

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001106-MR

CONNIE R. WITHROW

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
ACTION NO. 07-CI-00904

CALGON CARBON CORPORATION

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Connie Withrow appeals from two orders of the Boyd Circuit Court, one setting aside a default judgment and one granting summary judgment in favor of Calgon Carbon Corporation. We affirm both orders.

This is a gender discrimination action. Withrow claims Calgon discriminated against her for being a woman when she was fired after an

explosion, but a similarly situated male employee, Linden Skeens, was not discharged. Calgon operates an industrial plant in Catlettsburg, Kentucky. Withrow was employed as a floater technician at the plant. As a floater, she was trained to do many jobs. Withrow had been employed at Calgon's plant for 27 years. On November 17, 2005, Withrow's supervisor assigned her the job of lighting one of the furnaces at the plant. Skeens, also a floater, was assigned to the task as well.

In order to light the furnace, one employee must be in a control room and another must be at the furnace. Withrow was located in the control room and Skeens was at the furnace. Withrow was responsible for controlling and monitoring the flow of natural gas to the hearths on the furnace. Withrow was responsible for communicating information to Skeens about whether gas was entering the furnace. Skeens could not independently verify this information on the furnace.

Based on information received from Withrow, that there was no accumulation of gas in the furnace, Skeens lit the furnace. An explosion occurred, causing substantial damage, but injuring none. Calgon investigated the incident. It found that both Withrow and Skeens were at fault. Withrow was terminated and Skeens received a thirty-day suspension.

Withrow's union challenged her termination. No claim of gender discrimination was raised. An arbitrator conducted a hearing in which evidence

and testimony were presented. The arbitrator ultimately concluded that Calgon had good cause to discharge Withrow.

Withrow filed the current action in August of 2007. She alleged that she was terminated because of her gender in violation of Kentucky's Civil Rights Act. Calgon did not answer the complaint and default judgment was entered in Withrow's favor. Subsequently, Calgon filed a motion to set aside the default judgment, which was granted by the trial court. After extensive discovery, Calgon moved for summary judgment. The trial court granted the motion finding that Withrow could not make a *prima facie* case of gender discrimination. The court further found that even assuming Withrow could make a *prima facie* case for gender discrimination, she did not produce any evidence that Calgon's stated reason for discharging her was pretextual, i.e., that it had no basis in fact and that she was actually fired because of her gender. The court found that Calgon had a legitimate, non-discriminatory reason to discharge Withrow. This appeal followed.

Withrow presents two arguments to this Court. Her first argument is that the trial court should not have set aside the default judgment.

[Kentucky Civil Rule (CR)] 55.02 provides that a court may set aside a default judgment in accordance with CR 60.02 for good cause shown. Factors to consider in deciding whether to set aside a judgment are: (1) valid excuse for default, (2) meritorious defense, and (3) absence of prejudice to the other party.

Perry v. Central Bank & Trust Co., 812 S.W.2d 166, 170 (Ky. App. 1991).

The trial court set aside the default judgment in this case because it found that Calgon failed to file an answer to the complaint due to excusable neglect. It also found that Calgon had a meritorious defense to Withrow's complaint. We agree with the trial court. Withrow's complaint was filed in August of 2007. Calgon's legal office received the complaint, but inadvertently misplaced it before it could be reviewed by counsel. After twenty days had passed and not receiving any response, Withrow moved for default judgment. No notice of the motion was sent to Calgon. The trial court held a hearing on the default judgment on September 21, 2007. The trial court denied the motion because it erroneously believed Calgon was entitled to receive notice of the motion for default judgment.¹ Another hearing was scheduled for October 5, 2007, with the clerk being instructed to send Calgon notice. Again, no responsive pleading or entry of appearance was filed by Calgon prior to the October 5 hearing. Default judgment was entered after the hearing.

Calgon did not receive the notice of the default judgment hearing until October 9. When Calgon received the default judgment order, it filed a motion to set aside the default judgment. Briefs were filed on the matter and Calgon revealed that when it received the complaint, it was not entered into the company's computer database and the hard copy had been mixed up with another file. The complaint was not found until October 19, 2007. The trial court held a hearing on

¹ CR 55.01 states that only parties who have made an appearance in the action are required to receive notice of a motion for default judgment. Calgon made no appearance; therefore, it was not entitled to notice of the motion.

October 26 and entered an order on November 6 granting the motion to set aside the judgment, finding Calgon had shown good cause to set aside the judgment.

We find that the trial court properly found Calgon had good cause to set aside the default judgment. Granting default judgment is discretionary with the trial court and default judgments are not looked upon with favor in the Commonwealth. *Dressler v. Barlow*, 729 S.W.2d 464, 465 (Ky. App. 1987). The trial court found that the company misplaced the complaint and did not receive notice of the default judgment hearing until after the hearing had taken place. We cannot say that this was an abuse of discretion. Also, as will be discussed further, Calgon had a meritorious defense against Withrow's claim of gender discrimination. Finally, there would be little prejudice to Withrow in allowing the case to go forward; only about two months had passed since the complaint was filed and the case had already gone through arbitration. We hold that the trial court did not abuse its discretion in setting aside the default judgment.

Withrow's other argument is that the trial court erred in granting summary judgment in favor of Calgon.

The 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. Kentucky Rules of Civil Procedure (CR) 56.03
"The record must be viewed 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 Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail

under any circumstances.” *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor” *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

In cases of employment discrimination where there is no direct evidence of discrimination, the person claiming discrimination must make a *prima facie* showing that there has been discriminatory action toward her. To do this on a claim of sex discrimination, an employee must show that she is a member of the protected class, that she was subject to an adverse employment action, that she was qualified for the position, and that a similarly situated male was treated more favorably. If such a showing is made, the burden shifts to the employer to establish legitimate nondiscriminatory reasons for the employment action, which may then be countered by the employee showing that the reasons are a pretext for discrimination.

Commonwealth v. Solly, 253 S.W.3d 537, 541 (Ky. 2008)(citations omitted).

The trial court found that Withrow could not make a *prima facie* showing of gender discrimination. As stated previously, Withrow must show: (1) that she is a member of a protected class; (2) that she was subject to an adverse employment action; (3) that she was qualified for the position; and (4) that a similarly situated male was treated more favorably. The trial court found that she did not meet the third and fourth requirements. The court found that she did not meet the third requirement because she did not perform her job satisfactorily. This was in error. Performing a job satisfactorily is not the third element, being qualified for the job

is. There is no dispute as to this issue. She was a twenty-seven year employee who was trained and qualified as a floater, whose duties included activating and operating the furnaces, just as Skeens was.

The trial court also found that she could not meet the fourth requirement, that a similarly situated male employee, Skeens, was treated more favorably. Specifically, the trial court found that Withrow and Skeens were not similarly situated.

[T]o be deemed “similarly-situated”, the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and 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.

Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992). The trial court found that Withrow and Skeens were not similarly situated because Withrow was in the control room during the accident and she was the one relaying information to Skeens. It also found that Withrow was uncooperative during the investigation. Finally, the trial court found that Withrow and Skeens had different disciplinary histories, with Skeens having the cleaner record. The evidence in the record supports all these findings. On the other hand, both Withrow and Skeens were long time employees of Calgon, received the same training as floaters, and both tasked with lighting the furnaces. This is a close call and we cannot say that the trial court erred; however, we find that the next step in the gender discrimination analysis definitively settles this case.

Assuming Withrow made a *prima facie* showing of gender discrimination by meeting the four discussed requirements, we now look to see if Calgon's reason for discharging her was pretextual, i.e., that it had no basis in fact or that it did not actually motivate Calgon's decision. "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." *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111, 116 (Ky. App. 2010).² If the employer provides a legitimate, nondiscriminatory reason for its employment decision,

the ultimate burden shifts back to [the plaintiff] to show that the explanation is merely pretextual and that the decision was actually motivated by [gender] discrimination. A plaintiff must present "cold hard facts creating an inference showing [gender] discrimination was a determining factor" in his discharge. A plaintiff may meet this burden by direct evidence, or by circumstantial evidence showing that (1) the proffered reasons for the employment decision are false; (2) the proffered reasons did not actually motivate the decision; or (3) the reasons given were insufficient to motivate the decision.

Id.(citations omitted).

The trial court in this case also found that even if Withrow could present a *prima facie* case of gender discrimination, she could not produce any evidence that Calgon's stated reason for discharging her was pretextual and motivated by gender discrimination. We agree. An explosion occurred at Calgon's factory. Calgon fired Withrow because it believed her actions led to the explosion. An

² *Flock* primarily concerns age discrimination, but the factors to consider are the same as those in gender discrimination cases.

investigation and arbitration supported this belief. It is undisputed that causing an explosion is a terminable offense. Withrow's evidence of pretext is that she did not cause the explosion and that Skeens was just as culpable, or more so, and should have been fired. Withrow cannot prevail on her discrimination claim merely questioning the soundness of Calgon's business judgment or practices. Even if we were to assume Calgon rushed to judgment about Withrow's culpability or if her punishment was unfair, Withrow must show that her gender was a motivating factor in her termination. *See Flock* at 117. Here, both employees involved in the explosion were punished, Withrow was fired and Skeens was suspended. Calgon believed Withrow was more at fault, hence the harsher employment decision. There is absolutely no evidence, direct or circumstantial, that Withrow's gender was a motivating factor in her termination.

Based on the foregoing, we affirm the trial court's granting of summary judgment in favor of Calgon.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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