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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002081-MR

EDWARD CATRON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CI-00028

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; WHITE,[1] SENIOR JUDGE.

WHITE, SENIOR JUDGE: Edward Catron, a former candidate for an environmental inspector position at the Lexington-Fayette Urban County Government (LFUCG), Department of Environmental and Emergency Management (DEEM), appeals from a Fayette Circuit Court summary judgment in

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

favor of LFUCG. The trial court based its decision upon Catron's failure to prove that he was disabled or that LFUCG regarded him as disabled. The trial court also concluded that Catron was unable to perform the duties required of an environmental inspector due to his heavy lifting restriction. On appeal, Catron claims that the summary judgment was erroneous because: (1) LFUCG perceived that Catron was disabled; (2) Questions of fact existed concerning whether heavy lifting was an essential function of the position; and (3) Catron was physically capable of performing the job. After a careful review of the record, we affirm the Fayette Circuit Court's summary judgment.

From 1994-2005, Catron was employed by LFUCG as a firefighter. During his service, Catron suffered a series of back injuries. His final back injury occurred in 2005 when Catron bent over to pull a fire hose. Following this injury, Catron had three medical examinations to assess his condition. In July 2005, Catron's treating physician determined that Catron had reached maximum medical improvement. The physician assessed a permanent restriction of lifting no greater than 10-15 lbs. An independent medical assessment concurred with the treating physician's opinion. A third medical examination in 2005 found that Catron was unable to significantly bend over and that he was only able to perform sedentary functions. Based upon his injuries and prognosis, Catron applied for and received disability retirement from LFUCG.

Three months later, Catron applied for a position as an environmental inspector with the LFUCG Division of Environmental and Emergency

Management. The following excerpt from the job listing describes the position's duties:

> Duties include performing inspections and investigating complaints related to Fayette County ordinances; conducting on-site operational inspections of under/above ground storage tanks for removal and installation and of the facilities which have under/above ground storage tanks; conferring with property owners, contractors, and others to discuss violations and possible sources of corrective action; and other related duties. . . .

The listing further stated that the position "requires physical strength and agility to allow considerable walking, carrying heavy equipment and working outside in various weather conditions."

Catron had two interviews for the environmental inspection position.[2] The first interview was conducted by DEEM employees Pat Dugger, Steve Jackson, and Shelly Bendall. In a sworn affidavit filed on September 8, 2008, Catron stated, "Ms. Dugger told me the job required heavy lifting and walking with 'booms' over your shoulders as well as manning the EOC as needed." Although Catron claims that he expressed concern that he would be unable to physically perform the job based upon his back injuries, the panel asked him to return for a second interview.

At the second interview, Catron alleges that he was told that the position involved teaching rather than field work. Dugger told Catron that they would like to offer him the position with the approval of the human resources

[2] The record contains conflicting information concerning whether Catron had two or three interviews with DEEM.

department following a review of Catron's medical records. Later Dugger called Catron and informed him that he would not be offered the environmental inspector position based upon the review of his medical records. Later, Dugger contacted Catron again to inform him of another position available with DEEM. Catron told Dugger that he did not wish to be considered for the position because it was funded by a federal grant and was subject to grant renewal each year.

On January 3, 2006, Catron filed a complaint against LFUCG, in the Fayette Circuit Court, claiming that he was denied the environmental inspector position based upon his disability. On October 6, 2008, the trial court granted summary judgment in favor of LFUCG. This appeal follows.

In order to establish a disability discrimination claim, a plaintiff must show: (1) a disability as that term is used in KRS 344.010; (2) that he was otherwise qualified to perform the job with or without reasonable accommodations; and (3) that he suffered an adverse employment decision due to the disability. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706-07 (Ky. App. 2004). LFUCG does not dispute that Catron was denied employment based upon his history of back injuries and lifting restrictions. Therefore, our inquiry focuses upon whether Catron was disabled, or perceived as disabled, and whether Catron was capable of performing the job with or without reasonable accommodation.

While the first prong requires plaintiffs to prove a disability, the definition of "disability" provided in KRS 344.010(4)(c) includes perceived

disabilities and allows plaintiffs to show that they experienced discrimination based upon a condition that the employer believed to cause impairment. KRS 344.010(4) defines a disability 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.** [Emphasis added.]

Despite asserting that he qualified as disabled in his claim, Catron later acknowledged that he would not likely qualify as disabled under the above statute. Although he now claims that he does have a disability, Catron nonetheless bases his claim on the premise that LFUCG regarded him as being disabled.

"As with actual impairments, the perceived impairment under the 'regarded as' prong must be one that, if real, would substantially limit a major life activity of an individual." *Hallahan*, 138 S.W.3d at 707. *See also Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 593 (Ky. 2003). This prong protects job applicants from being denied employment based upon "myths, fears, and stereotypes associated with disabilities." *Hallahan*, 138 S.W.3d at 708.

Although Catron was medically restricted from lifting weight in excess of 10-15 lbs., Catron failed to present evidence to show that the injury substantially inhibited his life functions. Evidence that a restriction inconvenienced Catron's daily life or made his daily activities more difficult is

insufficient. "[A]n individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term." *Id*. at 711, quoting *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198, 122 S.Ct. 681, 691, 151 L.Ed.2d 615 (2002).

United States courts and Kentucky courts have previously found work to be an activity of central importance. In order to prove that he was substantially limited in the major life activity of working or regarded as so limited, Catron must have shown that he is:

> significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills and abilities. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.

McKay v. Toyota Motor Mfg, U.S.A., Inc., 110 F.3d 369, 371 (6th Cir. 1997), quoting 29 CFR § 1630.2(j)(3)(i).

Catron failed to show that LFUCG believed that Catron's lifting restriction prevented him from performing a broad class of jobs. Instead, the record only reflects that LFUCG believed the lifting restriction to inhibit Catron's ability to perform the functions of an environmental inspector which specifically included heavy lifting in, at times, emergency situations.

Further, we are unconvinced that Catron could have performed this job with or without reasonable accommodation. Catron claims environmental

inspectors were rarely required to lift heavy objects and that a factual dispute existed as to whether heavy lifting was an essential function of the position.

The job listing, however, clearly stated that heavy lifting was a requirement of the position. In his deposition, Stephen Jackson, the environmental manager, described the lifting requirement: "You're not gonna lift a manhole cover every single day, but you may be required to do that everyday." The position requires inspectors to lift heavy objects such as manhole covers and booms in creeks in emergency situations with little or no notice. Lack of notice may prevent inspectors from receiving assistance in lifting.

Based upon Catron's failure to prove that LFUCG regarded him as disabled, as well as his failure to show that he could perform the job with or without reasonable accommodation, we affirm the Fayette Circuit Court's summary judgment.

We must note that our decision was not based upon LFUCG's claim that the fact that Catron was subsequently offered a different position proves that LFUCG did not regard Catron as disabled or unable to perform a broad class of positions. Catron was not offered the second position as an alternative to the environmental inspector position. Catron was offered the job only after he was denied the inspector position. Our inquiry focused upon the facts at the time of the denial of employment rather than subsequent remedial measures.

Accordingly, we affirm the Fayette Circuit Court's summary judgment in favor of LFUCG.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward E. Dove
Lexington, Kentucky

BRIEF FOR APPELLEE:

Keith Moorman
Lexington, Kentucky