RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000911-MR

GREEN RIVER DISTRICT HEALTH DEPARTMENT, in its own name, and by and through its BOARD OF DIRECTORS: DAVID NATION; SHEILA SIMS; LESLIE SMEATHERS; GLENN ARMSTRONG; ANN MATCHEN; JODY JENKINS; COY E. BAL; PATRICK DONAHUE; TERRY L. NORRIS; MELISSA STONE; FREIDA PAGAN; CHAD TOWNSEND; JAMES R. FINEY; DANIEL HERRON; EDNA M. RICE; WALTON R. ALLEN; CHARLES ALEXANDER; MARK SEARS; JOHN D. MARSHALL; BRUCE TODD; KELLY THURMAN; DAVID SUNN; JOE K. HOWELL; AND ROBERT COX[1] APPELLANTS

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 12-CI-00342

NITYANAND GUPTA APPELLEE

OPINION
AFFIRMING

[1] The individual board members were initially named parties to the litigation; they were dismissed as parties during the proceedings below.

** ** ** ** **

BEFORE: KRAMER, SPALDING, AND L. THOMPSON, JUDGES.

SPALDING, JUDGE: Green River District Health Department, in its own name, and by and through its Board of Directors, appeals from a judgment based upon a jury verdict awarding appellee, Dr. Nityanand Gupta, the sum of $65,000 on his claim of retaliation for opposition to unlawful employment practices proscribed by the Kentucky Civil Rights Act. Green River argues that the Daviess Circuit Court erred in failing to grant its motions for a directed verdict and for judgment notwithstanding the verdict. We affirm.

Green River hired Dr. Gupta as its medical director in 2005 and terminated his employment on March 9, 2010, after receiving an email which stated, "I sue." Although the reason for the email and the context of it are much debated, certain facts regarding Dr. Gupta's employment with Green River appear of record. From the time of his hiring until Debbie Fillman assumed the position of Public Health Director in January 2008, Dr. Gupta received evaluations rating him as effective and competent. However, in her first evaluation of Dr. Gupta in October 2008, Ms. Fillman rated him less than effective and competent and borderline "needs development" in several categories. In an October 2009 evaluation, Ms. Fillman rated him less than satisfactory in some areas and noted that in July 2009, Dr. Gupta's employment was changed to part-time status with a

corresponding cut in his salary. In September 2009, Ms. Fillman issued a verbal admonishment, the memorandum of which Dr. Gupta refused to sign. Ms. Fillman then put a notation at the bottom of the document stating that "he knew which direction this is going & needed more time to formulate a response."

By letter dated February 17, 2010, Ms. Fillman notified Dr. Gupta of her intent to suspend him from the position of medical director for three days and thereafter listed numerous factors upon which the disciplinary action was based. On February 19, 2010, Dr. Gupta sent an email stating only, "I sue." Three days after receiving the "I sue" email, Ms. Fillman notified Dr. Gupta by letter of her intent to dismiss him from the position of medical director. The bases for dismissal listed in the February 22, 2010 letter were identical to those cited in the February 17 suspension letter. Dr. Gupta thereafter initiated this litigation alleging that Green River had discriminated against him on the basis of his national origin and the fact that he was an individual with a disability. He also alleged that he was removed from his position as medical director in retaliation for having opposed Green River's unlawful employment practices proscribed under the Kentucky Civil Rights Act, Kentucky Revised Statutes (KRS) Chapter 344. At trial, the jury found in favor of Green River on the discrimination counts of the complaint and in favor of Dr. Gupta on his retaliation claim, awarding him the sum of $65,000. This appeal followed.

Concerning the retaliation claim, the jury was instructed as follows:

> Regardless of whether or not you have found for the Plaintiff on either of the preceding instructions (Nos. 2 or 3), you will find for the Plaintiff under this instruction (No. 4) if you are satisfied from the evidence that (a) the Plaintiff opposed actions by the Defendant which the Plaintiff reasonably believed were unlawful practices under the Kentucky Civil Rights Act, and (b) Plaintiff's opposition to said acts was a substantial motivating factor in Defendant's decision to terminate his employment, but for which Defendant would not have terminated Plaintiff.
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> Otherwise, you will find for Defendant under this instruction (No. 4).

Although this instruction does not precisely mirror the prevailing law regarding claims of retaliation, Green River offered no objection to Dr. Gupta's proposed instruction and does not argue in this appeal that the instruction is incorrect in failing to precisely follow existing law. Rather, Green River's appeal argues that appellee failed to establish a prima facie case for retaliation and the court wrongfully denied its motion for directed verdict insisting that Dr. Gupta failed to produce sufficient evidence of retaliation. Those issues are essentially the same—that the appellee did not present enough evidence to make his case.

We commence by reiterating the standard by which appellate courts review the denial of motions for a directed verdict or JNOV:

> In reviewing evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict or

> JNOV. *See Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998); *NCAA v. Hornung*, 754 S.W.2d 855 (Ky. 1988). All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. We may not disturb the trial court's ruling unless the decision is clearly erroneous. *Peters v. Wooten*, 297 S.W.3d 55, 65 (Ky. App. 2009) (citing *Bierman*, 967 S.W.2d at 18). As such, a denial of a directed verdict or JNOV "**should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice**." *Id*. (citation omitted).

Insight Kentucky Partners II, L.P. v. Preferred Automotive Services, Inc., 514 S.W.3d 537, 545-46 (Ky. App. 2016) (emphasis added). With these principles in mind, we turn to an examination of Green River's arguments for reversal.

The remarkably similar case of *Asbury University v. Powell*, 486 S.W.3d 246 (Ky. 2016), guides our analysis. In *Powell*, the Supreme Court of Kentucky emphasized that one does not have to prevail on the underlying claim of discrimination to prevail on a retaliation claim; rather, "[t]o prove unlawful employer retaliation, an aggrieved employee must prove only that her employer retaliated or discriminated against her 'because [s]he has opposed a practice declared unlawful by [the KCRA]. . . .'" *Id.* at 251-52. *Powell* sets out four elements a plaintiff must prove to succeed on a retaliation claim: (1) that he engaged in a protected activity; (2) which was known to the defendant; (3) that the

defendant thereafter took an employment action adverse to the plaintiff; and (4) which was causally connected to the plaintiff's protected activity. *Id*. at 258.

To obtain retaliation protection under KRS 344.280(1), an employee must show "a reasonable and good faith belief" that the adverse employment practices he opposed were violations of the Kentucky Civil Rights Act; "whether that belief is reasonable or in good faith is a question for the jury." *Id*. at 252. The Supreme Court also clarified that "the appropriate standard to determine whether retaliation has occurred because a discrimination claim was made is whether the retaliatory conduct would have occurred 'but for' the employee engaging in protected complaints of discrimination . . . ." *Id.* at 254. Notably in this regard, the Supreme Court took the opportunity "to make clear that retaliatory motive need not be the sole, or even primary, cause of the challenged employment action; rather, it need only be **a** (not '**the**') but-for cause of the decision." *Id*. at 259 (emphasis added).

Turning again to the instruction given to the jury in this case, we note that the instruction contains elements of (1), (3), and (4) as required by *Powell*, but omits element (2). It seems clear that under *Powell*, the instruction should not have used the language "was a substantial motivating factor" for the discharge. The instruction also should have included some provision that the defendant knew about plaintiff having engaged in protected activity. Nevertheless, because Green

River did not raise any objection to the instruction in the trial court nor has it asked this Court to overturn the judgment based upon incorrect trial instructions, we decline to do so as well.

Concerning the issues which are presented, we are convinced that the opinion in *Powell* is dispositive of Green River's arguments regarding its entitlement to a directed verdict or judgment notwithstanding the verdict. The standard by which a trial judge reviews a motion for a directed verdict closely resembles the appellate review standard previously cited:

> A trial court may grant a directed verdict only if the evidence is insufficient to sustain a verdict. *Garcia v. Whitaker*, 400 S.W.3d 270, 274 (Ky. 2013). It cannot direct a verdict "unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *Nat'l Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988).
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> And in ruling on the motion, "the trial court must 'draw all fair and rational inferences from the evidence in favor of the party opposing the motion.'" *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996) (quoting *Spivey v. Sheeler*, 514 S.W.2d 667, 673 (Ky. 1974)). Whenever there is conflicting proof, the court must reserve to the jury the determination and resolution of such conflicts. *Bierman*, 967 S.W.2d at 19. And the judge may not consider the credibility or weight of the evidence, the evaluation of which being solely a function of the fact-finding jury. *Cochran v. Downing*, 247 S.W.2d 228, 229-230 (Ky. 1952).

Id. at 257. Utilizing this standard, we are persuaded that Dr. Gupta presented sufficient evidence to satisfy the third and fourth elements discussed in *Powell*. The objective evidence adduced at trial was that immediately after receiving an email containing the words, "I sue," Green River fired Dr. Gupta rather than merely suspending him as was being discussed. This evidence alone satisfies those two elements of Dr. Gupta's claim of retaliation. Also, based on Ms. Fillman's testimony that the appellant considered the "I sue" email self-explanatory, the element of the defendant's knowledge was met even though it was not instructed.

In our view, the real question to be resolved is whether Dr. Gupta produced sufficient evidence to support the position that he "opposed actions by the Defendant [Green River] which [he] the Plaintiff reasonably believed were unlawful practices under the Kentucky Civil Rights Act." *Powell* requires an employee to have a reasonable good-faith belief that the adverse employment practices he opposed were KCRA violations. *Id*. at 252. Green River argues that the fact that Dr. Gupta could not remember why he sent the "I sue" email or what he meant by it precludes him from prevailing at trial. On the other hand, Dr. Gupta argues that the plain language of the email, the history between the parties, and his refusal to resign are all part and parcel of his general opposition to Green River's pattern of discrimination against him. As stated previously, Ms. Fillman testified

at one point that the "I sue" email was self-explanatory, meaning that Dr. Gupta was going to bring a lawsuit against Green River.

Powell also settled the question of the quantum and quality of proof required to satisfy each element of a retaliation claim:

> Here, no one disputes the absence of direct evidence causally connecting Powell's complaints to the challenged employment action by Asbury. As such, this case is no different than the vast majority of retaliation cases where "smoking gun" evidence, such as written or oral declarations by the decision-maker, does not exist. Thus, Powell had to establish causation with circumstantial proof. *Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 135 (Ky. 2003).
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> As this Court has noted, circumstantial evidence of causation is "evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." *Id*. (alteration in original) (quoting *Nguyen v. City of Cleveland*, 229 F.3d 559, 565 (6th Cir. 2000)). "In most cases, this requires proof that (1) the decision-maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action." *Id*. (citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)).

Id. at 258. We conclude that the jury in this case had before it circumstantial evidence sufficient to satisfy this standard and its decision was not flagrantly against the evidence.

After a history of negative and apparently escalating employment actions under Ms. Fillman's leadership, Green River notified Dr. Gupta of its intent to suspend him for three days to which he responded, "I sue." Within a matter of days, Green River changed its decision to suspend Dr. Gupta to a decision to terminate him. These facts alone provide "proof that (1) the decision-maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action." *Id*.

KRS 344.280(1) states that it shall be unlawful to "retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter . . . ." In this case, the practice opposed by Dr. Gupta was his treatment by Ms. Fillman, which he believed violated his rights. That he intended to "sue" over that treatment is merely part of that opposition. Thus, in our view, Green River has failed to demonstrate that there was a complete absence of proof to support the jury's verdict. Drawing all fair and rational inferences from the evidence for the party opposing a motion for directed verdict, we cannot say there was a complete absence of proof that Green River retaliated against Dr. Gupta for opposing what he believed was unlawful treatment under the Kentucky Civil Rights Act. Thus, the trial court did not err in denying Green

River's motions for directed verdict or err in granting a judgment in conformity with the jury's decision.

Accordingly, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEE:
Michael T. Lee Owensboro, Kentucky	David Leightty Alison Mettex Louisville, Kentucky