

RENDERED: DECEMBER 21, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001746-MR

MICHAEL LEE BARNETT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 17-CI-02945

CENTRAL KENTUCKY HAULING, LLC

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, D. LAMBERT, AND SMALLWOOD,¹ JUDGES.

COMBS, JUDGE: Michael Lee Barnett appeals from an order of the Fayette Circuit Court that granted the motion of Central Kentucky Hauling, LLC's (CKH) to dismiss and dismissed his complaint against CKH. After our review, we affirm.

¹ Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

On August 15, 2017, Barnett filed a complaint against CKH for damages resulting from the termination of Barnett's employment with CKH. He alleged that the termination violated KRS² Chapter 344, the Kentucky Civil Rights Act (KCRA). He claims that he suffered discrimination due to his association with his wife, a person with a disability (as defined by the KCRA). The complaint alleges the following facts leading to Barnett's termination.

Barnett was employed by CKH as a driver beginning in March of 2011. Throughout his employment, his wife suffered from cystic fibrosis, and his employers were aware of her illness. On December 28, 2013, his wife was admitted to the hospital due to complications from her disease. Barnett requested and was granted leave from work to care for his wife. At that time, he was reassured that he would not lose his position with CKH, and he eventually returned to work following his wife's lung transplant in early 2014.

Several months later, Barnett was called into his supervisor's office to discuss allegations that he had been making disparaging comments regarding the company. Barnett denied these allegations. During this meeting, a supervisor mentioned Barnett's absence from work because of his wife's illness.

² Kentucky Revised Statutes.

In November 2014, his wife's condition again worsened. Soon after, through a co-worker, Barnett obtained forms necessary to pursue work leave under the Family and Medical Leave Act. On December 3, 2014, Barnett was terminated from CKH for "lack of work," but it was also made known that one of the supervisors "wanted Barnett gone."

CKH immediately filed a motion to dismiss the complaint pursuant to CR³ 12.02(f) for failure to state a claim upon which relief could be granted. Following oral arguments, the trial court entered an order on September 25, 2017 granting CKH's motion to dismiss and dismissing Barnett's complaint. It is from this dismissal that Barnett appeals.

CR 12.02(f) permits judgment in favor of a movant on the basis of the plaintiff's "failure to state a claim upon which relief can be granted[.]" A motion to dismiss should only be granted where "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Whether to dismiss an action pursuant to CR 12.02(f) is a question of law. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). Therefore, "a reviewing court owes no deference to a trial court's

³ Kentucky Rules of Civil Procedure.

determination[.]” *Id.* The issue must be reviewed *de novo*. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011). Additionally, statutory interpretation is purely a legal matter and is also reviewed *de novo*. *Commonwealth v. McBride*, 281 S.W.3d 799, 803 (Ky. 2009). We must construe statutes according to their plain meaning. *Id.*

The sole and rather unique issue presented in this case is whether the KCRA provides a claim of relief to individuals due to their **association** with a person with disabilities. After reviewing the parties’ arguments and the applicable law, we are compelled to agree with CKH that Barnett’s complaint fails to state a cognizable claim for relief under current Kentucky law.

The pertinent portion of the protection provided in the KCRA states as follows:

- (1) It is an unlawful practice for an employer:
 - (a) To . . . discharge any individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because . . . the person is a qualified individual **with a disability**[.]

KRS 344.040. (Emphasis added). The KCRA defines 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.

KRS 344.010(4). Finally, the KCRA further defines a “qualified individual with a disability” as:

[A]n individual with a disability as defined in KRS 344.010 who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individuals holds or desires unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s disability without undue hardship on the conduct of the employers’ business.

KRS 344.030(1).

“In cases involving statutory interpretations, the duty of the court is to ascertain and give effect to the intent of the General Assembly.” *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). We may not “interpret a statute at variance with its stated language.” *Stephenson v. Woodward*, 182 S.W.3d 162, 171 (Ky. 2005). The combined effect of the above statutory provisions is to provide protection from discrimination for people with disabilities. None of the above provisions makes any mention of an associational disability, and no such cause of action can be found anywhere in the KCRA. Thus, there is nothing indicating the General Assembly has shown any intent to extend protection to those who associate with persons with disabilities.

In his brief, Barnett attempts to draw comparisons to support his position that Kentucky should recognize disability discrimination claims based on

association. Because one of its stated purposes is to execute the policies in the American with Disabilities Act of 1990 (ADA) and other federal civil rights acts, Kentucky courts have interpreted the KCRA in harmony with the ADA and federal law. KRS 344.020(1); *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 595 (Ky. 2003). Hence, Barnett argues that this Court should adopt and incorporate the ADA's specific, codified protection from associational disability discrimination and that this Court should follow federal law in recognizing such claims -- regardless of the absence of specific statutory language of our own creating that type of claim or deferring to federal law. But to do so, as already noted, would be to contravene the **plain language** of the KCRA.

Significantly, the KCRA was enacted two years **after** the implementation of the ADA. If the legislature had desired to include a protection for associational discrimination claims similar to those referenced in the ADA, such protection could have been included at that time. Because it was not included, we must presume that the legislature did not intend to provide such a protection to Kentucky citizens. Thus, we must conclude that Barnett has failed to state a claim supported under Kentucky law.

The lone Kentucky case that Barnett cites to for support is *Lexington-Fayette Urban County Human Rights Comm'n v. Metro Mgmt.*, 2001-CA-001234-MR, 2003 WL 22271567 (Ky. App. Oct. 3, 2003), an unpublished decision from

this Court. Unpublished appellate decisions may be considered if there are no published cases on point, but they are not binding upon us. CR 76.28(4)(c). In *Lexington-Fayette Urban County*, this Court found that an interracial couple had not established a *prima facie* claim of housing discrimination under the KCRA because the couple did not qualify for housing otherwise. But the Court acknowledged in a footnote that being in an interracial relationship is protected under the KCRA without citing to any caselaw for support. We do not find that a couple's right to housing is synonymous with an individual's right to his employment, and each situation requires different statutory interpretations. Thus, that decision does not provide guidance or precedent. The KCRA and Kentucky law do not provide for a claim of associational disability discrimination.

Finally, in additionally construing the legislative intent underlying the KCRA, we observe one of the other delineated purposes of the KCRA:

To safeguard all individuals within the state from discrimination because of familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person's status as a qualified individual with a disability as defined in KRS 344.010 and KRS 344.040[.]

KRS 344.020(1)(b). The intended purpose is clear and associational disability is not referenced or implied. The stated purpose also directly aligns and coincides with the statutory provisions discussed above. There is no ambiguity or need for interpretation.

Pursuant to KRS 344.040, the relevant definitions, and the above-stated purpose, the KCRA, as it pertains to this case, is intended to protect those individuals **with** disabilities, not individuals associated with those suffering disabilities -- such as a family member or spouse. Because Barnett is not a person within the class intended to be protected by KRS 344.040, he is not entitled to assert a right of action for discrimination against CKH. We are not at liberty to add to the statute to make it so. *Com., Dept. of Revenue, Finance and Administration Cabinet v. McDonald*, 304 S.W.3d 62, 65 (Ky. App. 2009) (citing *Harrelson*, 14 S.W.3d at 546).

Finding no ambiguity in the statute and no Kentucky case that recognizes a claim for “associational discrimination,” we hold that an action for associational discrimination pursuant to the KCRA is not supported in Kentucky. Although we acknowledge that other jurisdictions have expanded their employment discrimination caselaw to support such claims, we lack jurisdiction to expand our existing law to encompass claims of associational disability. That is a matter within the exclusive purview of the General Assembly. Thus, we find no error in the decision of the trial court to grant CKH’s motion pursuant to CR 12.02(f).

We affirm the order of the Fayette Circuit Court granting CKH’s motion and dismissing Barnett’s complaint.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Paul Stewart Abney
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Robert E. Maclin, III
Frankfort, Kentucky