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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001768-MR

DORIS MCCLURE — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN BATES, JUDGE
ACTION NO. 05-CI-00328

DOLLAR GENERAL STORES, LTD. — APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: Doris McClure appeals the August 3, 2007, order of the Grant Circuit Court granting summary judgment in favor of Dollar

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

General Stores, Ltd. (DGS) in McClure's lawsuit against DGS for unlawful termination. We affirm in part and reverse and remand in part.

McClure was an employee of DGS from January 1992 until May 2005. During the last several years of her employment with DGS, McClure was the store manager of the DGS located in Dry Ridge, Kentucky. From April 9, 2005, through May 13, 2005, McClure was on a special assignment where she rotated between fifteen stores and conducted inventory. During this time, Debra Burden was in charge of the Dry Ridge store. On May 10, 2005, money was missing from the deposit of the Dry Ridge store. McClure stopped by the store to assist DGS employees in finding the money. The money was not found.

On May13, 2005, McClure was terminated by District Manager Mike Pennington for being listed as the store manager at the time the money was lost. McClure contacted the DGS corporate office and was informed that she had, in fact, been terminated and an investigation was pending in her personnel file for the missing money. As its reason for McClure's termination, DGS contends that McClure violated store policy by giving the safe combination to other DGS employees and by permitting non-employees to perform employee tasks.

On July 15, 2005, McClure filed a complaint against DGS in the Grant Circuit Court. In her complaint, McClure alleged age discrimination, gender discrimination, intentional infliction of emotional distress, negligent supervision/training, slander per se and vicarious liability of DGS for the acts of its employees. McClure also sought attorney fees. DGS moved for summary

judgment. After discovery and an attempt at mediation, the trial court granted DGS's motion for summary judgment. The trial court order read in part:

> [w]ith regard to Plaintiff's claims of gender discrimination, age discrimination, outrage or intentional infliction of distress, defamation, and negligent supervision, the Court finds that there is no genuine issue as to any material fact and Defendant is entitled to judgment as a matter of law.

This appeal followed.

On appeal, McClure argues that the grant of summary judgment should be reversed and remanded so that a jury can resolve all factual disputes. By McClure's own admission, her claims of intentional infliction of emotional distress and negligent supervision were waived at the trial court level and have been voluntarily withdrawn at this level. Accordingly, those claims will not be addressed and this Court will review only the claims of age discrimination, gender discrimination and defamation.

The standard of review of a trial court's grant of 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co*., 814 S.W.2d 273, 276 (Ky.1991). An appellate court must review the record in a light most favorable to the party

opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky.1991). "Because summary judgments involve no fact finding, this Court reviews them de novo, in the sense that we owe no deference to the conclusions of the trial court." *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky.App. 2006) (citation omitted).

In order to establish a prima facie case of defamation, a plaintiff must prove defamatory language about the plaintiff which is published and which causes injury to reputation. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004) (citation omitted). "The notion of "publication" is a term of art, and defamatory language is "published" when it is intentionally or negligently communicated to someone other than the party defamed." *Id.* at 794.

McClure alleges that she was defamed by Pennington's statements to other DGS employees regarding the missing money and by the investigation performed by the corporate office. She claims that these acts had a disparate impact on her reputation in the small community where she worked. Although McClure refers to these instances in which she believes she was defamed, she offers no evidentiary citations in her brief that would support a judgment in her favor. Issues of fact cannot be created by making conclusory statements which are unsupported by any citation to specific evidence. Accordingly, the summary judgment with regard to her defamation claim is affirmed.

Because McClure's claim of gender discrimination was withdrawn during oral argument before this Court, we affirm the summary judgment in regard to that claim and next turn our attention to her claim of age discrimination.

> It is an unlawful practice for an employer: 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, . . .

KRS[2] 344.040(1).

In the absence of direct evidence of discriminatory intent, a plaintiff alleging age discrimination 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). That analysis places the burden on the plaintiff to establish a prima facie case of discrimination 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); *see also*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In age discrimination cases, the fourth element is modified to require replacement by a significantly younger person, even if they are within the protected class. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 496 (Ky. 2005). *See also Turner v. Pendennis Club*, 19 S.W.3d 117, 120-21 (Ky.App. 2000) (citing *O'Connor v.*

[2] Kentucky Revised Statutes.

Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)) (supporting the supposition that the fourth element of an age discrimination case does not require replacement by a person outside the protected class, but by a significantly younger person).[3]

Once a plaintiff makes a prima facie case under this test, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the termination. *McDonnell,* 411 U.S. at 802. If the employer articulates such a reason, the burden then shifts back to the plaintiff to show that the explanation is merely pretextual. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

In support of her claim for age discrimination, McClure offers the testimony of former DGS employee Debra Burden that Pennington had commented on McClure's age and her necessity to retire because of it. During her deposition, Burden stated that Pennington "made the comment, he said, well, at her age, she needed to retire anyway, because she was 67 years old." (Burden Dep. 19). Later in her deposition, Burden stated "[h]e just made the comment that, you know, at 67, she needed to retire and stuff." (Burden Dep. 39). An affidavit of Burden also states "I heard Pennington state that [McClure] was getting too old to work for Dollar General and the she needed to retire because of her age."[4] (Burden

[3] DGS argues that *Turner* does not apply to the case *sub judice*, because *Turner* was a case involving pay discrimination. We do not agree. Under KRS 344.040(1), employment discrimination is equally unlawful whether it is the basis of discharge or disparate compensation.

[4] DGS calls attention to the fact that the testimony in the affidavit and the testimony at deposition are not identical. For the purposes of summary judgment we do not believe the minor

Aff. 2; *see also* R. at 293). It is also worth noting that similar testimony was offered by DGS employee Betty Varner, who testified that Pennington "said she was at the age . . . that she needed to retire." (Varner Dep. 17-18). An affidavit of Varner's also states "I heard Pennington state that [McClure] was getting too old to work for Dollar General and that she needed to retire because of her age." (Varner Aff. 2; *see also* R. at 295).

DGS argues that the statements of Pennington, as testified to by Burden and Varner, are inadmissible hearsay. We do not agree.

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence to prove the truth of the matter asserted*.

KRE[5] 801(c) (emphasis added). McClure does not offer Pennington's statements to prove that she was at an age which would necessitate her retirement. Rather, the statements are offered to demonstrate the state of mind of Pennington regarding age at the time she was terminated. KRE 803(3). Therefore, any testimony as to comments made by Pennington in regard to her age are admissible and serve as sufficient direct evidence to create an issue of material fact as to McClure's age discrimination claim. We believe these statements could be considered by a jury to be the "cold hard facts" from which an inference of age discrimination can be drawn. *Handley*, 827 S.W.2d at 700.

McClure is also successful in establishing a prima facie case of age discrimination by showing that: 1) she is of the protected group, over 40 years of

discrepancies in the testimony to be relevant.

[5] Kentucky Rules of Evidence.

age; 2) she was subjected to an adverse employment decision; 3) she was qualified for her position; and 4) she was replaced by someone significantly younger.

DGS further argues that if McClure is successful in establishing a prima facie case of age discrimination, her claim fails because she cannot show that DGS's reasons for her termination are in fact pretext. We do not agree.

> [A] plaintiff may establish that the proffered reason was a mere pretext by showing that 1) the stated reason had no basis in fact; 2) the stated reason was not the actual reason; and 3) that the stated reason was insufficient to explain the defendant's action.

Logan v. Denny's, Inc., 259 F.3d 558, 574 (C.A.6 (Ohio) 2001)[6]. DGS has articulated two legitimate, nondiscriminatory reasons for terminating McClure: (1) giving out the safe combination and (2) allowing non-employees to perform employee tasks. Both acts were violations of DGS policy, acknowledged by McClure and thus preclude her from establishing pretext under the first and third methods set out in *Logan*. However, the evidence introduced by McClure satisfies the second method set out in *Logan*, i.e., that DGS's stated reasons are not its actual reasons. Therefore, for the purposes of the summary judgment motion, McClure has made a sufficient showing which would allow a jury to reasonably conclude that the reasons for her termination were mere pretext. When construing the facts in a manner most favorable to McClure, it does not appear to be impossible for her to produce evidence at trial supporting a judgment in her favor.

[6] While we take notice that the 6th Circuit Court of Appeals used the word "and" between the second and third ways to show pretext, we are under the impression that the Court intended to use the word "or." *See Wheeler v. McKinley Enterprises*, 937 F.2d 1158 (C.A.6 (Tenn.) 1991).

Accordingly, the summary judgment with respect to the age discrimination claim is reversed and remanded.

In her appeal before this Court, McClure makes three final arguments: (1) that she exercised reasonable diligence to secure substantially equivalent employment, (2) that she is entitled to punitive damages, and (3) that she is entitled to damages for pain and suffering. These issues were not addressed by the trial court in its order granting summary judgment and therefore are not properly before us. We will note, however, that punitive damages are not available for a claim brought under the Kentucky Civil Rights Act, which is the source of McClure's discrimination claim. *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003). Therefore, because McClure's common law claims were withdrawn and only the discrimination claims remain, punitive damages are not a remedy available to her. McClure will have an opportunity to address the remaining two issues upon remand to the trial court and, assuming proper preservation, will be entitled to appeal them if necessary.

For the foregoing reasons, the August 3, 2007, order of the Grant Circuit Court is affirmed in part and reversed and remanded in part for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Shane C. Sidebottom
Covington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Jonathan O. Harris
Nashville, Tennessee