

RENDERED: NOVEMBER 9, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001321-MR

S. MAYBERRY; R. LESLIE; M. WATKINS; P. EDISON;  
L. ROBBINS; S. MUCKER; D. BURKE; H. ROBBINS, SR.;  
D. EADS; J. DIXON; J. KEYES; D. POTTER; E. MCALISTER;  
E. BROOKS; E. COOK; D. SHORT; D. GILMORE; AND  
T. ALLEN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE  
ACTION NO. 13-CI-003139

PARK DUVALLE COMMUNITY HEALTH CENTER, INC.;  
AND ANTHONY OMOJASOLA

APPELLEES

OPINION  
AFFIRMING

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BEFORE: J. LAMBERT, MAZE AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Shermetta Mayberry, et. al., (hereinafter “Appellants”) appeal from an order of the Jefferson Circuit Court granting summary judgment in favor of Park DuValle Community Health Center, Inc. and Anthony Omojasola.

Appellants argue that the trial court erred: in applying a heightened age discrimination standard to Appellants' non-age discrimination claims; in dismissing Appellants' age discrimination claims; and in dismissing Appellants Mayberry and Robbins Sr.'s retaliation claims. They seek an opinion reversing the summary judgment and remanding the matter for further proceedings. We find no error, and AFFIRM the order on appeal.

Park DuValle Community Health Center, Inc. ("PDCHC") is a non-profit medical center providing low cost dental, medical and other services to qualified recipients in Louisville, Kentucky. PDCHC receives federal funding through the Department of Health and Human Services. In order to retain that funding, the Health Resources and Services Administration ("HRSA") conducts surveys and sight visits to ensure compliance with various operational, financial and quality standards.

In 2011, PDCHC was informed of certain operational areas which did not conform to federal standards. In response, it undertook a review and restructuring process to bring itself into compliance. The review revealed a growing budget deficit of more than \$310,000 at the 2010 fiscal year end, and by mid-year 2011, it had a \$485,000 deficit.

A 2011 site visit by HRSA resulted in a number of recommendations aimed at increasing revenue and decreasing costs. These recommendations

included switching to electronic health records, restructuring billing and transaction processes, increased provider productivity, filing third party private insurance, and fee restructuring.

In December 2011, PDCHC hired Dr. Anthony Omojasola as Chief Executive Officer. In response to HRSA's findings and recommendations, Dr. Omojasola began implementing various measures to regain financial accountability and ensure ongoing federal funding. According the record, these measures included: 1) compliance with HRSA's directives to revamp the billing department and front desk staff; 2) workforce reduction by identifying non-essential or duplicative positions; and 3) the increase of revenue-generating employees.

As part of that process, Chief Administrative Officer Ann Hagan-Grigsby was assigned the duty of compiling positions and employees to be included in the workforce reduction. After considering various criteria, 41 PDCHC employees were terminated in 2012 and given four weeks of severance pay. Twenty-two of the terminated employees were under the age of 40. Some of the job duties of the eliminated employees and positions were assigned to existing employees or combined with other positions. Appellants herein are some of the persons whose employment was terminated as a result of this restructuring.

In mid to late 2013, Appellants filed complaints and amended complaints alleging that PDCHC and Dr. Omojasola improperly terminated their

employment as a result of age discrimination and retaliation prohibited by the Kentucky Civil Rights Act (Kentucky Revised Statute (“KRS”) Chapter 344), the Kentucky Wage and Hour Act (KRS Chapter 337), and the Kentucky Workers’ Compensation Act (KRS Chapter 342). The matter proceeded in Jefferson Circuit Court, whereupon Appellants filed a motion for partial summary judgment on their age discrimination claims. PDCHC and Dr. Omojasola filed motions for summary judgment on all claims filed by Appellants.

Written arguments were filed and a hearing on the motions was conducted on March 28, 2017. On May 3, 2017, the Jefferson Circuit Court rendered an order granting summary judgment in favor of PDCHC and Dr. Omojasola on all claims. In accepting the arguments of PDCHC and Dr. Omojasola, the circuit court implicitly found that none of the Appellants proved a prima facie claim of age discrimination, retaliation or disability discrimination as set out in the complaint.

Appellants filed a motion to alter, amend or vacate, which was denied by order entered on August 8, 2017. In addressing the motion, the court noted that if age discrimination claims were considered under “the usual summary judgment standard,” it would not have granted the summary judgment motion in favor of PDCHC and Dr. Omojasola. However, because age discrimination plaintiffs are burdened with a higher standard in rebutting motions for summary judgment, the

court found that summary judgment was proper under the facts before it. This appeal followed.

Appellants now argue that the Jefferson Circuit Court erred in applying a heightened age discrimination standard to Appellants' non-age discrimination claims. They first maintain that two of the Appellants - Darlene Eads and Herbert Robbins, Sr.<sup>1</sup> - established prima facie claims for disability discrimination by demonstrating that they were: 1) disabled; 2) qualified for their respective positions; and 3) suffered adverse employment decisions because of their disabilities. Eads was diagnosed with non-Hodgkin's lymphoma in 2007, and in 2013 suffered a surgically-repaired rotator cuff. H. Robbins was a diabetic and had chronic bowel obstructions due to a gunshot wound. Appellants argue that the circuit court erred in applying an age discrimination summary judgment standard rather than a lower standard derived from the Kentucky Civil Rights Act ("KCRA") and the Americans with Disabilities Act ("ADA"). They argue that the circuit court erred in dismissing their non-age discrimination claims by applying an inappropriate, heightened standard to those claims.

In order to establish a prima facie claim of disability discrimination, a plaintiff must demonstrate that: 1) he was disabled as that term is defined in the

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<sup>1</sup> We will refer to Herbert Robbins Sr. as "H. Robbins" to distinguish him from Appellant L. Robbins.

KCRA; 2) he was otherwise qualified to perform his respective job requirement with or without reasonable accommodation; and 3) he suffered an adverse employment decision because of his disability. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706-07 (Ky. App. 2004). To prove the first element, H. Robbins and Eads must demonstrate that they: a) have a physical or mental impairment that substantially limits one or more of his or her major life activities; b) have a record of such impairment; and, c) are regarded as having such an impairment. KRS 344.010(4).

We find persuasive the arguments of PDCHC and Dr. Omojasola that Eads and H. Robbins cannot prove either the first or third elements of a prima facie claim of disability discrimination as set out *Hallahan*. *Arguendo*, even if Eads and Robbins could demonstrate that they are disabled as defined by the KCRA, neither can establish that they suffered adverse employment decisions *because of their disability*. The record amply demonstrates that PDCHC was operating outside its budgetary constraints, that Dr. Omojasola was hired to establish fiscal accountability in accordance with guidelines established by the Department of Health and Human Services, and that Dr. Omojasola achieved those goals through targeted personnel cuts and other restructuring.

Eads goes on to argue that the trial court erred in dismissing her wage and hour claims. After directing our attention to KRS 337.385, which compels

employers to remit wages in a timely manner, Eads contends that PDCHC failed to pay her in a timely manner for wages earned while working from home while she was recovering from rotator cuff surgery. PDCHC asserted that the first work log submitted by Eads was incomprehensible, and that a few weeks later she was paid in full for her at-home work. Eads acknowledges that she received the wages to which she was entitled for the work she completed from home while recovering from surgery, and as such we find no error on this issue.

Next, Paul Edison argues that the Jefferson Circuit Court erred in dismissing his workers' compensation retaliation claim. Edison states that he sustained an on-the-job injury on February 14, 2012, when he slipped on ice and broke his ankle. He received medical treatment for the injury and subsequently filed a workers' compensation claim. Edison returned to work in April 2012, and his employment was terminated on June 8, 2012. He asserts that the temporal proximity of his injury and his termination from employment is sufficient to establish the "causal connection" element of his workers' compensation retaliation claim.

In order to establish a prima facie case of retaliation, Edison must demonstrate that: 1) he engaged in the protected activity of asserting a workers' compensation claim; 2) PDCHC knew that he had done so; 3) adverse employment action was taken; and 4) there was a causal connection between the adverse

employment action and the workers' compensation claim. *Chavez v. Dakota Integrated Systems, LLC*, 832 F.Supp.2d 786, 800 (W.D. Ky. 2011). The fourth element requires that Edison demonstrate that the "workers' compensation claim was a substantial and motivating factor but for which [he] would not have been discharged." *Bishop v. Manpower, Inc. of Central Kentucky*, 211 S.W.3d 71, 75 (Ky. App. 2006).

PDCHC argues that Edison has produced no evidence of a causal connection between his workers' compensation claim and his discharge from employment. It is noteworthy that PDCHC did not contest Edison's workers' compensation claim, and that Edison returned to work after being released by his physician. Edison's sole argument on this issue is that there was a temporal proximity between his workers' compensation claim and his discharge from employment. This temporal proximity consists of a period of almost four months, during which time PDCHC acceded to Edison's workers' compensation claim and he returned to full employment after his recovery. These facts fall short of establishing a causal connection between the workers' compensation claim and the adverse employment action. This is especially true given that these events occurred contemporaneously with the restructuring of PDCHC's entire workforce as part of its efforts to remain financially viable. When considering the totality of the record, we cannot conclude that the Jefferson Circuit Court erred in concluding



that Edison failed to establish a prima facie claim of workers' compensation discrimination.

Appellants next argue that the trial court erred in granting summary judgment on their age discrimination claims in favor of PDCHC and Dr. Omojasola. Appellants contend that they established a prima facie claim of age discrimination by demonstrating that: they are members of a protected class (age 40 or older at the time of their terminations); were discharged from employment; were qualified for their respective position; and, were replaced by persons outside the protected class. They maintain that PDCHC and Dr. Omojasola then failed to demonstrate a legitimate, non-discriminatory reason for the employment action and that the Jefferson Circuit Court erred in failing to rule. Accordingly, Appellants argue that summary judgment on these claims was therefore not warranted.

Kentucky Revised Statute (KRS) 344.040(1) provides that it is unlawful for an employer to discharge or otherwise discriminate against an individual because the individual is forty years of age or older. In the absence of direct evidence of discriminatory motivation, a plaintiff claiming age discrimination with respect to an employment decision must satisfied the burden- shifting test set forth by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Williams v. Wal-Mart Stores, Inc.*, 184 S.W. 3d 492, 495 (Ky. 2005).

*Flock v. Brown-Forman Corporation*, 344 S.W. 3d 111, 114 (Ky. App. 2010).

The plaintiff must first present evidence sufficient to establish a prima facie claim of age discrimination by showing that he/she: “(1) is a member of a protected class, (2) was discharged, (3) was qualified for the position from which they were discharged, and (4) was replaced by a person outside the protected class.” Williams *supra* at 496. “[U]sing the *McDonnell Douglas* framework . . . a plaintiff is not required to introduce direct evidence of discrimination. *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 349 (6<sup>th</sup> Cir.1997).” Williams, *supra* at 496.

Under circumstances where the employer argues that the termination was due to a work-force reduction, the individual can meet his prima facie claim by showing that he was replaced by a younger employee. See *Barnes v. Gen Corp., Inc.*, 896 F.2d 1457 (6<sup>th</sup> Cir. 1990), and *Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6<sup>th</sup> Cir. 1980).

Once a plaintiff establishes a prima facie claim, the burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the termination. *McDonnell Douglas, supra* at 802. If met by the employer, then this shifts the burden back to the plaintiff to demonstrate that the employer’s nondiscriminatory explanation is a mere pretext and that the decision to terminate was actually motivated by age. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

The plaintiff must present “cold hard facts creating an inference showing age discrimination was the determining factor” in his discharge. *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226 (Ky. 1984). A plaintiff may meet this burden by direct or circumstantial evidence demonstrating: that: “(1) the proffered’s reasons [of 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.” *Williams, supra* at 497.

The inference of discrimination raised by the plaintiff’s prima facie showing, once rebutted by a stated legitimate reason, cannot serve to create a genuine issue of material fact. Instead, the plaintiff, after establishing a prima facie but now rebutted claim, “must produce specific evidence of pretext to avoid summary judgment. . . . In the absence of specific evidence of age discrimination, a summary judgment is proper.” *Harker* at 230.

Assuming the Appellants have met the four-element *Williams* test, the burden shifts to PDCHC and Dr. Omojasola to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Williams, supra*. PDCHC and Dr. Omojasola met that burden by demonstrating that the adverse employment action was part of an extended process to bring financial solvency to PDCHC and to comply with federal mandates as the circuit court held. PDCHC’s financial restructuring plan was part of an ongoing process initiated months before

Appellants' adverse employment action. Therefore, even if Appellants were successful in establishing a prima facie case of employment discrimination, PDCHC and Dr. Omojasola met the burden of articulating a legitimate, nondiscriminatory reason for the adverse employment action. This shifted the burden back to Appellants to show that PDCHC's nondiscriminatory explanation is a mere pretext for age discrimination. Summary judgment may be avoided only if specific evidence of pretext is shown. *Harker*, 679 S.W.2d at 230. Appellants did not meet this burden.

Appellants' final argument is that the trial court erred in dismissing Shermetta Mayberry and H. Robbins' retaliation claims. Mayberry and H. Robbins direct our attention to KRS 344.280, which recognizes a prima facie claim of retaliation when an employee: 1) engages in activity protected by Title VII; 2) the employer knew of this exercise of civil rights; 3) the employer took adverse employment action against the employee; and 4) there was a causal connection between the adverse action and the protected activity. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 803 (Ky. 2004).

Mayberry contends that she complained to Dr. Omojasola about PDCHC terminating its older employees, that these complaints constitute the exercise of a civil right under Title VII, and that her employment was terminated as a result. H. Robbins argues that he requested being able to use the restroom more

frequently, and that his supervisor Brenda Palmer made comments about him “moving too slow.” H. Robbins’ employment was later terminated. Like Mayberry, H. Robbins argues that he was engaging in a protected activity, that PDCHC knew of his exercise of his civil rights, that his employment was terminated and there was a causal connection between the protected activity and the adverse employment action.

We have closely examined the record and the law on this issue, and find no error. Mayberry and H. Robbins’ retaliation claims must fail as a matter of law because neither can identify a protected activity nor a causal connection between such activity and their terminations. *Arguendo*, even if Mayberry’s complaints to Dr. Omojasola and H. Robbins’ request to use the restroom more frequently could be characterized as the exercise of civil rights under Title VII, *Brooks, supra*, and if it could be shown that said exercise was causally connected to the adverse employment action, PDCHC and Dr. Omojasola have amply demonstrated the legitimate, nondiscriminatory reasons for their respective terminations. We find no error.

For the foregoing reasons, we AFFIRM the order of the Jefferson Circuit Court granting summary judgment in favor of Park DuValle Community Health Center, Inc. and Dr. Anthony Omojasola.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Amanda R. Walker  
Louisville, Kentucky

BRIEF FOR APPELLEES:

Patricia C. Le Meur  
Louisville, Kentucky