

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000586-MR

LOUISE HAMMOND

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 07-CI-006177

NORTON HEALTHCARE, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Louise R. Hammond, appeals from an opinion and order of the Jefferson Circuit Court granting summary judgment in favor of Appellee, Norton Healthcare, Inc., and dismissing her claim of disability

¹ Senior Judge Joseph E. Lambert 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.

discrimination. For the reasons stated herein, we conclude that summary judgment was not proper and, therefore, reverse and remand for further proceedings.

Hammond is a registered nurse who began working for Norton in 1978. She retired for one year in 1995, but returned to Norton in 1996. In July 2005, Hammond was assigned to the 7:00 pm to 7:00 am shift in the oncology unit of the hospital. Hammond's duties during her shift included completing rounds on nine patients to check each patient's status, check breathing by counting respirations, administer medications, and provide any other necessary treatments. Hammond was required to perform at least one assessment per patient during her shift and document the results in the hospital's computer. The results were utilized by nurses and doctors on subsequent shifts to monitor patient health status.

On July 12, 2005, a patient allegedly complained to Kim Forsythe, a Clinical Nurse Manager, that Hammond had not completed an assessment on her the previous night. The patient reported that Hammond rolled up to the doorway of her room on a rolling desk chair, but never physically entered the room. However, when Forsythe reviewed the patient's file she found that Hammond had entered results of a complete assessment, including a notation that she had listened to the patient's lung and bowel sounds.

The following day, Hammond met with Forsythe, as well as another nursing director, Pam Missi, and an employee relations manager, Lauren Berger. Although Hammond was informed of the patient's complaint, she was never told the identity of the patient or shown the assessment record. In fact, Hammond states that the

majority of the meeting concerned her use of an office rolling chair to move about the hallways because severe arthritis in her knees made it difficult to walk. A July 14, 2005, Counseling Record, a form of written discipline, reflected that as a result of the patient's complaint, Hammond received "written counseling" and was placed on administrative leave for two days. Further, the Counseling Record documented the "Specific Improvement Goals/Expected Outcome" as:

1. Assessment on patients must be thoroughly conducted and documented.
2. Interactions with patients and care delivered to patients must consist of Louise walking into the patient's room to do so, and not in a rolling chair.

At the end of her administrative leave, Hammond again met with Forsythe, Missi and Berger. At that time, she was presented with the July 14th Counseling Record, but it had been modified to reflect that upon "further investigation" Hammond was to be terminated. Hammond's termination was effective July 19, 2005.

On July 2, 2007, Hammond filed an action against Norton in the Jefferson Circuit Court alleging that her termination was the result of disability discrimination under Kentucky's Civil Rights Act, KRS Chapter 344. Hammond claimed that her disability, arthritis in her knees that substantially impacted her ability to walk, sit and stand, was the primary reason she was terminated. Norton thereafter filed a motion for summary judgment on the grounds that Hammond had not established a prima facie case of discrimination, and further that she could not

rebut Norton's legitimate non-discriminatory reason for her termination - the improper patient assessment and falsification of medical records.

On November 18, 2010, the trial court entered a fourteen-page opinion and order granting Norton's motion and dismissing Hammond's claims. The trial court found that although Hammond proved that she was a "qualified individual with a disability," she nevertheless failed to demonstrate that she was discharged solely because of that disability:

Mrs. Hammond contends that the sole reason for her termination is her disability and that this is evident from the fact that much of the discussion in the July 15, 2005, counseling session was about her use of the rolling chair. However, the counseling record presented to her makes it clear that the problem was not her issue of the rolling chair. Norton terminated Mrs. Hammond for failing to assess a patient properly and falsifying medical records by documenting that she had assessed certain physical conditions without actually touching or examining the patient. The Court is satisfied that Mrs. Hammond was not terminated solely due to her disability. Norton has offered a legitimate reason for its termination

Hammond's motion for reconsideration was denied and this appeal ensued.

Our standard of review on appeal of a 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 shall be granted "if 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.” Kentucky Rules of Civil Procedure (CR) 56.03.

The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* Finally, since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Hammond argues in this Court that the trial court erroneously granted summary judgment on the basis that her disability was not the “sole reason” for her termination, rather than utilizing a mixed-motive standard to uphold her claim. Norton responds that although the trial court properly found that Hammond’s termination was not because of her disability, it erred in finding that she was a qualified individual with a disability. Norton claims that Hammond’s arthritis did not rise to the level of a disability and further that she was not qualified to perform the required duties of her job.

The Kentucky Civil Rights Act (“KCRA”), KRS Chapter 344, provides that it is unlawful “to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . [when] the person is a qualified individual with a disability”

KRS 344.040(1)(a). One of the purposes of the KCRA is to “provide for execution within the state of the policies embodied in ... the Americans with Disabilities Act of 1990 (“ADA”) . . .” as well as the other federal civil rights acts. KRS 344.020(1). Accordingly, Kentucky courts have interpreted the KCRA consistently with the ADA and federal law. *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003).

The ADA prohibits covered entities from discriminating against “a qualified individual on the basis of disability” in terms of employment. 42 United States Code (U.S.C.) § 12112(a). A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). Both the ADA and the KCRA define “disability” as:

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

KRS 344.010(4); *see also* 42 U.S.C. § 12102(1).

In *Hallahan v. The Courier–Journal*, 138 S.W.3d 699, 706–07 (Ky. App. 2004), a panel of this Court held that to establish a prima facie case of disability discrimination, a plaintiff must show: (1) that he had a disability as that term is used under the KCRA; (2) that he was “otherwise qualified” to perform the

requirements of the job, with or without reasonable accommodation; and (3) that he suffered an adverse employment decision because of the disability. *See also Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444, 552-53 (6th Cir. 2004). By establishing a prima facie case, the plaintiff shifts the burden to the employer to offer a legitimate, non-discriminatory reason for the adverse decision. The burden then shifts back to the plaintiff, who must show that the employer's proffered reason is pretextual and that the real reason for the adverse decision was discrimination. *Id.*

Hammond does not dispute that she had the burden of showing that her termination was due to her disability. However, she maintains that she only needed to demonstrate that such was a substantial motivating factor rather than the sole reason for Norton's action. For the reasons that follow, we conclude that neither standard is appropriate.

The trial court herein applied the standard adopted by the Sixth Circuit and Kentucky federal district courts. In *Brohm v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir. 1998), the appellate court noted that to prevail on a disability discrimination claim under either the ADA or KCRA, a plaintiff must prove that he was terminated "solely by reason of his disability," rather than for conduct "causally related" to that disability. *Id.* at 520. Kentucky federal district courts similarly imposed the "solely by reason of" standard to disability discrimination claims under the KCRA. *See Turner v. Sullivan Univ. Sys.*, 420 F.Supp.2d 773, 781-82 (W.D. Ky. 2006). Thus, because the Sixth Circuit, as well as Kentucky federal and

state courts, interpreted both the ADA and the KCRA as requiring proof that the disability was the sole cause of the adverse employment action, the trial court properly applied the same standard herein.

Notably, however, in the interim and while this matter was on appeal in this Court, the Sixth Circuit rendered *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*), wherein the Court revisited the causation standard required in disability discrimination claims under the ADA. The Court explained that the “solely” because of standard is a term that appears in the Rehabilitation Act but not the ADA. Nevertheless, the standard “crept into . . . ADA jurisprudence” in *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir.1995), which involved claims under the ADA and the Rehabilitation Act of 1973. *Lewis*, 681 F.3d at 314. Relying on similarities between the two laws, *Maddox* applied the Rehabilitation Act's causation standard to both claims “since the ADA parallels the protection of the Rehabilitation Act.” *Maddox*, 62 F.3d at 846 n. 2. Consistent with *Maddox*, the Court used the “solely” standard in an ADA-only claim a year later, *Monette v. Electronic Sys. Corp.*, 90 F.3d 1173, 1177–78 (6th Cir.1996), “and before long that became the standard for relief under the ADA in this circuit” *Lewis*, 681 F.3d at 314.

The *Lewis* court examined the similarities and differences between the ADA and the Rehabilitation Act and concluded that applying the same standard to claims brought under each was erroneous:

The longer we have stood by this standard, the more out of touch it has become with the standards used by our sister circuits. At this point, no other circuit imports the “solely” test into the ADA.

Our interpretation of the ADA not only is out of sync with the other circuits, but it also is wrong.” Since *Maddox*, Congress has amended the Rehabilitation Act and the ADA several times, but the distinction between the causation standards used by the two laws persists. . . .
. . . .

That leaves us with two laws with two distinct causation standards. One bars differential treatment “solely by reason of” an individual’s disability; the other bars differential treatment “because of” the individual’s disability. No matter the common history and shared goals of the two laws, they do not share the same text. Different words usually convey different meanings, and that is just the case here. A law establishing liability against employers who discriminate “because of” an employee's disability does not require the employee to show that the disability was the “sole” cause of the adverse employment action.

The sole-cause standard in the end is a creature of the Rehabilitation Act, and that is where we should leave it. The standard does not apply to claims under the ADA.

Id. at 315-317. (Citations omitted).

In evaluating what standard trial courts should use in instructing juries in ADA cases, the *Lewis* Court relied on the United States Supreme Court’s decision in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009), wherein the Court discussed the “because of” standard applicable in claims under the Age Discrimination in Employment Act (“ADEA”):

The words “because of” mean “by reason of: on account of.” 1 *Webster's Third New International Dictionary* 194

(1966); *see also* 1 *Oxford English Dictionary* 746 (1933) (defining “because of” to mean “By reason of, on account of” (italics in original)); *The Random House Dictionary of the English Language* 132 (1966) (defining “because” to mean “by reason; on account”). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act. To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the “but-for” cause of the employer's adverse decision.

It follows, then, that the plaintiff retains the burden of persuasion to establish that age was the “but-for” cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. *See Kentucky Retirement Systems v. EEOC*, [554 U.S. 135, 128 S.Ct. 2361, 171 L.Ed.2d 322 (2008).]

Gross, 557 U.S. at 176-177, 129 S.Ct. at 2350-2351.

Following the rationale in *Gross*, the *Lewis* Court concluded that “the ADEA and the ADA bar discrimination ‘because of’ an employee's age or disability, meaning that they prohibit discrimination that is a ‘but-for’ cause of the employer's adverse decision.” *Gross*, 557 U.S. at 176, 129 S.Ct. 2343. “The same standard applies to both laws.” *Lewis*, 681 F.3d at 321.

Notwithstanding the change in the law since the trial court’s decision, we conclude that although the trial court applied the proper standard at the time of trial to evaluate Appellant’s discrimination claim, it erred in determining that summary judgment was proper. On the issue of whether Hammond suffered an adverse employment decision because of her disability, the trial court found that the

Counseling Record clearly established that Hammond was terminated for failing to properly assess patients and falsifying patient records. In so doing, the court relied almost completely on Forsythe's deposition testimony. Specifically, when asked what "further investigation" occurred prior to Hammond's termination, Forsythe testified that Hammond had told her there were many patients she did not assess. Forsythe stated that Hammond was very nonchalant about the matter and even contended that other nurses did the same thing. To the contrary, however, Hammond has maintained throughout this litigation that she performed an assessment on each patient she cared for, in the manner in which she had been trained by Norton and in the same manner as other nurses.

We find it significant that at no point has Norton identified the patient that allegedly made the complaint, produced the patient's record that Hammond is accused with falsifying, or even furnished a written rule or policy that Hammond violated. Such effectively eliminated Hammond's ability to meaningfully respond to questions about the patient or the care provided.

Norton's claim that Hammond improperly assessed patients and falsified patient records is inconsistent not only with Hammond's sworn testimony, but also with the numerous positive performance reviews she received during her 27-year employment with Norton. Thus, even rejecting Appellant's "substantial motivating factor" test in favor of the "solely by reason of" test, we must conclude that there exist genuine issues of material fact, and that based upon the record, it would not be impossible for Hammond "to produce evidence at trial warranting a

judgment in [her] favor.” *Steele*, 807 S.W.2d at 482. Accordingly, summary judgment was not proper.

The opinion and order of the Jefferson Circuit Court granting summary judgment in favor of Norton Healthcare, Inc. is reversed and this matter is remanded for further proceedings in accordance with the standards set forth in *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*).

LAMBERT, SENIOR JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. I agree in large part with the legal analysis set forth in the majority opinion, but in my view the trial court correctly evaluated the record in finding that Norton discharged Hammond for failure to assess a patient properly and falsifying medical records. The majority opinion finds a factual issue when none exists. I would affirm the summary judgment of the Jefferson Circuit Court.

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