

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000959-MR

GORDON MILBY

APPELLANT

v. APPEAL FROM JEFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 99-CI-006123

JEFFERSON COUNTY BOARD
OF EDUCATION

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. In his civil action alleging discrimination under the Kentucky Civil Rights Act, KRS 344.040, et seq., and constructive discharge, Gordon Milby (hereinafter "Milby") has appealed from the Jefferson Circuit Court's summary judgment entered on March 7, 2001, in favor of the Jefferson County Board of Education (hereinafter "the Board") and from the April 25, 2002, order denying his Motion to Alter, Amend or Vacate that

judgment. Having considered the parties' briefs and oral arguments, as well as the certified record and applicable case law, we affirm.

In its memorandum opinion entered March 7, 2001, the trial court presented an excellent recitation of the facts, which we shall adopt as our own:

Mr. Milby began working for Jefferson County Public Schools ("JCPS") in 1968. In 1979, he became principal of Doss High School. In 1991, Mr. Milby was diagnosed with congestive heart failure, and in 1995, became a candidate for a heart transplant. Mr. Milby's condition caused him to be absent from his position as principal from September, 1995 through February, 1996. When Mr. Milby returned to work, he maintained a two day per week schedule. On November 17, 1995, a ventricular assist device ("VAD") was surgically implanted in Mr. Milby to keep his blood flowing throughout his body while he awaited a transplant. Mr. Milby wore the battery pack portion of the device, which was open and visible, while he continued as principal and was regularly assisted by his wife, who was also employed by JCPS.

In May, 1996, Mr. Milby met with Superintendent of Schools Stephen Daeschner ("Superintendent Daeschner") and William Eckels ("Mr. Eckels"), Executive Director of Human Resources, to discuss Mr. Milby's health concerns and the status of his position as principal of Doss High School. The Board of Education alleges that during this discussion, Mr. Milby indicated that he had two years before he was fully vested in his retirement benefits and that he wanted to continue working until then. A letter dated May 31, 1996 from Superintendent Daeschner to Mr. Milby outlined his

agreement with the Jefferson County School District ("District") relating to his work assignment for the 1996-1997 and 1997-1998 school years. Mr. Milby maintained his status as principal and his benefits but was voluntarily transferred from Doss High School into an interim principal position. The District also agreed to flexible scheduling for Mrs. Milby, who was employed by JCPS, to allow her to work by his side.

On June 21, 1996, Mr. Milby underwent successful heart transplant surgery. He returned to the interim principal position on a part-time basis eight days after surgery. At the end of the 1997-1998 school year, Mr. Milby advised John Sizemore ("Mr. Sizemore"), an assistant superintendent and his supervisor, that he wanted to continue working in the interim principal position. Once Superintendent Daeschner learned of Mr. Milby's request, he contacted Mr. Milby by letter dated June 10, 1998 advising him that he would be placed in an assistant principal position at his current salary but his salary would be "red-lined" pursuant to District Policy. Consequently, Mr. Milby would receive an annual increase of one-half the percentage increase in certified salaries until the salary level for an assistant principal reached the level of Milby's salary as principal.

Mr. Milby advised Mr. Eckels that he did not want to be placed in an assistant principal position and wanted to continue in the interim principal position that had been created due to his pending open heart surgery. It was ultimately decided that Mr. Milby could continue in his current position for an additional 15 months. Superintendent Daeschner testified that he first suggested other options to Mr. Milby such as applying for other positions within the District. He also testified that he and Mr. Eckels believed the May 6, 1996 agreement was not enforceable in respect to Mr. Milby's plan

to retire after the 1997-1998 school year. Ultimately, an agreement was reached permitting Mr. Milby to continue in the interim principal position for 15 months and maintaining his same level of compensation. The agreement included Mr. Milby's notice of retirement effective September 30, 1999.

Mr. Milby retired effective October 1, 1999. On October 4, 1999, he sent a letter to Superintendent Daeschner requesting that he be reinstated to the interim principal position. He stated that he had made repeated requests to Superintendent Daeschner to continue employment with the District. Superintendent Daeschner responded to Mr. Milby by letter dated October 6, 1999. Superintendent Daeschner disputed Mr. Milby's claim that he made such repeated requests and suggested that he apply for a position in the District if he wished to continue his employment. On October 14, 1999, Mr. Milby filed this civil action in Jefferson Circuit Court alleging discrimination under the Kentucky Civil Rights Act, KRS 344.040 et seq. and constructive discharge.

The circuit court held that Milby was disabled as defined by KRS 344.010(4) and by the federal Americans with Disabilities Act¹ (hereinafter "ADA") from September 1995 until July 1996, and that the Board was required to provide appropriate accommodation during the time Milby was experiencing difficulty breathing and frequent absences from his position. The circuit court noted that Superintendent Daeschner had created an unbudgeted position for him. However, once Milby returned to work following his successful heart transplant, the

¹ 42 U.S.C. § 12101, et seq.

Board was no longer, by law, required to accommodate him. The circuit court also held that Milby presented no evidence to support his claim of constructive discharge, as a reasonable person would not have found his working conditions intolerable. Lastly, the circuit court noted that Milby was no longer disabled when he entered into the final 1998-1999 agreement, at the end of which he included a notice of resignation effective September 30, 1999, and that although he had the opportunity to apply for other positions in the district, he chose not to do so. The circuit court denied Milby's motion for partial summary judgment and granted the Board's cross-motion for summary judgment. The circuit court denied Milby's motion to alter, amend or vacate on February 25, 2002, and this appeal followed.

Our standard of review regarding summary judgments is well settled in the Commonwealth. In Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996), this Court set forth the applicable standard of review as follows:

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992). "The 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." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . ." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), citing Steelvest, supra (citations omitted).

Furthermore, "[b]ecause summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." Lewis v. B&R Corporation, Ky.App., 56 S.W.3d 432, 436 (2001). With this standard in mind, we shall review the matter before us.

In his brief, Milby continues to argue that he established a *prima facie* case of disability discrimination, arguing that he was disabled in May 1996, that he was qualified to be a high school principal, and that the Jefferson County Public Schools (hereinafter "JCPS") discriminated against him due to his disability, as it was legally obligated to accommodate him unconditionally and that it actually discharged him by coercing him to submit his resignation. On the other hand, the Board argues that Milby failed to establish a *prima*

facie case of disability discrimination because he was not disabled when he retired in 1999 and because he was not forced to retire in return for an accommodation. Furthermore, his refusal to take the offered employment or otherwise apply for another position rendered him unqualified as a matter of law. Additionally, the Board exceeded its obligation to accommodate Milby and did not discharge him. We agree with the Board.

Under KRS 344.040 of the Kentucky Civil Rights Act, which mirrors the ADA,

It is an unlawful practice for an employer:

- (1) To fail or refuse to hire, or to discharge any individual, or otherwise 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 non-smoker, as long as the person complies with any workplace policy concerning smoking.

KRS 344.030(1) defines a "qualified individual with a disability" as:

An individual with a disability as defined in KRS 344.010² who, with or without reasonable accommodation, can perform the

² KRS 344.010(4) provides that:

'Disability' means, with respect to an individual:

- (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
- (b) A record of such impairment; or
- (c) Being regarded as having such an impairment.

essential functions of the employment position that the individual holds or desires unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's disability without undue hardship on the conduct of the employers' business.
(footnote added)

In Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1178 (6th Cir. 1996), the 6th Circuit Court of Appeals reviewed the plaintiff's disability discrimination claim under the ADA and held that "[t]o recover on a claim of discrimination under the Act, a plaintiff must show that: 1) he is an individual with a disability; 2) he is 'otherwise qualified' to perform the job requirements, with or without reasonable accommodation; and 3) he was discharged solely by reason of his handicap." As to the reasonable accommodation requirement, the Court stated "employers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future. Moreover, employers are not required to create new positions for disabled employees in order to reasonably accommodate the disabled individual." Id. at 1187. See also Walsh v. United Parcel Service, 201 F.3d 718 (6th Cir. 2000) and Brohm v. JH Properties, Inc., 149 F.3d 517 (6th Cir. 1998).

In the case before us, we agree with the circuit court and Milby that he was disabled pursuant to the statute in May

1996. We also agree with Milby that he was otherwise qualified to perform the job of principal because he had the requisite education and certifications.³ However, we disagree with Milby's contention that he was discharged, either constructively or actually, due to a disability.

When Milby returned to his position as principal of Doss High School on a part-time basis in February 1996, the Board provided an accommodation for him through the end of the school year, going so far as to allow his wife, who was employed as a counselor by JCPS, to remain at his side to assist him. Once Milby recovered from his successful heart transplant later that summer, the Board was no longer under any obligation to provide him with an accommodation. However, Milby stayed in his unbudgeted position as an interim principal without a reduction in his salary for two years pursuant to the 1996 agreement. At the end of the two-year agreement, Milby, by that time fully recovered, wanted to continue in the unbudgeted position as an interim principal without a reduction in his salary. He did not want to take the offered assistant principal job with his salary being "red-lined" and did not want to continue in his present job at half the salary. Therefore, Milby entered into a second agreement in 1998 for another fifteen-month period. That

³ Although not an issue before us, we question whether Milby could have performed the essential functions of his job as principal, with or without accommodation.

agreement provided that he would continue in the interim position at the same salary and at the end of the fifteen months he would resign.

Prior to the end of the second period, Milby expressed his desire to stay in the same position permanently, without any salary reduction. The Board refused this request to continue Milby in, at that time, a partially unbudgeted position, but told him that he would be considered for any position to which he chose to apply. Milby did not apply for any other positions in JCPS, and retired effective October 1, 1999.

Based upon the facts of his case in a light most favorable to him, Milby cannot establish a *prima facie* case of disability discrimination. Although he was disabled when he entered into the first agreement in May 1996, he was clearly not disabled in October 1999 when he tendered his retirement documents. The Board provided him with an accommodation above and beyond that required by law, and allowed him to continue in that capacity far past the time he was no longer disabled. Although Milby argues that the original agreement should have included an unconditional accommodation, i.e., one that was not conditioned upon his retirement at the end of the two-year period, the agreement itself did not mention that Milby had to retire. The second agreement, entered into when Milby was no longer disabled, was the only agreement that mentioned

retirement. Furthermore, Milby was not precluded from finding other employment in the school system, accepting an assistant principal position, or continuing in his current job at a reduced salary. Milby cannot establish that he was subjected to discrimination on the basis of disability.

It is also clear that JCPS did not discharge him, either constructive or actually.⁴ Pursuant to the 6th Circuit Court of Appeals in Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987),

A finding of constructive discharge in this circuit requires an inquiry into both the objective feelings of an employee, and the intent of the employer. A constructive discharge exists if "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982), cited in Henry v. Lennox Industries, 768 F.2d 746, 752 (6th Cir. 1985); and Geisler v. Folsom, 735 F.2d 991, 996 (6th Cir. 1984).

Milby voluntarily retired, even when he still had the option to seek out and apply for other positions within JCPS. He apparently bases his argument on the Board's decision to place him in an assistant principal position at the same salary, albeit "red-lined," or allow him to stay in the same position at the budgeted salary level, which was approximately half of his

⁴ We agree with the Board that Milby is precluded from raising the argument that he was actually discharged because he did not raise this argument before the circuit court.

current salary. Although he claims he wanted to be reappointed to a principal position, Superintendent Daeschner did not have the authority to do so, as the appointment of a principal is within the authority of the site-based council. Milby cannot establish that a reasonable person in his shoes would have found such conditions so difficult or unpleasant that he would feel compelled to resign.

Because Milby cannot establish that he was discharged due to his disability, his claim for damages must fail, and the circuit court properly entered a summary judgment in favor of the Board.

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

ALL CONCUR.

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