

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000716-MR

SHIRLEY O'QUINN

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 96-CI-01267

LARRY LYNN, D.M.D.

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, GUIDULGI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Shirley O'Quinn (hereinafter "O'Quinn") is pursuing a second appeal in her retaliatory discharge claim against Larry Lynn, D.M.D., (hereinafter "Dr. Lynn"), this time from the Pike Circuit Court's February 8, 2002, order of dismissal and from the March 11, 2002, order denying her motion to alter, amend or vacate. We affirm.

The Court of Appeals has previously reviewed this case in an unpublished opinion rendered August 27, 1999, and made

final on April 4, 2000.<sup>1</sup> The opinion in the first appeal presented an excellent recitation of the facts, which we shall adopt herein:

Shirley O'Quinn, appellant, had begun working as a dental assistant for appellee, Dr. Larry Lynn, in 1986. Her duties included serving as a dental hygienist, as well as other dental office work. In 1987, appellant developed a skin condition caused by an allergic reaction she had to certain chemicals used in the office, particularly formo-cresol, a chemical used in processing dental x-ray's. Exposure to these chemicals caused appellant to suffer blisters, cracks, and sores on her hands. Her condition worsened after she spilled some formo-cresol on her hands. In addition to the skin condition, her allergic reaction to the office chemicals also caused appellant to suffer breathing problems. Appellant was treated by a doctor and a dermatologist, and had to take numerous medications to relieve her symptoms. The dermatologist also recommended that appellant wear gloves.

Appellant filed a workers' compensation claim in 1991. In an opinion and order dated March 16, 1993, the administrative law judge (ALJ) concluded that appellant was suffering an occupational disability of 25%. The ALJ determined that as a result of appellant's exposure to the chemicals in the dental office, she had developed asthma and dermatitis. In addition to the compensation awarded, which was apportioned 60/40 between Lynn and the Special Fund, the order stated that appellant "shall further recover of the Defendant Employer for the cure and relief from the effects of the injury and such medical, surgical and hospital treatment including nursing, medical and surgical supplies and appliances as may reasonably be

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<sup>1</sup> O'Quinn v. Lynn, appeal No. 1998-CA-001295-MR.

needed to treat her occupational disease and thereafter during disability." The ALJ's order noted that Lynn contested the medical expenses award, but stated that he failed to show that the medical expenses were not related to appellant's work injury.

After receiving the award, appellant continued to work for Lynn. Appellant had been advised by the dermatologist to wear gloves to protect her hands from the chemicals, but because she was allergic to latex, she eventually had to quit wearing the standard latex gloves used in the dental office. As a result, although appellant's skin condition was still causing her to have sores and cracks on her hands, she worked with no gloves, despite the fact that she worked around patients' bodily fluids. Therefore, in January, 1996, appellant was written a prescription by a physician for hypo-allergenic gloves. These special gloves, at \$42.50 per box, were more expensive than the regular latex gloves normally used in the office. Lynn resisted buying the special gloves, stating, according to appellant, "I won't, I can't, and I don't see who will." Therefore, appellant, who made \$6.00 an hour, bought the first box of gloves herself. Appellant submitted a claim to Lynn's insurance company, Wausau, but Wausau did not pay the claim.

Appellant bought the second box of gloves herself, and again, submitted the claim to Wausau. On May 30, 1996, Wausau sent a letter to appellant informing her that Wausau would not pay for the gloves, and that it was Dr. Lynn who was required to pay for the gloves. The letter stated, "Your employer already provides gloves for all employees, it should be the employer's responsibility to pay for special gloves if you require them due to your pre-existing condition of sensitive skin." Wausau sent a copy of this letter to Lynn. Eventually,

Lynn reimbursed appellant for the cost of the second box. Due to the difficulties appellant was having getting Wausau or Lynn to pay for the gloves, she had to try to make a box of gloves last as long as she could. She would use the same pair over and over, washing them herself in between patients. Appellant eventually ran out of gloves again, and had to work without gloves in the month of June, 1996. Finally, at the end of June, Lynn, after persistence by appellant, bought her another box of gloves.

On August 5, 1996, appellant had run out of the special gloves again. She had notified Lynn the week before that she was almost out of gloves. On the morning of August 5, appellant asked Lynn if he had obtained any gloves for her, and he replied that he had not. She was supposed to prepare a patient that morning for a crown, a procedure which would involve blood. Appellant had begun to fear for her health working as a dental assistant without gloves, and therefore told Lynn that she was going home, and to call her if he got some of her special gloves. Lynn then became angry at appellant, and appellant went home. When appellant came into work the next morning, August 6, 1996, Lynn fired her, stating the reason as "insubordination".

On September 3, 1996, appellant filed a complaint against Lynn in Pike Circuit Court, alleging that she was terminated by him in retaliation for attempting to exercise her rights under Kentucky's workers' compensation laws, and seeking compensatory and punitive damages. A jury trial was held on October 21-22, 1997. At the end of appellant's evidence, defense counsel made a motion for a directed verdict, arguing that appellant did not have a cause of action under KRS 342.197, rather that this was a medical fee dispute governed by 803 KAR 25:012. The trial judge denied the motion. Defense counsel renewed the

motion for directed verdict at the end of the trial. The judge denied the motion again, and allowed the case to go to the jury. After over four hours of deliberation, there was a hung jury, and the case ended in a mistrial. On October 31, 1997, defense counsel filed a motion for judgment notwithstanding the verdict, based upon the same arguments stated in both of his motions for directed verdict. In an order entered May 7, 1998, the judge sustained the motion, finding that there was not a cause of action for wrongful discharge.

The Court of Appeals then reversed the trial court's decision and remanded the matter for a new trial, determining that there was sufficient evidence for a jury to reasonably find Dr. Lynn guilty of retaliatory discharge based upon the contention between him and O'Quinn regarding the special gloves. The Supreme Court denied Dr. Lynn's motion for discretionary review, and the opinion of the Court of Appeals became final on April 4, 2000.

On April 4, 2000, the trial court scheduled a new trial date, and the parties proceeded with further discovery. As a result of this discovery, Dr. Lynn filed a motion for summary judgment on August 16, 2000, arguing that O'Quinn had no cause of action because she had been found to be totally disabled as of August 5, 1996, the day before Dr. Lynn discharged her. This information was not known until after the Court of Appeals rendered its decision. Dr. Lynn relied upon a

decision of the Social Security Administration finding that O'Quinn had been totally disabled since August 5, 1996, and awarding benefits accordingly. According to the decision, O'Quinn alleged in her application that she had been totally disabled since August 5, 1996. O'Quinn responded, arguing that there remained an issue of fact as to the date Dr. Lynn discharged her, and that the total disability was caused in part by Dr. Lynn's conduct. On September 7, 2000, the trial court entered an order on Dr. Lynn's motion for summary judgment. However, rather than ruling on the motion, the trial court ordered O'Quinn to supplement her response within ten days to provide at least some affirmative evidence showing that there was a genuine issue of material fact.

Dr. Lynn filed supplemental documents to his motion for summary judgment, which included a 1997 motion to reopen O'Quinn's workers' compensation claim and the affidavit attached to it. In the affidavit, O'Quinn stated that since August 5, 1996, she had been disabled to the extent that she could no longer work in a dentist's office or in any place where she would be exposed to dangerous chemicals. Additionally, in a motion for ruling on the motion for summary judgment filed on November 28, 2000, Dr. Lynn provided further documentation that O'Quinn was discharged on August 6, 1996. Later, Dr. Lynn filed a third supplement to his motion for summary judgment, attaching

a subsequent motion to reopen O'Quinn's workers' compensation claim along with an affidavit in which O'Quinn claimed to have been disabled since August 5, 1996.

Not until November 29, 2000, did O'Quinn respond to the trial court's September 7, 2000, order requiring her to supplement her response to the motion for summary judgment. In the response, O'Quinn submitted an affidavit in which she stated that, "her discharge and termination was a component of her anxiety." She also stated that she was relying upon the deposition of Dr. K.D. Gibson. The trial court denied Dr. Lynn's motion for summary judgment on December 29, 2000, and ordered the parties to mediate the matter. On October 2, 2001, the trial court allowed O'Quinn's counsel to withdraw, and continued the trial scheduled to begin that day. O'Quinn informed the trial court that she would be representing herself in a response filed October 19, 2001.

Dr. Lynn finally moved the trial court to dismiss the case due to a lack of a cause of action on November 13, 2001, continuing to argue that she could not have a claim for wrongful discharge if she was totally disabled to work the day before being discharged. He again utilized the social security decision and the two motions to reopen with accompanying affidavits filed in her workers' compensation action to establish that she had been claiming total disability since at

least August 5, 1996. Dr. Lynn relied upon dicta in Hardaway Management Company v. Southerland, Ky., 977 S.W.2d 910 (1998), to support his proposition. O'Quinn, represented by new counsel, filed a response, arguing that Dr. Lynn had discriminated against her when she exercised her right under federal and state occupation safety and health laws to work in a safe environment. She further argued that the issues raised in Dr. Lynn's motion were irrelevant.

Following a hearing on the motion, the trial court entered an order of dismissal on February 8, 2002:

This cause came before the Court on the Defendant's Motion to Dismiss. The Court conducted a hearing on December 7, 2001, with the proceedings being recorded on Tape No. 1062-A-01, and has reviewed the Motion, the Response filed thereto, and the record.

In a non-published Opinion that was final on April 4, 2000, the Court of Appeals reversed and remanded this case for a trial on the Plaintiff's claim under KRS 342.197. The Court of Appeals found that there was evidence that the special hypo-allergenic gloves that the Plaintiff claimed she needed were a point of contention between the parties and a reason for the Defendant to discharge the Plaintiff on August 6, 1996.

On March 25, 1998, the Plaintiff received a "Fully Favorable" decision from the Social Security Administration, finding that she had been under a "disability" since August 5, 1996, one day before the Defendant discharged her. The fact that the Plaintiff was alleging her date of disability as August 5, 1996, was unknown to this Court or the Court of Appeals in the prior appeal.

On September 7, 2000, the Court entered an Order adopting the federal rule mentioned in dicta in *Hardaway Management Co. v. Southerland*, Ky., 977 S.W.2d 910 (1998), that an employer is not liable for back pay for periods during which an employee is unavailable for work due to disability. At that time, the Plaintiff alleged that the discharge itself was a substantial factor in causing her disability but presented no support for this allegation. The Court then gave the Plaintiff ten days to supplement her Response with affirmative evidence. Sixteen months later, the Plaintiff has not filed the affirmative evidence with the Court.<sup>2</sup> The Plaintiff's last Response filed on December 6, 2001, does not address this issue.

The Plaintiff's claim is contradictory and illogical. She has been "totally disabled" according to the Social Security Administration since August 5, 1996. However, she wants lost wages and back pay for a period during which she was unavailable for work due to disability.

For the foregoing reasons, IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss is GRANTED, and this cause is DISMISSED WITH PREJUDICE.

There being no just cause for delay, this is a final and appealable Order, and this cause is STRICKEN from the docket.  
(footnote added)

O'Quinn moved the trial court to alter, amend or vacate its order, arguing that the essence of her claim was retaliation

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<sup>2</sup> We note that O'Quinn filed a late response to the motion for summary judgment on November 29, 2000, in response to the trial court's order, in which she stated she was relying upon her attached affidavit and the deposition of Dr. Gibson. However, this misstatement of the trial court does not affect our holding herein.

rather than lost wages in that she had suffered an adverse effect of employment when she requested the special gloves. The trial court denied O'Quinn's motion on March 11, 2002, and this appeal followed.

O'Quinn's first argument is that in an action for retaliatory discharge in violation of KRS 342.197<sup>3</sup>, an employee only has to show that the lawfully impermissible reason for the discharge was a substantial and motivating factor, citing First Property Management v. Zarebidaki, Ky., 867 S.W.2d 185 (1994). This Court previously addressed the same issue in its prior opinion, holding that there was sufficient evidence for a jury to reasonably believe that O'Quinn's pursuit of the special gloves was a substantial motivating factor in her discharge in violation of KRS 342.197. We shall not address this issue any further as it has previously been decided and because it is irrelevant to the matter before us.

O'Quinn's second argument is that it is not necessary to file a workers' compensation claim or have an existing claim

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<sup>3</sup> KRS 342.197. Discrimination against employees who have filed claims or who have a diagnosis of coal-related pneumoconiosis - Civil Remedies

- (1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.
- (2) . . .
- (3) Any individual injured by any act in violation of this 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.

in order to pursue a claim for wrongful discharge in retaliation for seeking workers' compensation benefits, citing Overnite Transportation Co., v. Gaddis, Ky.App., 793 S.W.2d 129 (1990). Again, this Court previously addressed this issue in the prior decision, agreeing with O'Quinn's contention that her pursuit of the special gloves was protected by KRS 342.197. As with her first argument, we shall not address this issue any further as it has no relevance to the present appeal.

O'Quinn's third argument is that Dr. Lynn violated rules contained in the Kentucky Occupational Safety and Health Standards for General Industry (hereinafter "OSS"). Interestingly, O'Quinn did not raise Dr. Lynn's alleged violations of these rules until very late in her case below. We agree with Dr. Lynn, however, that her arguments in this regard are inapplicable.

KRS 338.121 protects any employee who, believing a violation of an occupational safety and health standard exists that threatens physical harm, requests an inspection from the commissioner. In particular, KRS 338.121(3)(a) provides that, "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . . ." KRS 338.121(3) provides the means by which an employee who believes

he has been discriminated against or terminated in violation of the statute must proceed. This involves the filing of a complaint with the commissioner, who will begin an investigation if appropriate. There is nothing in the record, and O'Quinn does not even allege, that she instituted any type of complaint procedure with OSS. Furthermore, the U.S. District Court for the Western District of Kentucky in Hines v. Elf Atochem North America, Inc., 813 F.Supp. 550 (W.D. Ky. 1993), addressed this issue, holding that:

Both the federal OSHA statute, 29 U.S.C. § 660(c), and the Kentucky OSHA statute, K.R.S. § 338.121(3)(b) create a public policy exception by prohibiting termination or discrimination against employees who refuse to violate these statutes. Both statutes provide a structure for employees to pursue when alleging violations. The statutes preempt wrongful discharge claims based on OSHA.

Id. at 552. O'Quinn's argument is irrelevant to the matter on appeal.

O'Quinn next argues that the trial court erred in entering an Order of Dismissal. Again, O'Quinn argues an issue that has already been decided by this Court, asserting that the pursuit of her workers' compensation claim was the motivating factor for her discharge.

Finally, O'Quinn argues that she is entitled to punitive damages. However, this argument relies upon her

earlier occupational safety and health claim, which we have already held has no relevance to the matter we are reviewing. Again, this argument must fail.

The only issue actually before the Court at this time is whether the trial court properly dismissed the cause of action because O'Quinn was seeking lost wages and back pay for a period of time during which she was disabled and therefore unavailable for work. O'Quinn did not address this issue in her brief, other than to assert that she was only seeking the difference between her monthly Social Security benefits and the wages she would have received if she had continued working for Dr. Lynn. Nevertheless, we shall address this issue.

Both the trial court and Dr. Lynn relied upon dicta from the Supreme Court in Hardaway Management Company v. Southerland, Ky., 977 S.W.2d 910. Therein, the Supreme Court addressed the issue as to whether Southerland could recover both workers' compensation benefits and back pay from Hardaway for a time period when she was totally disabled. After noting that this was an issue of first impression in this jurisdiction, the Supreme Court chose to rely upon the two-pronged rule the federal courts had developed. The first prong, which was neither raised nor addressed by the Supreme Court in the opinion, provides that, "the employer is not liable for back pay for periods during which the employee is unavailable for work

due to disability, N.L.R.B. v. Louton, Inc., 882 F.2d 412, 415 (3d Cir. 1987), citing Canova v. N.L.R.B., 708 F.2d 1498 (9<sup>th</sup> Cir. 1983) and American Manufacturing Co., 167 N.L.R.B. 520 (1967)." Hardaway, supra at 918.

In the present appeal, Dr. Lynn has presented documentation to establish that O'Quinn has claimed she was totally disabled from August 5, 1996, the day before Dr. Lynn discharged her, for whatever reason, on August 6, 1996. In the Social Security decision, the administrative law judge stated that O'Quinn alleged that the onset date of her disability was August 5, 1996, and later found that she met the requirements for disability as of August 5, 1996. Dr. Lynn also provided a copy of O'Quinn's October 22, 1997, motion to reopen her workers' compensation claim to establish an increase in her occupational disability. In the affidavit attached to the motion to reopen, O'Quinn stated that, "her last day of employment and exposure, on the job, to chemicals was August 5, 1996. At that time and since then Plaintiff is now disabled to such an extent that she can no longer work in a dentist's office or in other places in which she would be exposed to industrial chemicals." Dr. Gibson's medical report also relates her disability to her severe allergic hypersensitivity to chemicals. Dr. Lynn filed a copy of yet another motion to reopen, this one served on December 11, 2000. In the affidavit attached, O'Quinn

makes the same claim as to the onset of her current level of disability, again relating it to August 5, 1996.

It is clear from the record that O'Quinn was disabled and unable to work beginning on August 5, 1996. Therefore, she can have no claim for back pay from August 6, 1996, when she alleges she was discharged in retaliation for pursuing workers' compensation benefits. Hardaway Management Co. v. Southerland, Ky., 977 S.W.2d 910 (1998). Her argument that the discharge caused at least a portion of the disability is illogical as well, because she had not yet been discharged on the date she identified as the onset of her total disability. Therefore, O'Quinn's claim for retaliatory discharge pursuant to KRS 342.197 must fail.

For the foregoing reasons, the decision of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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