

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel R. Brumagin, :
Appellant :
v. :
Municipal Authority of the : No. 564 C.D. 2009
Borough of Union City : Submitted: October 9, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 29, 2010

Daniel R. Brumagin (Brumagin) petitions for review of an order of the Court of Common Pleas of Erie County (trial court) which granted the Municipal Authority of the Borough of Union City's (Authority) Motion for Summary Judgment on the ground that Brumagin failed to satisfy the fourth element of a *prima facie* cause of action for employment discrimination.¹

Brumagin's Complaint

¹ In employment discrimination cases, the employee bears the burden of establishing a *prima facie* case, which requires proof that: (1) he is a member of a protected class; (2) he was appointed to a position for which he was otherwise qualified; (3) he was discharged; and (4) the employer replaced him with a non-member of the protected class with equal or lesser qualifications. Associated Rubber, Inc. v. Pennsylvania Human Relations Commission, 915 A.2d 689 (Pa. Cmwlth. 2007); School District of Philadelphia v. Friedman, 507 A.2d 882 (Pa. Cmwlth. 1986); General Electric Corporation v. Pennsylvania Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976).

January 29, 2007, Brumagin filed a two-count Complaint in the Court of Common Pleas of Erie County.² In Count I, he alleged that the Authority terminated his employment as a result of a non-job related disability (cystic fibrosis) and his age (40 years old) in violation of Section 5(a) of the Pennsylvania Human Relations Act (PHRA),³ Act of October 27, 1955, P.L. 744, as amended, 43 P.S. § 955(a). Specifically, he averred that the Authority targeted him because of the high cost of his group health insurance policy due to his cystic fibrosis. He averred that his duties were reassigned, in part, to Matt Hanley, age 30, a non-disabled individual who was significantly younger than him. In Count II, Brumagin alleged that the Authority failed to accommodate him and terminated him on July 15, 2005, before his leave of absence expired on August 15, 2005, in violation of 16 Pa. Code § 44.5(b).⁴

² On January 6, 2006, Brumagin filed a complaint with the Pennsylvania Human Relations Commission (Commission) and claimed he was terminated from his employment with the Authority based upon discrimination due to his disability, cystic fibrosis, and his age, 40, under the PHRA. Because Brumagin filed his complaint in a court of common pleas, his PHRA complaint was dismissed pursuant to Section 12(c) of the PHRA, 42 P.S. §962(c).

³ Section 5(a) of the PHRA provides in relevant part:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

(a) For any employer because of their age, color, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability . . . or physical handicap or any individual . . . to discharge from employment such individual . . . or to otherwise discriminate against such individual . . . with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual . . . is the best able and most competent to perform the services required.

⁴ 16 Pa. Code §44.5(b) provides in relevant part:

(Footnote continued on next page...)

During discovery, Brumagin offered his own testimony to support his allegations. He testified that Hanley was the person who was being trained to take over the plant and that Hanley was an unlicensed operator. Brumagin also offered a letter from Larry Miller, an Authority Board member, which stated that the Authority believed the wages paid to Brumagin were “high” and the health insurance was “out of sight.” Deposition of Daniel Brumagin, February 22, 2008, at 172-173; Reproduced Record (R.R.) at 254a-255a.

The Authority’s Motion for Summary Judgment

On June 4, 2008, after the close of discovery, the Authority filed a Motion for Summary Judgment.

A motion for summary judgment is based on an evidentiary record which entitles the moving party to judgment as a matter of law. Pa.R.C.P. No. 1035.2. Unlike the motion for judgment on the pleadings, where the court is limited in its consideration to factual material contained in the pleadings themselves, the motion for summary judgment specifically permits the introduction of outside material such as depositions, answers to interrogatories, admissions or affidavits. 6 Standard Pennsylvania Practice 2d §32:5. For purposes of summary

(continued...)

(b) Handicapped or disabled persons may not be denied the opportunity to use, enjoy or benefit from employment and public accommodations subject to the coverage of the act, where the basis for the denial is the need for reasonable accommodations, unless the making of reasonable accommodations would impose an undue hardship.

judgment the record includes any pleadings, depositions, answers to interrogatories, admissions, affidavits and expert reports. Pa.R.C.P. No. 1035.1. To defeat a motion for summary judgment, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense. Pa.R.C.P. No. 1035.2. The mere assertion that a material issue of fact exists without producing any evidence would defeat the purpose of the motion for summary judgment. Kotwaskinski v. Rasner, 436 Pa. 32, 258 A.2d 865 (1969).

A defendant moving for summary judgment must make a showing at the completion of discovery that, based on plaintiff's discovery materials, the plaintiff will be unable at trial to establish elements necessary to his or her claims. Kroptavich v. Pennsylvania Power and Light Co., 795 A.2d 1048 (Pa. Super. 2002). The adverse party may not rest upon the mere allegations or denials in the pleadings but must identify one or more issues of fact arising from evidence in the record which controverts the evidence cited in support of the motion for summary judgment or challenge the credibility of one of more witnesses testifying in support of the motion. Pa.R.C.P. 1035.3(a).

Here, the Authority argued that Brumagin failed to come forth with evidence to satisfy the fourth element of a *prima facie* cause of action for discrimination. Specifically, the Authority alleged that Brumagin failed to proffer evidence that he was replaced by a non-member of the protected class (40 years old and disabled) with equal or lesser qualifications. The Authority argued that there was no genuine issue as to the following facts: (1) Robert Roth (Roth) was the individual who replaced Brumagin, not the younger, less-experienced Hanley;

(2) Roth was approximately 20 years older than Brumagin when he was hired; and
(3) Roth suffered from the effects of a genetic disorder. Therefore, Brumagin failed at the outset to demonstrate that he was replaced by a “non-member of the protected class.”

The Authority further argued that there was no genuine issue concerning whether Brumagin was replaced with a person of equal or lesser qualifications. The undisputed facts showed that Roth’s credentials were superior to Brumagin’s.

The Authority further argued that even if Brumagin successfully made out a *prima facie* case, the only evidence produced demonstrated that the Authority consistently and unfailingly accommodated Brumagin’s numerous medical leaves of absence and paid his health insurance since 1992, and that Brumagin was terminated for legitimate non discriminatory reasons, including theft and poor work performance. It was the Authority’s position that Brumagin failed to produce a shred of evidence that it discriminated against him for his cystic fibrosis, and that a trial is, therefore, entirely unnecessary and his lawsuit should be dismissed.

On March 12, 2008, the trial court granted the Authority’s Motion for Summary Judgment. The trial court concluded that Brumagin failed to support his

claim of discrimination with evidence sufficient to present a jury question. This appeal followed.⁵

Brumagin argues that the trial court erred when it entered summary judgment because the trial court usurped the role of the jury by resolving material issues of fact. This Court must agree.

The Trial Court May Not Resolve Credibility Issues

It is beyond cavil that a trial court may not resolve credibility issues in a motion for summary judgment based upon oral testimony since the credibility of such testimony is within the province of the fact finder. Borough of Nanty-Glo v. American Surety Co. of New York, 309 Pa. 326, 163 A. 523 (1932). There is a three-step process to determine if the Nanty-Glo rule applies to preclude a grant of summary judgment. Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. Second, it must be determined if there is any discrepancy as to any facts material to the case. Third, it must be determined whether, in granting summary judgment, the trial court has usurped the role of the fact finder by resolving any material issues of fact. Arocho v. County of Lehigh, 922 A.2d 1010 (Pa. Cmwlth. 2007).

Here, Brumagin alleged facts sufficient to establish a *prima facie* case of discrimination, if believed, based on age and disability. He alleged that he was

⁵ This Court's review of a trial court's grant of summary judgment is limited to determining whether the trial court abused its discretion or committed an error of law. D.C. v. School District of Philadelphia, 879 A.2d 408, 413 n.3 (Pa. Cmwlth. 2005).

terminated because of his age and because he had high insurance premiums due to his cystic fibrosis. Second, Brumagin presented sufficient evidence that tended to support those allegations when he testified that he was ultimately replaced by the younger and less-experienced Hanley and offered into evidence a letter from a board member that the cost of coverage, because of Brumagin's cystic fibrosis, was a high concern for the board. The Authority, in turn, presented opposing testimony to the effect that Brumagin was terminated due to poor job performance and for the surreptitious receipt of monies for recording the weather for the National Weather Service.

Clearly, the reason for Brumagin's termination is a material issue of fact that is dispositive to any determination by a fact finder, and hotly contested by both parties. The trial court, in entering summary judgment, accepted and relied on the Authority's explanation for terminating Brumagin and disregarded Brumagin's explanation. Because the trial court rejected Brumagin's proffered reasons for his termination and credited the merits of the Authority's explanation, this Court must conclude that the trial court committed reversible error.

Accordingly, the order of the trial court is reversed and the matter is remanded to the trial court for proceedings consistent with this Opinion. Jurisdiction is relinquished.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 29th day of January, 2010, the order of the Court of Common Pleas of Erie County in the above-captioned matter is hereby reversed and the matter is remanded for proceedings consistent with this Opinion. Jurisdiction is relinquished.

BERNARD L. McGINLEY, Judge