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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001806-MR

RAYMOND H. ELMS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 10-CI-2010

WESTERN KENTUCKY UNIVERSITY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND VANMETER, JUDGES.

MAZE, JUDGE: This appeal arises from an age-discrimination claim that Appellant, Raymond Elms, filed pursuant to KRS[1] 344.010, *et seq.*, also known as the Kentucky Civil Rights Act (hereinafter "KCRA"). Elms appeals from the trial court's order granting summary judgment for Appellee, Western Kentucky

[1] Kentucky Revised Statutes.

University ("WKU") and denial of a motion to alter, amend, or vacate that order. Finding no error in the trial court's holding that the record lacked affirmative evidence supporting a vital element of Elms's claim, we affirm.

Background

Until October 6, 2010, Elms was an employee of WKU, where he worked for more than twenty-five years. At the time of his termination, Elms was charged with providing technical support for WKU's faculty and staff. In 2010, Elms's supervisors raised concerns regarding his punctuality, productivity, use of university vehicles, and failure to submit required reports. As a result of these concerns, Elms's immediate supervisors, Lori Douglas and Chris Harmon, met with him in September 2010 to counsel him on their concerns. In addition, Douglas and Harmon spoke with Elms regarding an incident involving a loud and profane phone conversation Elms had within earshot of other WKU employees and students. Following this meeting, Elms received a written warning.

Additional concerns regarding Elms arose regarding his alleged excessive use of an office telephone as well as his employer-provided cell phone. An audit of Elms's telephone usage, which WKU asserts was routine and not targeted, revealed that Elms made more than 200 long-distance phone calls from his office telephone between January and August 2010, totaling thirty-nine hours. A review of Elms's use of his employer-provided cell phone showed that, between January and May 2010, Elms made 170 calls totaling twenty-nine hours and sent 5,600 text messages during work hours. Elms's supervisors also conducted a

search of Elms's employer-provided computer which revealed evidence of further inappropriate conduct, including access to dating websites and pornography.

Subsequently, on October 1, 2010, WKU suspended Elms, with pay, pending further investigation. Five days later, WKU notified Elms by letter of his immediate termination, citing insubordination and Elms's improper use of his university-provided telephones and computer as the basis for the termination.

In a complaint filed in November 2010, Elms initiated the action underlying this appeal, alleging WKU's violation of the KCRA. Elms specifically alleged that WKU fired him not for the reasons cited in the termination letter, but due to his age. Elms alleged that the performance-related reasons WKU gave for his termination were merely pretext. Over the next two years, the parties engaged in discovery, including interrogatories and the deposition of Elms's supervisors.

Based upon the testimony and evidence of record, WKU moved for summary judgment in April of 2013. WKU asserted that Elms had failed to present evidence demonstrating that a genuine issue of material fact existed in the record regarding an essential element of his claim: that the person hired to replace Elms was substantially younger than he. Elms responded by filing his sworn affidavit, which he argued showed a factual question regarding the age of those who replaced him. The affidavit stated, in part,

> 3. I cannot be entirely specific with regard to the current composition of my former department at [WKU], but it is my understanding and believe, based upon the information of which I am aware, that all persons who have been hired in to my former department at Western

> have been of an age significantly younger than me. The reason I cannot be specific[] is I do not know the name of each of these persons, nor do I know their exact respective ages. I have only been informed that all such persons are significantly younger than me.
>
> 4. WKU, my former employer, would have the names and ages of all such persons that have been hired in to this department since I was terminated.

In a June 3, 2013 order granting summary judgment, the trial court held that, while Elms had clearly satisfied the first three elements of his age discrimination claim, there existed no genuine issue of material fact showing that those who replaced him were younger. The trial court addressed Elms's affidavit, stating that while it indicated Elms's belief as to the age of his replacement, that belief was insufficient to successfully prevent summary judgment. Following entry of the order, Elms filed a motion to alter, amend, or vacate pursuant to CR[2] 59. The trial court denied this motion, and this appeal follows.

Standard of Review and the Summary Judgment Standard

The standard of review governing an appeal of a summary judgment is well-settled. Since a summary judgment involves no fact-finding, this Court's review is *de novo*, we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

[2] Kentucky Rules of Civil Procedure.

"The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In other words, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Thus, we will affirm a summary judgment only "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 a judgment as a matter of law." CR 56.03.

Though these terms provide a low bar for the party opposing summary judgment to clear, that party must not rely exclusively on his pleadings or on the hope that the trial court will merely disbelieve the movant's assertions in support of summary judgment. *See Steelvest* at 481. Rather, the party opposing summary judgment must provide affirmative evidence establishing a genuine issue of material fact for trial. *Id*. (citing to *Gullett v. McCormick*, 421 S.W.2d 352 (Ky. 1967)). A person's belief that something occurred "is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Analysis

The KCRA makes it illegal for an employer "to fail or refuse to hire, or to discharge any individual" based on several characteristics, including his age. KRS 344.040(1)(a). A claim of discrimination pursuant to the KCRA must proceed under the burden-shifting analysis announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this analysis, which our courts have adapted for specific application to age discrimination cases, a plaintiff alleging wrongful age-based termination must first establish a *prima facie* case with proof that he: (1) was a member of a protected class;[3] (2) was discharged; (3) was qualified for the position from which he was discharged; and (4) was replaced by a person outside the protected class. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 496 (Ky. 2005) (citation omitted). In age discrimination cases, the fourth element is modified to require replacement not by a person outside the protected class, but replacement by a significantly younger person. *Id*. (citing *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d. 433 (1996).

In this case, we concern ourselves solely with the evidence of record - specifically Elms's affidavit - and whether it created a genuine issue of material fact regarding the essential fourth element of the above analysis. In doing so, we must remember Elms's burden as a party opposing summary judgment. To survive the motion for summary judgment, Elms needed to provide "at least some

[3] By operation of KRS 344.040(1)(a), the "protected class" of individuals for purposes of an age discrimination claim is those aged forty years and over.

affirmative evidence showing that there [was] a genuine issue of material fact for trial" concerning the age of those who replaced him. *Steelvest*, 807 S.W.2d at 476.

On appeal, Elms contends that the affidavit he attached to his response to WKU's motion for summary judgment was sufficient to create a genuine issue of material fact as to the ages of the persons hired after his termination. He refutes the trial court's portrayal of his affidavit as a mere "subjective belief" rather than affirmative evidence; and he asks us to conclude that the legal sufficiency of his KCRA claim must be left to the jury to determine. We cannot oblige.

Elms's affidavit failed to illustrate a genuine issue of material fact concerning the requisite fourth element of his claim. The affidavit, which was the sole piece of evidence concerning the crucial fourth element of Elms's claim, disavowed specific knowledge of his successors' names and ages, and merely stated Elms's "belief" that those who succeeded him were "significantly younger." As our Supreme Court has held, such a belief, without more, was not enough to create an issue of material fact. *Humana, Inc.*, 796 S.W.2d at 3.

The evidentiary value of Elms's affidavit is also limited because it does not state that those whom it vaguely referenced actually filled his position – only that "they [had] been hired in to [his] former department at Western…." While this may seem an exercise in semantics, it is an important distinction. In *Flock v. Brown-Forman Corp*., this Court held that for purposes of proving the fourth element of an age discrimination claim, "[a] person is replaced only when

another employee is hired or reassigned to perform the plaintiff's duties." 344 S.W.3d 111, 115 (Ky. App. 2010) (quoting *Grosjean v. First Energy Corp*., 349 F.3d 332 (6th Cir. 2003)). The Kentucky Supreme Court has given credence to this principle, as well. *See Williams*, 184 S.W.3d at 496. Nonetheless, Elms's affidavit, and the record as a whole, contained no evidence to this effect.

Overall, Elms's affidavit failed to demonstrate that a genuine issue of material fact existed concerning the essential fourth element of his age discrimination claim. Even resolving all doubt in Elms's favor, the record lacks any affirmative evidence that an essential element of Elms's claim was met. This fact entitled WKU to a judgment as a matter of law.

Conclusion

We recognize that the purpose of the burden-shifting analysis employed in *McDonald Douglass* and its progeny "is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S. Ct. 1775, 1802, 104 L. Ed. 2d 268 (O'Connor, J., concurring). However, some evidence of discrimination must still exist for a plaintiff to clear even the low hurdle of the summary judgment standard. Following extensive discovery in this case, just one document - Elms's affidavit - addressed the essential fourth element of his claim; and it did so with

insufficient specificity or affirmativeness. Hence, summary judgment was appropriate.

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

ALL CONCUR.

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