

RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002712-MR

DANIEL GAY

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00782

DHL WORLDWIDE EXPRESS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Daniel Gay brings this appeal from an October 10, 2003, summary judgment of the Boone Circuit Court that dismissed with prejudice Daniel's complaint that he was wrongfully terminated from employment by DHL Worldwide Express (DHL) in violation of the Kentucky Civil Rights Act. We affirm.

On May 31, 2002, Daniel filed a complaint in the Boone Circuit Court against DHL. Therein, Daniel alleged to have suffered from a disability and that DHL terminated Daniel from his position without providing reasonable accommodations as

required by Kentucky Revised Statutes (KRS) Chapter 344. Daniel also alleged that by terminating him, DHL improperly retaliated in violation of KRS Chapter 344. Daniel further claimed constructive discharge and the tort of intentional infliction of emotional distress.

Daniel was employed as a maintenance mechanic-level I with DHL's maintenance department at the Cincinnati airport located in northern Kentucky. DHL is an overnight shipping company. In September of 2000, Daniel suffered a thoracic abdominal aortic aneurysm that necessitated emergency surgery. He obtained a seven-week leave of absence from DHL under the family and medical leave act. The doctor subsequently placed a 50 pound lifting restriction upon Daniel in his employment activities. The qualifications for Daniel's job description as a maintenance mechanic I required him to lift machine parts weighing up to 70 pounds. DHL attempted to accommodate Daniel's medical restrictions by offering him a bus driver position with the company. This position would have paid approximately \$2.40 per hour less than what he was making as a maintenance mechanic I. Daniel refused to accept the bus driver position. DHL subsequently placed Daniel on a leave of absence for one year, ultimately terminating his employment on August 28, 2001. Daniel then filed this action in the Boone Circuit Court on May 31, 2002.

DHL filed a motion for summary judgment in the Boone Circuit Court, arguing that Daniel was not disabled within the meaning of KRS 344.010. In Daniel's response memorandum to the circuit court, Daniel admitted that he was not disabled but asserted that DHL had regarded him as disabled, and DHL acted upon that perception in terminating his employment.¹ The circuit court concluded there was no evidence of this perceived disability by DHL and thus granted summary judgment. Daniel then filed a motion to alter, amend or vacate the summary judgment pursuant to Ky. R. Civ. P. (CR) 59.05. In this motion, Daniel argued for the first time that he did suffer from a physical impairment known as Marfan Syndrome and thus was a disabled person under the ADA definition of disability.² The circuit court denied the motion, and this appeal followed.

A review of the summary judgment reveals that the circuit court analyzed Daniel's claims under the Kentucky Civil Rights Act, as codified in KRS Chapter 344, and determined that summary judgment was proper upon those claims. The court noted:

The language of the Kentucky Civil Rights Act mirrors the language of both the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and the Rehabilitation Act, 29 U.S.C. § 701, et seq.

¹ KRS 344.010(4)(c) includes in the definition of disability, an individual who is regarded or perceived to have a disability.

² Interestingly, Daniel's argument in his motion to alter, amend or vacate looked exclusively to the Americans with Disabilities Act and otherwise failed to mention Kentucky Revised Statutes Chapter 344.

Both Acts forbid discrimination on the basis of disability. Accordingly, the court analyzes Gay's Kentucky Civil Rights claim guided by the ADA. Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95, 101 (Ky.App. 2000).

Although the court utilized the law interpreting the Americans with Disabilities Act (ADA) as a guide, the circuit court squarely addressed Daniel's claims as being brought under the Kentucky Civil Rights Act and specifically cited to the Act as the basis for summary judgment. The circuit court also entered summary judgment dismissing the tort of intentional infliction of emotional distress.

The position Daniel assumes in his brief is somewhat baffling. In his brief, Daniel clearly and unmistakably argues that the circuit court committed error by entering summary judgment dismissing his claim under the ADA. Appellant's Brief at 11-13, 18, 21, 23, 24. Daniel cites to specific provisions of the ADA and almost exclusively argues his contentions of error under the ADA. In fact, Daniel never substantively cites to the Kentucky Civil Rights Act in his brief.

The record clearly reflects that Daniel never asserted a claim under the ADA in his complaint. If a claim under the ADA had been asserted in the complaint, the action would have been subject to removal to federal court under 28 U.S.C. § 1441. Presumably, this was a conscious attempt by Daniel to avoid the federal court's summary judgment standard if the case were

removed to federal court. This standard is discussed thoroughly in Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). Therefore, we can only assume that it was part of Daniel's case strategy not to assert an ADA claim his in complaint.

The disability provisions found in the Kentucky Civil Rights Act are modeled after the ADA, and our Court's have treated as persuasive authority decisions of the federal courts regarding the ADA. Howard Baer, Inc. v. Schave, 127 S.W.3d 589 (Ky. 2003). However, Kentucky Courts have also recognized that KRS Chapter 344 provides broader relief than that provided for in the ADA. Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95 (Ky.App. 2000). In other words, federal law is not controlling in addressing claims under KRS Chapter 344.

We note that it is well-established law that an appellate court will not entertain issues never brought before and decided by a trial court. Combs v. Knott County Fiscal Court, 283 Ky. 456, 141 S.W.2d 859 (Ky. 1940). The law is also clear that the parties must adhere to the cause of action pled and practiced in the trial court. Weissinger v. Mannini, 311 S.W.2d 199 (Ky. 1958). Here, no ADA claim was asserted by Daniel. Daniel's argument was limited to the application of KRS Chapter 344 which he failed to address. Based upon the authorities cited above, we decline to review Daniel's

allegations of error under the ADA since an ADA claim was not plead or argued below. Therefore, we summarily affirm the circuit court's order of summary judgment.

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

ALL CONCUR.

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