

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002598-MR

CHARLOTTE GRASSMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 99-CI-007511

LANDRY'S SEAFOOD HOUSE d/b/a
JOE'S CRAB SHACK

APPELLEE

OPINION
VACATING AND REMANDING
* * * * *

BEFORE: COMBS and PAISLEY, Judges; and JOHN D. MILLER, Special Judge.¹

COMBS, JUDGE: Charlotte Grassman appeals the summary dismissal of her complaint for wrongful discharge against her former employer, Landry's Seafood House, d/b/a Joe's Crab Shack (Joe's). Grassman alleged that Joe's fired her as retaliation for her pursuit of workers' compensation benefits. The trial court concluded that there was no genuine issue of material fact and

¹Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

that Joe's was entitled to a judgment as a matter of law. After our review of the record, we disagree. Therefore, we vacate and remand for further proceedings.

Grassman was hired as a waitress by Joe's in August 1997. In November of that same year, she sustained a work-related injury when she fell on steps on Joe's premises. An assistant manager called an ambulance for her, and she was transported to a hospital for treatment. When Grassman called Joe's the next day to report the extent of her injuries, the general manager, Curtis Rader, warned her not to incur a lot of medical bills because her injury was not covered by workers= compensation. Grassman then contacted the Department of Workers= Claims for assistance, and Joe's eventually acknowledged liability for the incident.

In her deposition, Grassman testified that upon returning to work after her injury, she was treated differently by those in management. She was assigned to wait on the least profitable tables. She was harassed about not dancing (a requirement of servers at Joe's) despite the fact that she was wearing a knee brace and her doctor had restricted her from performing such activities. She was required to rifle through garbage for lost silverware -- a duty not imposed on any other employee. She was told that she was too old to be a server.

In June 1998, Grassman fell on a slippery substance in the kitchen at Joe's. Rader was in the kitchen at the time and

saw her get up. When she told him that she had injured her back, he told her that she was tough and that she should go to the restroom, clean herself up, and get back to work. Although she managed to work the remainder of her shift, it was obvious to other servers and patrons that she was limping and experiencing considerable pain. Rader, who was responsible for completing an Employer's First Report of Injury or Illness form, left that evening without completing the necessary paperwork and testified that he may have requested that the kitchen manager perform that task.

In addition to waiting tables, the servers at Joe's had other responsibilities. At the end of each shift, the servers were assigned to clean specific areas, to roll a certain amount of silverware in napkins, and to prepare their tables for the next shift. The latter duties involved filling up a six-pack (a cardboard beer container) with various condiments, filling the sugar container with sugar and sugar substitutes, and placing two comment cards² on each table.

At the end of the shift on the day of this second fall, Grassman cleaned the area assigned to her, rolled her silverware, and filled up the condiments in the six-packs for her tables. When she attempted to check out, she was told by her shift leader that she needed comment cards on her tables. Grassman could not

²These are cards for eliciting comments from patrons concerning the quality of service at the restaurant.

find the cards where they were normally kept, and she testified that she heard the shift leader say they were out of them. Grassman then took two comment cards from other tables and placed them on her tables. For this alleged infraction, she was terminated by the manager on duty, Fredrico Western.³ Western told Grassman that she could appeal to Rader, who, as general manager, had final authority with respect to decisions relating to hiring and firing of Joe's employees.

Grassman went to the hospital, where she was diagnosed with a fractured coccyx. When contacted by the hospital, Western acknowledged to the hospital personnel that her fall was work-related and authorized treatment. Grassman called Rader to discuss her job, and he told her they had nothing to talk about. Grassman subsequently filed and settled a claim for workers= compensation benefits.

On December 16, 1999, Grassman filed a complaint alleging that she had been discharged from her employment at Joe's in violation of KRS⁴ 342.197, which provides in part:

(1) No employee shall be harassed, coerced, discharged, or discriminated against in any

³Fredrico Western has not testified in this action. The disciplinary action report completed by Western states that Grassman was terminated for Astealing condimints [sic] from tables.@ However, Grassman denied removing condiments from the tables of her fellow servers. She admitted that she removed comment cards only after she was unable to find them anywhere else. Rader bolstered Western's report by his testimony that he considered comment cards to be Acondiments.@ While servers had been warned not to remove condiments from other tables, there had been no such warning concerning comment cards.

⁴Kentucky Revised Statutes.

manner whatsoever for filing and pursuing a lawful claim under this chapter.

. . . .

(3) Any individual injured by any act in violation of the provisions of subsection (1) or (2) of this section shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record.

Following the depositions of Grassman and Rader, Joe~~s~~ filed a motion for summary judgment. Joe~~s~~ argued that at the time Western fired Grassman, he was unaware that she intended to file a workers=compensation claim or even that she had sustained an injury. Joe~~s~~ contended that it had a legitimate business reason for terminating Grassman; that is, that she had been observed removing comment cards from the table of another server.

In response, Grassman maintained that there was evidence from which a jury could reasonably infer that Western was aware of her injury and that Joe~~s~~ allegedly superficial and clearly flimsy reason for discharging her was merely a pretext. In its final order dismissing Grassman~~s~~ complaint, the trial court found as a matter of fact that ~~Mr.~~ West [sic] did not know about [Grassman~~s~~] fall until he told her she was terminated,@ negating the theory of retaliatory discharge as a matter of law. This appeal followed.

The oft-repeated standard which governs the granting or the denial of a motion for summary judgment provides:

[T]he movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy. . . Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.

Steelvest Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 472, 482 (1991)(Citations omitted.) See also, CR⁵ 56.03.

Additionally, A[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.@ Id. at 480.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996). Because the issue is one of law, our review is *de novo*. Therefore, we do not defer to the trial court's findings of facts since we review the record in a light more favorable to the non-moving party. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

To establish a *prima facie* case for retaliatory discharge under KRS 342.197, the plaintiff need only demonstrate that he or she was engaged in a protected activity (*i.e.*, pursuing rights to workers=compensation benefits) and that the employer was motivated C at least in part C by the employee's

⁵Kentucky Rules of Civil Procedure.

exercise of those rights in making the decision to terminate employment. First Property Management v. Zarebidaki, Ky., 867 S.W.2d 185 (1993). Grassman is not required to prove that the sole or even primary reason for her discharge is related to her protected activity. Her burden is to prove that the pursuit of her workers= compensation benefits was a ~~A~~substantial and motivating factor@in her dismissal. Id. at 187-189. When viewed most favorably to Grassman, the record reveals sufficient evidence from which a jury could reasonably infer that Joe=s may have fired Grassman because of her pursuit of workers= compensation benefits in violation of KRS 342.197. The evidence encompasses the pattern of hostile treatment of Grassman after she had filed her first claim for workers= compensation benefits, the highly coincidental timing of her termination only hours after her second injury, the minor (indeed, apparently pretextual) nature of the alleged reason for her termination, and the disparate manner in which she had been treated as distinguished from other employees. After considering all these factors, we believe that the trial court erred in summarily disposing of her claim.

Joe=s maintains that it is entitled to summary judgment as a matter of law because Grassman filed her workers= compensation claim after she was terminated. It argues that ~~A~~retaliation, by definition, cannot occur until the initial act-- the filing of the claim--occurs.@ The trial court properly

refrained from adopting that line of reasoning. In Overnite Transportation Company v. Gaddis, Ky.App., 793 S.W.2d 129, 132 (1990), this Court held that A[a] literal construction of KRS 342.197" would not achieve the Astatute's purpose or the legislature's intent to protect employees@ it emphasized that the actual filing of a claim need not occur prior to the adverse employment action in order to activate and implicate the anti-retaliation provisions of the statute. Id. As explained in Gaddis, any other interpretation of the statute would foster the subterfuge of employers=circumventing the statute by hastily Afiring the injured employee before he could file [a claim].@ Id.

The evidence in the record establishes that Grassman had a viable potential claim for workers=compensation benefits at the time of her termination. She was injured at work hours prior to her termination; she reported the injury to the general manager immediately; she specifically requested that any injury report be completed; and prior to Rader's ratification of her termination, she had obtained medical treatment for her injuries. Under the well established interpretation of the anti-retaliation statute discussed in Gaddis, we hold that Grassman was acting in pursuit of a claim for workers=compensation benefits at the time of her discharge from Joe's.

Joe's also argues that it is entitled to a summary judgment because Grassman failed to meet her burden of overcoming

its legitimate business reason for her termination. Joe's claimed that Grassman was fired for removing two comment cards from the tables of other servers and placing them on tables for which she was responsible. It argues that such conduct was reprehensible because it caused other servers to work harder. When viewed favorably to Grassman, the evidence equally reveals that Grassman could not find the stock of comment cards in their usual location and that she left no tables without at least one comment card.

Pretext can be inferred from circumstantial evidence. Kentucky Center for the Arts v. Handley, Ky.App., 827 S.W.2d 697, 700 (1991). Grassman presented evidence that Joe's had no policy for firing servers for any misfeasance related to comment cards and that Joe's had never fired (much less disciplined) any employee for moving comment cards from one table to another. Perhaps the most compelling evidence of pretext is that two employees who actually stole merchandise from Joe's were not only not terminated but suffered no any adverse employment action whatsoever. There is adequate evidence of pretext to overcome the motion for summary judgment.

Finally, our review of the record reveals that the trial court erred in making its findings of fact by frequently viewing them in a light unfavorable to Grassman C contrary to the proper standard governing summary judgment. For example, the judgment recites:

[Grassman] stated that she did not tell Mr. West [sic] about her fall prior to her termination, and she did not know of anyone who had told Mr. West [sic] about the fall, including Mr. Rader. Based upon her testimony, Mr. West [sic] did not know about her fall until he told her she was terminated. . .

Conversely, Grassman was deliberate in her testimony in stating her belief that Western was aware of her injury before he fired her for moving comment cards from one table to another. She testified that her fall had caused a lot of commotion at the time it occurred, that several other employees knew about her fall, and that they had made several inquiries about her well-being throughout the evening. Additionally, her clothing was soiled with the greasy substance that had caused her fall, and she was obviously limping and was apparently in pain. A jury could reasonably infer that Western was fully aware that Grassman had sustained a work-related injury before terminating her employment. In short, the trial court erred in finding that Western was unaware of her fall. Western's knowledge in that regard was indeed a disputed fact of a material nature proper for a jury determination.

Finally, even if Western had been unaware of her fall, the record reveals that as the general manager, Rader had the final authority as to firing. At the time he ratified Grassman's termination, he was fully aware that she had sustained a serious injury as a result of her fall. In light of all the evidence surrounding this injury along with the pattern of hostile

treatment surrounding her previous claim for workers= compensation benefits, we believe that a jury question has been presented with respect to Joe's motives for firing Grassman.

The judgment of the Jefferson Circuit Court is vacated, and this matter is remanded for a trial on the merits of Grassman's complaint.

ALL CONCUR.

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