

RENDERED: JUNE 6, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000397-MR

DAVID I. YAHYA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 96-CI-03824

LEXMARK INTERNATIONAL, INC.,
INDIVIDUALLY AND
GREGG SURVANT

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

BAKER, JUDGE. David I. Yahya (appellant) brings this appeal from a November 8, 2001, judgment of the Fayette Circuit Court. We affirm.

In 1994, appellant was hired as an assembly line operator at Lexmark International, Inc. (Lexmark). Later that year, appellant claims he suffered a work-related injury to his shoulder. He was subsequently diagnosed with a rotator cuff

injury and placed on light duty. In January of 1996, appellant had surgery on the shoulder and thereafter returned to work. He was placed on permanent medical restrictions which included no lifting or carrying forty pounds on a repetitive basis. He was also to avoid forward positioning of the right arm, particularly at the level of the right shoulder and over his head, as well as reaching outward from his body. From the record, it appears that some time before surgery, appellant's job position was changed from assembly line operator to process specialist. It is uncontroverted that appellant could perform the duties of process specialist with his permanent medical restrictions.

On July 3, 1996, the supervisor covering the assembly line requested appellant to work at the dispatch position because of a shortage of workers. Appellant refused, alleging that the dispatch position required activity outside of his medical restrictions. After conducting an investigation, Lexmark decided to terminate appellant for insubordination.

Appellant thereupon filed suit against Lexmark alleging, *inter alia*, disability discrimination under Kentucky Revised Statute Chapter 344 (the Kentucky Civil Rights Act).¹ The matter came on for trial by jury in October 2001. The circuit court granted directed verdict upon appellant's claim that "he was not provided a reasonable accommodation for his

¹ Yahya also filed claims against one, Greg Survant; however, the claims against Survant are not relevant to this appeal.

disability." However, the court submitted to the jury the appellant's claim that "he was terminated because of his disability." The jury found in favor of Lexmark. This appeal follows.

As a threshold matter, neither of the briefs filed by appellant comport with Ky. R. Civ. P. 76.12(4)(c)(v), which requires ". . . at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Such a failure puts this Court in the position of necessarily reviewing the record in detail from beginning to end in order to determine whether such alleged error has been properly preserved.² Regardless, we have determined to conduct an exhaustive review of the videotaped trial testimony as well as the written record on appeal and, for the reasons indicated below, determine that appellant's position is without merit.

Appellant argues on appeal that the trial court erred in granting a directed verdict on his claim of reasonable accommodation for his disability. Appellant does not provide any legal authorities in support of this argument, nor are there any references to the record so indicating. The standard for the directing of a verdict is succinctly stated in Lee v.

² This Court has previously held on other occasions that it will not search the record for testimony when the rule is not observed. Reffitt v. Hajjar, Ky. App., 892 S.W.2d 599 (1994); Young v. Newsome, Ky., 462 S.W.2d 908 (1971).

Tucker, Ky., 365 S.W.2d 849, 851 (1963), as follows: “[I]f when all the evidence on both sides has been heard reasonable men may differ on the conclusion to be drawn, the question should be for the jury; otherwise, the clear conclusion is a matter of law, one way or the other.” In the matter before us, the burden was on the plaintiff at trial to establish the existence of an impairment that *substantially limits a major life activity* as an element of the plaintiff’s prima facie case. Noel v. Elk Brand Mfg. Co., Ky. App., 53 S.W.3d 95 (2000)(citing Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996)). While Lexmark conceded at trial that appellant did suffer from a work-related injury and disability, we have been unable to locate in the record any substantive evidence whatsoever which would tend to indicate that appellant’s injury and resulting disability “. . . limit[ed] a major life activity”, which is an essential element of a prima facie case based upon a claim of reasonable accommodation.

Hence, we believe the trial court correctly directed a verdict on appellant’s claim of failure to accommodate; accordingly, its refusal to instruct the jury on this claim, as well, was appropriate, and we perceive no error. See Kentucky Farm Bureau Mut. Ins. v. Gray, Ky. App., 814 S.W.2d 928 (1991).

Appellant next argues that the trial court’s jury instructions were “confusing and incomplete.” The court did

allow the case of disability discrimination to go to the jury over the objection of the defendant, and the trial court instructed as follows:

Do you believe from the evidence that Plaintiff's disability was a substantial and motivating factor in Defendants' decision to terminate his employment, and that, but for Plaintiff's disability he would not have been terminated?

We perceive this instruction to succinctly frame the issue developed by the proof at trial;³ hence, we find no error. Kentucky has adopted the "bare bones" approach to jury instructions. Rogers v. Kasdan, Ky., 612 S.W.2d 133 (1981). It is the duty of counsel to flesh out the instructions in closing arguments to the extent and to the measure that the respective counsel deem appropriate. Humana, Inc. v. Fairchild, Ky. App., 603 S.W.2d 918 (1980).

The balance of appellant's contentions on appeal center on the admission/exclusion of certain evidence that pertains either to the appellant's credibility or his medical/emotional condition, the latter of which, he claimed, resulted from the alleged discriminatory treatment. Clearly, both appellant's credibility and his physical/emotional health were very much in issue in this litigation, and we perceive no error in the court's rulings in this regard. The admission and

³ Ellison v. R&B Contracting, Inc., Ky., 32 S.W.3d 66, 73 (2000).

exclusion of evidence at trial is to be left in the sound discretion of the trial court, and we will not disturb such rulings unless there appears to be an abuse of that discretion. In any event, we are of the opinion that appellant has failed to demonstrate that the admission/exclusion of the controverted evidence affected "a substantial right." Kentucky Rules of Evidence 103.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BARBER, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

BARBER, JUDGE, DISSENTING IN PART. I respectfully dissent from that portion of the majority's opinion upholding the summary judgment in the issue of failure to accommodate. I believe there was sufficient medical evidence concerning the appellant's restrictions to submit the question to the jury.

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