RENDERED: DECEMBER 24, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-000624-MR

KELVIN BROOKS AND DONNA MARTIN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 98-CI-002519

JEFFERSON COUNTY FISCAL COURT; AND RONALD BISHOP — APPELLEES

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BARBER, COMBS, AND McANULTY, JUDGES.

BARBER, JUDGE: We are asked to decide four issues in this claim for racial discrimination and retaliation under Kentucky's Civil Rights Act, KRS Chapter 344: (1) Whether an individual can be held liable for retaliation in violation of KRS 344.280; (2) Whether the trial court erred in directing a verdict on a "disparate impact" racial discrimination claim, where failure to comply with the employer's "no facial hair" policy was due to a

medical condition, pseudo folliculi barbae ("PFB"), peculiar to African Americans; (3) Whether the trial court erred in its jury instructions on the elements of a claim for retaliation under KRS 344.280; and, (4) Whether the trial court erred in dismissing the punitive damages claims.

The Appellants, Donna Martin (Donna) and Kelvin Brooks (Kelvin), were employed by the Appellee, Jefferson County Fiscal Court, and worked at the Metropolitan Correctional Services Department (MCSD), better known as the Jefferson County Jail. The Appellee, Ronald L. Bishop, was the Director of MCSD. Appellees do not rebut Appellants' statement of the case in their counterstatement, but provide only a summary of certain procedural events. We therefore assume that Appellants' statement of the case is a fair and adequate presentation of the facts necessary to an understanding of the issues presented upon appeal. CR 76.12(4)(c)(iv) & (d)(iii). We refer to those facts as necessary to resolve the issue before us.

First, Donna asserts that the trial court erred, as a matter of law, in dismissing her retaliation claim against Bishop. Appellees had argued that Bishop was not subject to liability under KRS Chapter 344 as an individual, because he was not an employer. KRS 344.280 provides, in relevant part, that:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:

> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter;

Donna relies upon *Palmer v. International Association of Machinists and Aerospace Workers*[1] as authority that persons can be individually liable for retaliation under KRS Chapter 344; however, the issue we are asked to decide was not squarely addressed in *Palmer.* The issue there was whether the plaintiff was precluded from a civil remedy, because KRS 344.990 makes a willful violation of KRS 344.280 a misdemeanor. The Supreme Court remanded the issue of individual liability for retaliation to the circuit court, in light of its determination that KRS 344.450 provides for recovery in a civil action in addition to any other remedies contained in the chapter.

Appellees rely upon *Wathen v. General Electric Company,*[2] as did the trial court, for the proposition that an individual may not be held personally liable under KRS Chapter 344. Appellees assert that Bishop -- although a supervisor -- was not an employer, but was an employee of Jefferson Fiscal Court "just like Appellants."

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[1] Ky., 882 S.W.2d 117 (1994).
[2] 115 F.3d 400 (6th Cir. 1997).

In *Morris v. Oldham County Fiscal Court,* the Sixth Circuit addressed the issue of individual liability for retaliation under KRS Chapter 344.[3]

> This court has held that "an individual employee/ supervisor, who does not otherwise qualify as an 'employer,' may not be held personally liable under ... KRS Chapter 344," because the KCRA "mirrors Title VII...." *See Wathen v. General Elec. Co*., 115 F.3d 400, 405 (6th Cir.1997). Though this statement from *Wathen* is generally true, it clearly does not apply to retaliation claims brought under Ky. Rev. Stat. § 344.280. This section does not "mirror" 42 U.S.C. § 2000e-3(a), the analogous retaliation provision of Title VII, which forbids retaliation by "an employer." Rather, § 344.280 forbids retaliation by "a person." The Kentucky retaliation statute plainly permits the imposition of liability on individuals.

Accordingly, we reverse the trial court's dismissal of Bishop and remand for reinstatement of Donna's retaliation claim against him, individually.

Next, Kelvin argues that the trial court erred in directing a verdict against him on his claim for disparate impact racial discrimination.

> A plaintiff may prove a case of unlawful employment discrimination through either disparate treatment or disparate impact. *Rowe v. Cleveland Pneumatic Company,* 690 F.2d 88 (6th Cir.1982). . . . The disparate impact doctrine applies when the plaintiff attempts to show that a facially neutral employment practice falls more heavily on one group than another and

[3] 201 F.3d 784, 794 (6th Cir. 2000).

> this practice is not justified by any business necessity. *Rowe, supra. See Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).[4]

Kelvin alleges that he was terminated in November 1997 for failing to comply with MCSD's "no facial hair" policy, because he could not shave as a result of PFB. There was evidence that Kelvin's medical condition had been disclosed at the time he applied for employment with MCSD. Kelvin carried a military profile that excused his compliance with the Army's policy on facial hair. Kelvin contends that MCSD's policy had a disparate impact upon a protected class – African-Americans – because PFB is peculiar to African American men, a fact undisputed at trial. The trial court granted Appellees' motion for directed verdict, concluding that statistical evidence was required to establish a prima facie case of disparate impact.

Kelvin argues, as he did below, that the issue is controlled by *Johnson v. Memphis Police Dept.*[5] In *Johnson,* the plaintiff was also an African American male who suffered from PFB and could not comply with the employer's no facial hair policy. However, as the trial court noted, the basis for the court's determination of liability in *Johnson* was not only disparate impact, but because the proof established intentional discrimination, as well.

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[4] *White v. Rainbo Baking Co*., Ky. App., 765 S.W.2d 26, 29 (1988).
[5] 713 F. Supp. 244 (W.D. Tenn. 1989).

Appellees respond that Kelvin was the only individual impacted by the neutral policy. They rely upon *Watson v. Ft. Worth Bank and Trust*,[6] and other cases from various jurisdictions, to support their argument that a plaintiff must offer statistical evidence to satisfy his burden in a disparate impact case. Appellees assert that the trial court properly directed a verdict, due to a "fatal lack of statistical evidence" supporting Kelvin's claim.

It is accepted practice to look to federal case law construing Title VII in construing KRS Chapter 344.[7] We believe that the Sixth Circuit's reasoning in *Lynch v. Freeman,*[8] is applicable, here. *Lynch* involved the appeal of a Title VII action in which the plaintiff, a carpenter apprentice, had charged her former employer with sex discrimination for failure to furnish adequate, sanitary toilet facilities on a construction site, next to a powerhouse. *Lynch* explains that:

> A claimant proceeding under the disparate impact theory is not required to prove an intent to discriminate. In such a case, the trial court is concerned with "the *consequences* of employment practices, not simply the motivation." *Griggs v. Duke Power Co.,* 401 U.S. 424, 432, 91 S. Ct. 849, 854, 28 L. Ed. 2d 158 (1971) (Emphasis in original). Disparate impact cases typically are concerned with facially neutral practices or standards that in fact work to place a

[6] 108 S. Ct. 277 (1988).
[7] *Brewer v. Hillard*, Ky. App., 15 S.W.3d 1, 10 (1999).
[8] 817 F.2d 380 (6th Cir. 1987)

> disproportionate burden on a discrete group of employees who are protected under Title VII.[9]

Lynch's employer had contracted with a company to provide the portable toilets and to supply and maintain them in a sanitary condition; however, evidence showed that this was clearly not the case. Suffice it to say that the conditions were deplorable. To avoid using the toilets, Lynch began holding her urine until she left work. Within a few days after starting work she experienced pain and was advised that this practice frequently caused bladder infections, as did the use of contaminated toilet paper.

The powerhouse was off limits to construction workers. It had large, clean restrooms. Although she knew it was prohibited, Lynch used the powerhouse restrooms after her doctor diagnosed her with a urinary tract infection. Lynch was given a warning letter that she had violated a job rule, noting that she was in an unauthorized area. Ultimately, she was fired.

The district court rejected the employer's contention that Lynch failed to establish a prima facie case, because she produced no statistical evidence of a widespread impact. Nevertheless, the district court concluded that the toilet conditions were not a barrier to equal opportunities for women, reasoning that the female workers could have eradicated the

[9] *Id., at* 383.

increased health danger by "a few simple measures."[10] Thus, the district court determined that the unsanitary and inadequate toilet facilities did not impose a more substantial burden upon the women, than upon the men.

The plaintiff appealed and argued that she had met her burden of proving a significant adverse impact, by establishing that the toilets created a health hazard for women, not experienced by men. The employer argued that the condition of the toilets was not subject to a disparate impact analysis. The employer contended that conditions of employment are only dealt with in § 703(a)(1) of Title VII, and that § 703(a)(2) only forbids acts that limit, segregate or classify employees. The employer further contended that § 703(a)(1) applies to *disparate treatment* claims, and that §703 (a)(2) applies to *disparate*

[10] Such measures included the female employees carrying their own toilet paper at work; covering dirty seats with toilet paper or refraining from sitting directly on the seats; pursuing better compliance of the contract between the employer and the company supplying the portable toilets; procuring waterless hand cleaner or requesting permission to use indoor toilets during their menstrual periods. By adhering to these practices, the district court concluded that the disproportionate impact of the toilets on women would disappear. *Id.,* at 386.

impact claims, and that claims based upon *conditions of employment* must be brought under §703 (a)(1). The employer also argued that Lynch had failed to prove an adverse impact on the basis of statistically significant numbers. The Sixth Circuit disagreed, and explained that:

> Sections 703(a)(1) and (2) of Title VII provide:
> (a) It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
> 42 U.S.C. § 2000e-2(a)[11]

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[11] KRS 344.040 provides:
It is an unlawful practice for an employer:
(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;
(2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's race, color, religion, national origin, sex, or age forty (40) and over, because the person is

> We reject . . . [the employer's] argument that working conditions may never be the basis of disparate impact claims. The fact that the prohibited practices specified in §703(a)(1) include discriminatory conditions of employment and conditions are not mentioned in §703(a)(2) does not mean that discriminatory conditions may not for the basis of a disparate impact claim. . . . [T]he language of § 703 (a)(2) is clearly broad enough to include working conditions that have an adverse impact on a protected group of employees. It is an unlawful practice under § 703(a)(2) 'to limit . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.' The working condition of the toilets did 'limit' female . . . employees in a way that adversely affected their status as employees based solely on their sex.
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> [The employer argues] . . . that since it furnished the same facilities to all employees, it cannot be held to have discriminated. . . . If apparent equality of facilities could shield an employer from Title VII liability the entire rationale of the disparate impact theory – based as it is on 'consequences' – would be undercut. . . .
>
> **The district court . . . correctly ruled that the plaintiff was not required to prove her case by statistics. While Title VII plaintiffs may be able to prove some disparate impact cases by statistics, that is not the only avenue available. Both §§ 703(a)(1) and (a)(2) speak in terms of "any individual." The focus of § 703(a)(1) is discriminatory treatment of any individual, and of § 703(a)(2) discriminatory consequences for any individual. The language of the statute does not**

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a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

> **support . . . [the employer's] argument. . . .**
>
> We believe the district court erred as a matter of law in holding that the plaintiff failed to make a prima facie case because the . . . burden on women was not substantial. The evidentiary requirements of a prima facie case of discrimination are not onerous. [Citations omitted] . . .
>
> . . . Few concerns are more pressing to anyone than those related to personal health. . . .
>
> Title VII is remedial legislation which must be construed liberally to achieve its purpose of eliminating discrimination from the workplace. [Citations omitted] **Although Ms. Lynch was discharged for violating a rule, she did so in order to avoid the continued risk to her health which would have resulted from obeying the rule. . . . Anatomical differences between men and women are "immutable characteristics," just as race, color and national origin are immutable characteristics. When it is shown that employment practices place a heavier burden on minority employees than on members of the majority, and this burden relates to characteristics which identify them as members of the protected group, the requirements of a Title VII disparate impact case are satisfied.** (Emphasis added).[12]

Applying this analysis to the facts of the case *sub judice,* we conclude that the circuit court erred as a matter of law in directing a verdict against Kelvin and reverse and remand to the trial court with instruction to reinstate Kelvin's claim.

Next, Donna argues that the trial court erred in instructing the jury on her retaliation claim under KRS 344.280. Donna asserts that the jury instructions failed to properly

[12] *Id,* at 387-89.

incorporate the elements of the cause of action set forth in the statute. Kentucky law holds that a plaintiff, in making a *prima facie* case of retaliation, must prove that:

> 1) She engaged in a protected activity, 2) She was disadvantaged by an act of her employer, and 3) There was a causal connection between the activity engaged in and the employer's act. Again, if the employer articulates a legitimate, non-retaliatory reason for the decision, the employee must show that "but for" the protected activity, the adverse action would not have occurred.[13]

Instead, each subpart of Instruction No. 1, required the jury to be satisfied from the evidence that Donna was "subjected to abusive and intimidating conduct so severe or pervasive as to alter the conditions of her employment and to create an abusive working environment for her." We agree with Donna that the trial court's instructions are erroneous and misleading. "In this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error."[14] Appellees do not convince us that no prejudice resulted from the error. Accordingly, we reverse the judgment of the trial court entered upon the jury's

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[13] *Kentucky Center for the Arts v. Handley*, Ky. App., 827 S.W.2d 697, 701 (1991).
[14] McKinney v. Heisel, Ky., 947 S.W.2d 32, 35 (1997).

verdict in favor of the Appellee, Jefferson County Fiscal Court, on Donna's retaliation claims and remand for new trial.

Appellants' final argument is that the circuit court erred in dismissing their claims for punitive damages against Jefferson Fiscal Court under KRS Chapter 344. In that regard, we affirm. The issue was recently resolved by the Kentucky Supreme Court in *Dept. of Corrections v. McCullough,* which held that punitive damages are not available under KRS 344.450.[15]

ALL CONCUR.

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[15] Ky., ____ S.W.3d ____ (2003).