which Rigdon was aware. Hager asked Sosh to provide statements from both she and Browning as to what had occurred. After reviewing these statements, Hager concluded that terminating Rigdon's employment was the appropriate action and instructed Sosh to do so. Accordingly, on August 12, 2002, Sosh traveled to Store 2120, with Neale - who was now the manager of another district – serving as a witness, to fire Rigdon.

On May 9, 2003, Rigdon filed suit against Dollar General in the Warren Circuit Court alleging that her termination was the result of discrimination and retaliation for complaints she had previously made about Neale, both of which were violations of KRS Chapter 344 - the Kentucky Civil Rights Act ("KCRA"). On January 14, 2005, Dollar General filed a motion for summary judgment on the grounds that Rigdon could not establish a *prima facie* case of gender discrimination, age discrimination, or retaliatory discharge. Dollar General further contended that, even if Rigdon could show a *prima facie* case as to any of her claims, it would still be entitled to summary judgment because she could not demonstrate that the stated reason for her termination – having a handgun in her vehicle - was pretextual. On March 23, 2005, the trial court

entered an order overruling Dollar General's motion, and the case proceeded to trial.

On March 30, 2005, following the presentation of Rigdon's evidence, the court entered an oral ruling granting Dollar General's motions for directed verdict as to both of Rigdon's claims. On April 11, 2005, the trial court entered an order granting Dollar General's motion for directed verdict pursuant to Kentucky Rules of Civil Procedure (CR) 50.01 and setting forth a final judgment dismissing Rigdon's action. Rigdon's subsequent motion to set aside was rejected in an order entered on August 22, 2005. This appeal followed.

STANDARD OF REVIEW

"The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ." Gibbs v. Wickersham, 133 S.W.3d 494, 495 (Ky.App. 2004). "Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts." Id. "A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made." Id. "Upon such motion, the court may not consider the credibility of evidence

or the weight it should be given, this being a function reserved for the trier of fact." Id.

With this said, however, "[w]hile it is the jury's province to weigh evidence, the court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture." Id. at 496. "The trial court must favor the party against whom [a directed verdict] motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. In such a case, a directed verdict should be given. Otherwise, the motion should be denied." Id. (Internal quotations omitted). With these standards in mind, we turn to Rigdon's arguments.

ARGUMENT

A. The Trial Court's Decision to Grant Dollar General's Motion for Directed Verdict as to Rigdon's Disparate Treatment Gender Discrimination Claim Was Not Erroneous.

Rigdon's first claim against Dollar General is that her termination was motivated by disparate treatment discrimination - specifically gender discrimination – which is

prohibited by KRS 344.040. Of particular concern to Rigdon's claim is KRS 344.040(1), which provides – in relevant part – that "[i]t is an unlawful practice for an employer ... [t]o 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 . . . sex."

This category of discrimination occurs when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977). "Absent direct evidence of discrimination, [Rigdon] must satisfy the burden-shifting test of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)" in order to prevail on her claim. Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492, 495 (Ky. 2005). "The reasoning behind the McDonnell Douglas burden shifting approach is to allow a victim of discrimination to establish a case through inferential and circumstantial proof." Id. With this said, however, "[w]hile intentional discrimination may be inferred from circumstantial evidence, there must be cold hard facts presented from which the inference can be drawn that race or sex was a determining factor." Kentucky Center for the Arts v. Handley, 827 S.W.2d

697, 700-01 (Ky.App. 1991). As Rigdon notes in her brief, her claim of disparate treatment gender discrimination is supported solely by circumstantial evidence. The McDonnell Douglas framework is therefore relevant to our review.

In conjunction with this framework, Rigdon bears the initial burden of establishing a *prima facie* case of gender discrimination due to disparate treatment pursuant to KRS 344.040. See McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824; Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 797 (Ky. 2004); Jefferson County v. Zaring, 91 S.W.3d 583, 590 (Ky. 2002). To do so, she must satisfy a four-prong test first set forth by the United States Supreme Court in McDonnell Douglas, supra, by showing that "(1) she is a member of a protected group; (2) she was subjected to an adverse employment decision; (3) she was qualified for the position; and (4) she was replaced by a person outside the protected class, or similarly situated non-protected employees were treated more favorably." Peltier v. U.S., 388 F.3d 984, 987 (6th Cir. 2004).[2]

[2] Kentucky courts have historically interpreted the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws. See Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492, 495 (Ky. 2005); Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 802 (Ky. 2004). Accordingly, we look to federal, as well as state, law for authority in considering this appeal. See Jefferson County v. Zaring, 91 S.W.3d 583, 586 (Ky. 2002); Kentucky Commission on Human Rights v. Com., Dept. of Justice, 586 S.W.2d 270, 271 (Ky.App. 1979).

The parties do not dispute that Rigdon satisfies prongs (1)-(3) of the test, which leaves only prong (4) in issue. Moreover, as Rigdon was replaced as manager of Store 2120 by another woman, the only question remaining for our consideration is whether similarly situated male employees were treated more favorably than her. Such a comparison can be made only if the male employees that she has identified are "similarly situated in all respects" to her. Gragg v. Somerset Tech. College, 373 F.3d 763, 768 (6th Cir. 2004); Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992).

In support of her position that similarly situated male employees were treated differently than her, Rigdon points to the testimony of Phil Ausbrooks, a male manager of another Dollar General store in Auburn, Kentucky. Ausbrooks testified that, although his store experienced "shrinkage," or inventory loss, he was not written up for it or terminated. Rigdon, on the other hand, was written up for the "shrinkage" that occurred at Store 2120. Rigdon contends that - because Ausbrooks dealt with the same supervisor as her (David Neale), was subject to the same company standards as to "shrinkage," and engaged in the "same conduct of being a Dollar General store manager" – he was a similarly situated male employee, and she consequently established a *prima facie* case of disparate treatment gender discrimination. We disagree.

Had Rigdon been terminated for purported violations of Dollar General's "shrinkage" policy, her claim here would arguably have merit.[3] Instead, the conduct in issue used by Dollar General as the justification for Rigdon's firing was her alleged possession of a handgun on company property. The Sixth Circuit Court of Appeals has held that employees to whom a plaintiff compares herself in a disparate treatment case such as this must "have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Clayton v. Meijer, Inc., 281 F.3d 605, 611 (6th Cir. 2002), quoting Mitchell, 964 F.2d at 583. Put another way, the plaintiff must establish that the other employees' actions were of "comparable seriousness" or of "the same magnitude" to the infraction leading to the plaintiff's termination. See Mitchell, 964 F.2d at 583; see also Reynolds v. Humko Products, 756 F.2d 469, 472 (6th Cir. 1985); Lanear v. Safeway Grocery, 843 F.2d 298, 301 (8th Cir. 1988). Moreover, the other employees must have received better treatment thereafter. See Mitchell, 964 F.2d at 582-83.

Accordingly, the comparison of Rigdon to other Dollar General employees in her position who violated the company's

[3] We say "arguably" because the record reflects that Rigdon's store had "shrinkage" in excess of 3%, while Ausbrooks testified that he did not receive a write-up because his "shrinkage" was "minute" in comparison.

handgun policy is of primary concern to her case. There is nothing in the record to indicate that Ausbrooks was ever accused of having a handgun in his possession on company property and subsequently disciplined – or not disciplined – because of it. Given that such possession is the conduct in issue here, we consequently cannot say that Ausbrooks is "similarly situated" to Rigdon for purposes of her suit.

As Dollar General further notes, Rigdon and former district manager Donna Butler testified that they were unaware of any male employee who had allegedly violated the company's handgun policy without being subsequently terminated. To counter this, Rigdon points out that Sharon Hager testified that she recalled one or two instances in which a Dollar General employee possessed a handgun on company property without her giving a recommendation that they be terminated; however, in both cases, the employees either had not received a copy of the company's policy in issue or had protective orders allowing for such possession. Here, Rigdon testified that she was aware of Dollar General's policy and that she did not have a protective order. Moreover, the gender of the individuals mentioned by Hager was never revealed at trial, nor their position with the company or who their supervisors were. It was therefore never shown that these employees were "similarly situated" to Rigdon for purposes of establishing a case of disparate treatment

gender discrimination. Without the production of such evidence, Rigdon's claim must necessarily fail.

Consequently, as Rigdon has failed to establish that similarly situated male employees of Dollar General were treated more favorably than her under prong (4) of the McDonnell Douglas test as to the conduct in question in this case, we must conclude that she failed to meet her burden of showing a *prima facie* case that her termination was the result of gender discrimination by disparate treatment under KRS 344.040 The trial court's entry of a directed verdict as to this claim was therefore appropriate and we find no error.

B. The Trial Court's Decision to Grant Dollar General's Motion for Directed Verdict as to Rigdon's Retaliation Claim Was Not Erroneous.

Rigdon next argues that the trial court erred in granting Dollar General's motion for directed verdict as to her KRS 344.280 retaliation claim against the company. That statute makes it unlawful for one or more persons "[t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter." KRS 344.280(1). Because Rigdon failed to demonstrate a *prima facie* case of retaliation, we find

that entry of a directed verdict as to the claim was appropriate.

In order to establish a *prima facie* case of retaliation, a plaintiff is required to show (1) that she engaged in an activity protected by the Act; (2) that the exercise of her civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to her; and (4) that there was a causal connection between the protected activity and the adverse employment action. See Brooks, 132 S.W.3d at 803. In cases where there is no direct evidence of a causal connection, "the causal connection of a *prima facie* case of retaliation must be established through circumstantial evidence." Id. at 804. "Circumstantial evidence of a causal connection is evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." Id. (Internal quotations omitted). "In most cases, this requires proof that (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action." Id. It is with these standards in mind that we address Rigdon's claim.

At trial, Rigdon testified about conversations that she had previously had with Dollar General higher-ups Fred Wine (in August 2000), Jimmy Lemmons (in February 2001), and Bob Warner (in March 2002) about her problems with Neale. On direct examination, Rigdon indicated that she was complaining about "female discrimination" when she spoke to these individuals; however, on cross-examination, she could recall no instances from the conversations in which she gave direct, specific complaints to these individuals that Neale or anyone else at Dollar General was engaging in sexual discrimination towards her. Instead, she testified only in vague generalities about expressing her dissatisfaction with Neale's conduct towards her. "An employee may not invoke the protections of the Act by making a vague charge of discrimination." Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1313 (6th Cir. 1989). From the testimony in the record, we simply do not believe that the conversations here have been sufficiently shown to be "protected activity" under KRS Chapter 344.

Even if we were to assume, however, that Ridgon's complaints to these individuals did constitute "protected activity," we do not believe that she has demonstrated a "causal connection" between the complaints and her termination. None of these individuals was involved in the decision to fire Rigdon, and their conversations with her took place – in all instances –

five months or more before her firing. Accordingly, we do not believe that a "close temporal relationship" between Rigdon's complaints to these individuals and her termination has been shown in this case, particularly given that Rigdon introduced no evidence that she was harassed or treated differently by her supervisors at Dollar General following her March 2002 discussion with Bob Warner. We are therefore disinclined to conclude that the trial court erred in holding that these complaints, in and of themselves, do not constitute evidence sufficient to establish a *prima facie* case of retaliation.

However, Rigdon also cites to a conversation that she had with district manager Barbara Sosh on August 8, 2002 – only four days before her termination - contending that she also complained about gender discrimination towards her by Neale on this occasion. Again, however, we simply do not find this to be the case. Rigdon's testimony about her "very brief" discussion with Sosh simply does not reflect that the issue of gender discrimination was ever raised in a direct and specific manner. Instead it appears as if the purpose of the conversation was for Rigdon to advise Sosh that she had had previous problems with Neale – who was no longer her supervisor – in an effort to explain some of the write-ups in her file. Although Rigdon also testified that she told Sosh about her previous complaints about Neale during this conversation, she did not specifically

indicate whether or not she advised Sosh that her complaints were predicated on gender discrimination. We also note that Rigdon herself testified at trial that her last "complaint" about Neale was made to Bob Warner in March 2002.

Again, however, even assuming that Rigdon's conversation with Sosh could be considered "protected activity," we again fail to see that a "causal connection" between the activity and Rigdon's termination was shown. Although Field Employee Relations Coach Sharon Hager testified that she worked in partnership with Bosh in deciding to fire Rigdon, she specifically indicated that she "encouraged" and "instructed" Sosh to fire Rigdon after receiving the statements about the subject incident, an indication that she was the ultimate decision-maker responsible for Rigdon's termination. Hager further testified that she had no knowledge of the complaints previously made by Rigdon or her conversation with Sosh on the day of the incident, and that these events were not considered in her determination. Consequently, there is no evidence to support a "causal connection" between the alleged complaints and Hager's decision. We therefore conclude that the trial court did not err in entering a directed verdict as to this claim.

C. Rigdon's Claim That She Did Not Receive a "Level Playing Field" at Trial Is Without Merit.

We finally address a number of issues raised by Rigdon relating to her claim that she did not receive a "level playing field" at trial. Specifically, she complains that (1) she was not allowed to review David Neale's personnel file; (2) the trial court would not allow testimony from Sharon Hager as to a phone call purportedly made by Rigdon to Dollar General's Employer Response Center on March 25, 2002; (3) the trial court refused to admit into evidence the deed to Store 2120's parking lot; (4) the trial court made inappropriate comments before the jury; and (5) the trial court abused its discretion by not allowing testimony from Sara Reece and Donna Butler. We reject all of these claims as meritless for the reasons set forth below.

1. David Neale's Personnel File

Rigdon first complains that it was an abuse of discretion for the trial court to prohibit her from reviewing David Neale's personnel file because of the possibility that the file might contain complaints that she had made about him. Rigdon requested the file in discovery, but Dollar General objected. Rigdon subsequently took no action with respect to this objection until February 16, 2005, when she filed a motion

to compel. However, the trial court denied the motion as untimely.

Rigdon raised the issue again at trial, and the court this time decided to review the personnel file – which counsel for Dollar General had in her possession – to determine if any possibly relevant information was contained therein. After conducting this review *in camera*, the court concluded that the file did not contain anything relevant to the issues in this case – including any documents reflecting any complaints made by Rigdon – and denied her request to review the file. Rigdon has provided us with nothing in terms of legal authority to suggest that the trial court abused its discretion in acting and in ruling in this manner, and we accordingly find no error in its determination.

2. The Phone Call to the "Employer Response Center"

Rigdon next complains that the trial court erred in refusing to allow her to further question Sharon Hager as to her testimony that Rigdon called Dollar General's Employer Response Center on March 25, 2002 at 9:01 a.m. from Store 2120 and as to a document memorializing that call. Rigdon contends that such questions would be "directly on point to determine or substantiate the complaints [Rigdon] made to corporate Dollar General about David Neale's disparaging treatment of her."

However, as Dollar General points out, it was demonstrated at trial that Hager did not work at the Center and had no personal knowledge of the call or of the document. Moreover, it was shown that the call pertained to Rigdon seeking advice as to how to handle a customer issue and did not raise a claim of discrimination. Indeed, counsel for Rigdon noted during a bench conference on the matter that the call simply reflected that Rigdon was "doing a good job." A trial court's ruling on evidentiary matters is reviewed under an "abuse of discretion" standard. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Given the facts set forth here, we cannot say that the trial court abused its discretion in prohibiting further testimony as to this issue.

3. The Parking Lot Deed

Rigdon next complains that the trial court erred in refusing to allow her to introduce the deed to Store 2120's parking lot into evidence, given Sharon Hager's testimony that finding a gun in Rigdon's truck would have been a "non-issue" if Dollar General did not own the parking lot. As Dollar General

points out, however, it stipulated early in the trial that, although it did not own the parking lot in question, it did lease it in conjunction with its leasing of the store. Dollar General further notes that Hager's testimony – taken as a whole – actually reflects that leased premises, including parking lots, are included in the definition of "Dollar General property" under the company's weapons policy. Given that the fact of ownership - or lack thereof - was stipulated, we again cannot conclude that the trial court abused its discretion in ruling in this fashion.

4. The Trial Court's Comments Before the Jury

The next complaint raised by Rigdon as to her contention that she was subjected to a "non-level playing field" is a vague reference to a number of purportedly "inappropriate" comments made by the trial court before the jury that she alleges "hurt" her in the jury's eyes. After reviewing the comments in question, however, we fail to see how they were inappropriate. Moreover – and more importantly - as the case was subjected to a directed verdict after the close of Rigdon's evidence, we fail to see how we can possibly find that any such comments somehow prejudiced her in the eyes of the jury. Consequently, we must again conclude that no reversible error is present here.

5. The Trial Court's Exclusion of Testimony from Sara Reece and Donna Butler

The final complaint raised by Rigdon is that the trial court abused its discretion in refusing to allow certain testimony from Donna Butler and Sara Reece as to Neale's prior treatment of Rigdon to be presented to the jury. After reviewing the arguments of the parties, we do not believe that the trial court abused its discretion in deciding not to admit the testimony in question. We also do not find that the trial judge unnecessarily "rushed" Butler in her avowal testimony.

CONCLUSION

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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