

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001508-MR

VERNITA ROBINSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 99-CI-02173

UNIVERSITY OF KENTUCKY
MEDICAL CENTER

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. In this discrimination action against University of Kentucky Medical Center (hereinafter "UKMC"), Vernita Robinson (hereinafter "Robinson") has appealed from the Fayette Circuit Court's Judgment entered May 15, 2002, following a jury trial and from the order overruling her motion for a new trial entered June 21, 2002. We affirm.

We shall briefly outline the pertinent facts as they relate to the matters on appeal. In 1994, Robinson began working for UKMC as a Medical Assistant I. She transferred to the Obstetrics and Gynecology department in 1995, and in 1996, became a Medical Assistant II in the same department. She eventually began working at Kentucky Clinic South in the Division of Reproductive Endocrinology, which was also known as in the Infertility Clinic (hereinafter "the Clinic"). Robinson's position was at the front desk, where her responsibilities included registering patients, scheduling appointments, collecting payments, answering the telephone, pulling medical charts, and filing.

Dr. Bradley Hurst (hereinafter "Dr. Hurst") became the Director of the Reproductive Endocrinology Division in 1997, and in late 1998 decided to create a Clinical Clerical Supervisor position to address, among other things, the Clinic's financial problems. The Human Resources form detailing the requirements for this position revealed that the minimum qualifications for this job were a high school degree and at least four years of experience in OB/GYN. Furthermore, Dr. Hurst indicated that he preferred that any applicant have either an Associate's or Bachelor's degree. Prior to learning of Dr. Hurst's preference for a candidate with a degree, nurses Donna Roberts (hereinafter "Roberts"), who was Robinson's interim supervisor at the time,

and Marsha Milhelm both approached Robinson and encouraged her to apply for the new position. However, Robinson did not have a degree. Neither mentioned the position to Robinson again once they learned of Dr. Hurst's preference for a candidate with a degree. In any event, Robinson submitted her application and informed Roberts that she had done so.

The Human Resources office forwarded the names and applications of only four people to Dr. Hurst, including that of Linda Thompson (hereinafter "Thompson"), a white female. Robinson's application was not included. Each of the four submitted applicants had at least a two-year degree. Although both Roberts and Dr. Shona Murphy participated in the interview process with Dr. Hurst, Dr. Hurst had the final decision-making power. Roberts did not inform Dr. Hurst that Robinson had expressed an interest in the new position, and Dr. Hurst was unaware of Robinson's application. Dr. Hurst eventually hired Thompson for the Clinical Clerical Supervisor position. Shortly thereafter, Robinson filed a complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC") because she did not receive the promotion to Clinical Clerical Supervisor.

Thompson began working at the Clinic on January 4, 1999, in the Clinical Clerical Supervisor position, in which capacity she supervised Robinson. She quickly implemented changes and new procedures to correct the existing problems.

Thompson immediately encountered problems with Robinson. Over the course of the next few months, Robinson's behavior became more and more hostile and uncooperative, and she did not follow procedures put in place by Thompson. On May 4, 1999, Dr. Hurst placed Robinson on probation for ninety days, citing several infractions. The next day, Dr. Hurst suspended Robinson without pay for three days for inappropriate and unsatisfactory job performance following her probation. Finally, Dr. Hurst terminated Robinson's employment with the Clinic on June 7, 1999, citing her continuing willful neglect of her job duties.

Robinson did not immediately begin looking for new employment upon her termination. Instead, she enrolled in a course to become a nail technician at Lexington Beauty College, which she completed in January 2000.¹ Robinson then received an Associate's Degree in Applied Science from Lexington Community College in May 2001. Subsequently, Robinson applied to several temporary agencies looking for work. In July, she received a placement from BJM Associates for a front desk job at a medical office with responsibilities similar to those she had in her position at the Clinic. Robinson only stayed in the position for a few days, choosing to end her placement prior to its contemplated ending date. She eventually obtained employment in the field of computers.

¹ Robinson never sought work as a nail technician, choosing to pursue this as a hobby.

On June 21, 1999, shortly after her termination, Robinson filed a complaint in Fayette Circuit Court alleging racial discrimination as well as discrimination by failure to promote and in retaliation for filing an EEOC claim. Robinson sought compensatory damages, lost wages and punitive damages. Following discovery, the matter proceeded to a four-day trial on April 15, 2002. The trial court entered directed verdicts in favor of UKMC on the issue of racial discrimination due to a failure to promote as well as on the issue of her claim for punitive damages. The jury then returned a verdict in favor of UKMC on the remaining claims of racial discrimination and retaliation. The trial court entered its judgment on May 15, 2002, and denied Robinson's subsequent motion for a new trial on June 21, 2002. This appeal followed.

On appeal, Robinson argues that the trial court improperly granted directed verdicts on her failure to promote claim and regarding her claim for punitive damages. She also argues that the trial court erred in several of its pretrial and trial rulings. Specifically, she argues that the trial court abused its discretion in denying her motion *in limine* to prevent UKMC from calling any witnesses, refusing to order UKMC to produce documents she requested for discovery, refusing to allow her to introduce several exhibits at trial, and allowing UKMC to introduce records of her later search for employment. On the

other hand, UKMC argues that the trial court properly granted directed verdicts and did not abuse its discretion in making its pretrial and trial rulings.

DIRECTED VERDICTS

The standard of review for an appellate court in reviewing a decision of a trial court on a motion for directed verdict made pursuant to CR 51.01 is well settled in the Commonwealth:

In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, Ky.App., 700 S.W.2d 415, 416 (1985).

Furthermore, an appellate court's standard for reviewing a trial court's denial of a motion for a new trial is whether the decision was clearly erroneous. Miller v. Swift, Ky., 42 S.W.3d 599 (2001). With these standards in mind, we shall review the two directed verdicts the trial court granted in favor of UKMC.

I. RACIAL DISCRIMINATION - FAILURE TO PROMOTE

At the close of Robinson's presentation of proof, UKMC moved for a directed verdict on the failure to promote claim on the basis that Dr. Hurst did not know, and Robinson could not establish that he knew, that she had applied for the Clinical Clerical Supervisor position. Robinson argued that she met the minimum qualifications for the position as a college degree was not required, but merely desired. The trial court granted UKMC a directed verdict on this claim, reasoning that there was insufficient evidence to establish that Dr. Hurst, the decision maker, had any knowledge of her application.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), the United States Supreme Court set out the requirements to establish a *prima facie* case of racial discrimination:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Once a *prima facie* case is established, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. Finally, "should the defendant carry this

burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L.Ed.2d 207, 215, 101 S.Ct. 1089, 1093 (1981).

In the present matter, there does not appear to be any disagreement between the parties that Robinson had established a *prima facie* case of racial discrimination for failure to promote. The issue is whether UKMC presented a legitimate and nondiscriminatory reason for the decision not to promote Robinson. Robinson relies upon the Supreme Court's opinions in Lee v. Tucker, Ky., 365 S.W.2d 849 (1963), and Perkins v. Trailco Manufacturing and Sales Co., Ky., 613 S.W.2d 855 (1981), to argue that there was enough circumstantial evidence of Dr. Hurst's knowledge of Robinson's application to allow the matter to go to the jury. We disagree.

During her presentation of proof, Robinson did not introduce any evidence to establish that Dr. Hurst knew that she had applied for the position other than her own testimony to the effect that she assumed he knew because she had told her supervisor, Donna Roberts, that she had applied. Furthermore, Dr. Hurst never saw all of the applications because the Human Resources office selected the best candidates from among the

applications, and forwarded only the top four to Dr. Hurst for further consideration. Therefore, even reviewing the evidence in a light most favorable to her, Robinson cannot establish that she did not receive a promotion due to her race because she cannot prove that the person making the hiring decisions knew she had applied for the position. We cannot hold that Robinson's mere assumption, standing alone, that Dr. Hurst knew of her interest in the position establishes sufficient evidence to defeat UKMC's motion for directed verdict.

The trial court properly entered a directed verdict on this issue because Robinson did not introduce sufficient evidence to support her claim.

II. PUNITIVE DAMAGES

At the close of its case, UKMC renewed its directed verdict motions, including Robinson's entitlement to an award of punitive damages. As to that issue, UKMC argued that the doctrine of sovereign immunity barred Robinson's common law punitive damages claim as well as her claim under KRS Chapter 344. The trial court, however, bypassed the issue of whether sovereign immunity would bar an award of punitive damages by holding that there was no factual basis to support an award of punitive damages. We agree.

In her brief, Robinson limits her argument regarding punitive damages to her common law claim, arguing that she

presented evidence of conduct showing oppression, fraud or malice sufficient to justify an award of punitive damages pursuant to KRS 411.184. On the other hand, UKMC continues to argue that Robinson's KRS Chapter 344 and common law claims for punitive damages are barred by the doctrine of sovereign immunity, that Robinson did not present sufficient evidence to justify an award of punitive damages, and that the issue is moot because of the jury's defense verdict. Because the trial court only addressed the sufficiency of the evidence supporting an award of punitive damages, we shall not consider whether sovereign immunity works to block her entitlement to such an award of damages.

KRS 411.184(2) allows a plaintiff to "recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." The term "oppression" is defined as "conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship." KRS 411.184(1)(a). The term "fraud" is defined as "an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff." KRS 411.184(1)(b). Lastly, the term "malice" is defined as:

[E]ither conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

KRS 411.184(1)(c). In Simpson County Steeplechase Ass'n, Inc. v. Roberts, Ky.App., 898 S.W.2d 523, 525 (1995), this Court stated, "[t]he key element in deciding whether punitives are appropriate is malice or conscious wrongdoing. Fowler v. Mantooth, Ky., 683 S.W.2d 250, 252 (1984). Malice may be implied from outrageous conduct and need not be express so long as the conduct is sufficient to evidence conscious wrongdoing. Id." See also Northeast Health Management, Inc. v. Cotton, Ky.App., 56 S.W.3d 440 (2001).

Robinson bases her claim for punitive damages upon the allegedly false information contained in her letters of probation, suspension and termination, as well as upon her treatment by Dr. Hurst and Roberts following disciplinary procedures. UKMC counters this argument, averring that the disciplinary actions were warranted by Robinson's actions and that only Robinson's self-serving testimony supports her claims.

In reviewing the evidence in a light most favorable to Robinson, we agree with UKMC that Robinson failed to put forth sufficient evidence of oppression, fraud, malice, or any

conscious wrongdoing to establish her claim for punitive damages. Therefore, the trial court properly granted UKMC a directed verdict on Robinson's claim for punitive damages.

PRE-TRIAL AND TRIAL RULINGS

It is a long-standing rule in the Commonwealth that rulings regarding evidentiary matters are within the discretion of the trial court. "Abuse of discretion is the proper standard of a trial court's evidentiary rulings." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000). "Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion." Simpson v. Commonwealth, Ky., 889 S.W.2d 781 (1994). "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable an unfair decision.' . . . The exercise of discretion must be legally sound." (citations omitted.) Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994). See also Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777 (2002). Therefore, we shall review the trial court's rulings for abuse of discretion.

Robinson first argues that the trial court abused its discretion by denying her motion *in limine* to prevent UKMC from calling witnesses at trial due to its failure to comply with

discovery deadlines. Pursuant to the pre-trial order, UKMC had to identify the witnesses it intended to call by February 1, 2002. However, UKMC did not file its witness list until March 15, 2002. UKMC argues that the trial court did not abuse its discretion in denying Robinson's motion, in particular because the majority of the witnesses listed were also listed on Robinson's witness list. Furthermore, the only witnesses not listed on both were the representatives from employment agencies. At the hearing on this motion, counsel for UKMC indicated that he knew of the February 1, 2002, due date for the witness list and that he did not know the document had not been timely filed. Under the circumstances of this case, including counsel's belief that the document had been timely filed and the similarity between Robinson's and UKMC respective witness lists, the trial court did not abuse its discretion in denying Robinson's motion *in limine* and allowing UKMC to call witnesses at trial.²

Next, Robinson argues that the trial court abused its discretion in denying her motion to compel UKMC to respond to her second Request for Production of Documents mailed on March 13, 2002. Robinson avers that the requested documents would have allowed her to establish that the reasons given by UKMC for

² We also note that the trial court disallowed UKMC's late attempt to file its motion for summary judgment in contravention to the pre-trial order.

her probation, suspension and termination were false.³ UKMC counters this argument, again stating that the trial court did not abuse its discretion in denying the motion to compel. UKMC did not receive the request until March 15, 2002, the day discovery was to be completed pursuant to the pre-trial order. Additionally, Robinson was requesting a voluminous amount of old records, some of which were no longer maintained, and she did not show the relevance of the proposed discovery.

We agree with UKMC that the trial court did not abuse its discretion in denying the motion to compel on the basis that the request was unduly burdensome and impossible to comply with before the trial scheduled for April 15, 2002. We also note that Robinson was permitted to testify as to her belief in the falseness of the allegations in the probation, suspension, and termination documents.

Next, Robinson argues that the trial court abused its discretion in granting UKMC's motion *in limine* to exclude several of Robinson's proposed trial exhibits, which were responses Robinson drafted to the probation, suspension, and termination letters for use at trial. The trial court reasoned that proposed exhibits were summaries of what she would testify to at trial and that they were not prepared contemporaneously

³ The record does not reveal what documents she was requesting or how these documents would establish the falsity of the reasons given in the probation, suspension, and termination letters.

with the events in question, but rather just before trial. However, the trial court allowed her to refer to her summaries to refresh her memory. Robinson relies upon Davenport v. Ephraim McDowell Memorial Hospital, Inc., Ky.App., 769 S.W.2d 45 (1998), for the proposition that she should be permitted to introduce summary exhibits based upon her examination of documents. UKMC, on the other hand, argues that the trial court properly excluded the proposed summary exhibits for several reasons.

We agree with UKMC that the trial court did not abuse its discretion in excluding three of Robinson's proposed summary exhibits. In Municipal Paving Co. v. Farmer, Ky., 255 S.W.2d 618 (1953), the former Court of Appeals addressed the use of an auditor's summary of documents admitted as evidence and filed as exhibits, including payroll, checks, and general ledger sheets. The Court noted, "the trial court has broad discretion in admitting or rejecting such a summary and in imposing the conditions under which it may be admitted." Id. at 620. At least one general condition is that the documents be made accessible to the opposing party. Id. See also Davenport v. Ephraim McDowell Memorial Hospital, Inc., supra. Furthermore, KRE 1006, which allows for summaries of voluminous documents, requires that "[a] party intending to use such a summary must give timely written notice of his intention to use the summary,

proof of which shall be filed with the court." The Rule also requires that the originals or duplicates of the summarized documents be reasonably made available for examination.

In the present matter, Robinson did not comply with the requirements of KRE 1006 and provide timely written notice that she was intending to use summary exhibits. Furthermore, Robinson was permitted to testify as to the contents of the summary exhibits and even use the documents to refresh her memory on the stand. Robinson was in no way prejudiced by the trial court's ruling, and the trial court did not abuse its broad discretion in refusing to permit her to introduce the three summary exhibits.

Finally, Robinson argues that the trial court abused its discretion by allowing UKMC to introduce records of her subsequent search for employment. In particular, Robinson argues that UKMC did not call the representative from BJM Associates, a temporary employment agency, to show her failure to mitigate her damages, but solely in order to prejudice her before the jury by emphasizing a false statement on her employment application. On the other hand, UKMC argues that it had a duty to put forth evidence to rebut Robinson's proof of lost wages, and used the testimony of Janie Moores, the representative from BJM Associates, to establish that Robinson did not mitigate her damages by accepting employment similar to

her position at the Clinic. Pursuant to her testimony, Robinson cut short a placement for a front desk position in a medical office. The trial court ruled that UKMC would not be permitted to use the application to impeach Robinson regarding her termination, but would allow it to be used to impeach her when appropriate and to refresh her memory.

The crux of Robinson's argument for this issue is that UKMC's use of the blow-up copy of the application was highly prejudicial because it contained admittedly false information regarding her previous terminations from employment. However, this argument must fail for several reasons. First, UKMC did not use the blow-up copy of the application until Robinson stated that she needed to refresh her memory. The videotape of the trial reveals that counsel for Robinson did not object to the use of the blow-up copy of the application to refresh her memory. Second, the application and other documents from BJM Associates were relevant to Robinson's failure to mitigate her damages by refusing to stay in a position similar to the one she had held at the Clinic. Lastly, Robinson was permitted to offer testimony to explain why she decided, and felt compelled, to include false information on her employment application.

The trial court did not abuse its discretion in allowing UKMC to introduce evidence of Robinson's subsequent

search for employment in order to establish Robinson's failure to mitigate her lost wages claim.

CONCLUSION

For the foregoing reasons, the Fayette Circuit Court's May 15, 2002, Judgment and the June 21, 2002, order denying her motion for a new trial are affirmed.

ALL CONCUR.

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