

RENDERED: JANUARY 14, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000249-MR

KAREN HADLEY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 02-CI-005050

UNIVERSITY OF LOUISVILLE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant Karen Hadley, a University of Louisville (University) professor, appeals from an order entered by the Jefferson Circuit Court granting summary judgment in favor of the University in an employment discrimination and retaliation case. Hadley argues that the circuit court failed to apply the proper standard when reviewing her case, and that under a broader standard of review she satisfied the *prima facie* requirements of her claim. She also contends that the

University's stated reasons for its actions were pretextual, and that the University improperly retaliated by increasing her course load after she filed a grievance. As we agree with the circuit court's determination that there were no genuine issues of material fact as to whether Hadley failed to make a *prima facie* showing that she suffered a lasting or final adverse employment action, we affirm the court's order granting summary judgment in favor of the University.

The circuit court summarized the relevant facts of the case as follows:

[Appellant] is an Associate Professor in the English Department at the University of Louisville, having been hired in 1994 as an Assistant Professor (a tenure track position). She was required to work for three years prior to a pre-tenure review which was scheduled to occur during the 1996-97 academic year, with tenure review to occur in the 1999-00 academic year.

[Appellant's] pre-tenure review in 1997 resulted in both positive and negative findings with an emphasis on the need for more publications prior to tenure review. In February 1999 [appellant] requested and was granted a one year extension before her tenure review. The request was premised on a medical condition. The tenure review date was July 1, 2002.

When that date arrived, the English Department Personnel Committee recommended tenure, however, the English Department Chair recommended against it. This negative recommendation was affirmed by the Dean of the College of Arts and Sciences Department despite the Arts and Sciences Personnel Committee's request that the Chair's

recommendation be ignored, i.e., tenure be granted.

The Provost then reviewed the recommendations and concurred with the Chair and the Dean. Finally, the President of the University of Louisville concurred as well and [appellant] was denied tenure.

[Appellant] then filed a grievance with her department and engaged in a four day hearing. The grievance committee recommended tenure be reconsidered, however, the President and Provost disagreed.

[Appellant] then filed an appeal with the University Faculty Grievance Committee which recommended tenure be reconsidered.

[Appellant] was then awarded tenure in March 2002, all benefits and pay being retroactive to July 1, 2002.

[Appellant] filed [an] action on July 8, 2002, claiming the University discriminated against her on the basis of race, gender, and disability, and that she suffered retaliatory consequences due to her grievance procedure, all in violation of KRS 344. She claims that she was forced to undergo an arduous process to achieve her award of tenure; she incurred \$19,000 in legal fees; she suffered emotional distress, embarrassment and humiliation; she was forced to accept a heavier course load while receiving a salary among the lowest in the department.

The circuit court found that the facts of Hadley's review and eventual granting of tenure fit squarely within the facts of *Dobbs-Weinstein v. Vanderbilt University*,¹ wherein the Sixth Circuit Court of Appeals affirmed a trial court's grant of summary judgment because the plaintiff did not present all of the elements necessary to establish a *prima facie* case of

¹ 185 F.3d 542 (6th Cir. 1999).

discrimination. The *Dobbs-Weinstein* court held that an adverse employment action did not occur when an initial denial of tenure was followed by an in-house grievance process which resulted in tenure. Relying on *Dobbs-Weinstein*, the circuit court below found that Hadley satisfied part of her burden by demonstrating that she was a female who was qualified for the desired position. However, because Hadley succeeded in her grievance process and obtained the desired position, rank, status, and salary, she did not suffer a final or lasting adverse employment action and thus did not fully satisfy her *prima facie* responsibilities. The circuit court granted summary judgment for the University and this appeal followed.

The Kentucky Supreme Court, in *Brooks v. Lexington-Fayette Urban County Housing Authority*,² recently addressed the procedure which is to be followed in establishing and pursuing an employment discrimination and retaliation case under KRS 344.040(1) as follows:

In a claim arising under the statute, the plaintiff-employee bears the initial burden of proving a *prima facie* case of discrimination. *Jefferson County v. Zaring*, 91 S.W.3d 583, 590 (2002), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). One way this burden can be met is by proof that the plaintiff (1) is a member of a protected class, (2) was qualified for and applied for an available position, (3) did not receive

² 132 S.W.3d 790, 797 (Ky. 2004).

the job, and (4) that the position remained open and the employer sought other applicants. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 678. Upon establishing a prima facie case of discrimination, the burden shifts to the defendant-employer to articulate a "legitimate nondiscriminatory" reason for its action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207, 215 (1981). After the defendant has met this burden, "the *McDonnell Douglas* framework is no longer relevant." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510, 113 S.Ct. 2742, 2748, 125 L.Ed.2d 407, 418 (1993). This is because "the *McDonnell Douglas* presumption is a procedural device, designed only to establish an order of proof and production." *Id.* at 521, 113 S.Ct. at 2755, 125 L.Ed.2d at 425 (emphasis in original). The case then proceeds with the plaintiff having to meet her burden of persuading the trier of fact by a preponderance of the evidence that the defendant unlawfully retaliated against her. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 2106, 147 L.Ed.2d 105, 117 (2000).

A lower court's award of summary judgment should be reviewed on appeal *de novo*.³ Under CR 56.03, summary judgment may be granted only if, when viewed in the light most favorable to the opposing party,

the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the

³*Deaton v. Connecticut General Life Ins. Co.*, 17 S.W.3d 896, 898 (Ky. App. 2000).

moving party is entitled to a judgment as a matter of law.⁴

Hadley asserts on appeal that the circuit court failed to apply the proper standard when determining that she did not suffer an adverse employment action. We disagree. Hadley urges this court to follow the lead of six federal circuits that have adopted a very broad interpretation of what constitutes an "adverse employment action."⁵ The cases Hadley cites do not address the specific situation presented to us here, that of a tenure review dispute. As the court held in *Dobbs-Weinstein*,⁶ tenure reviews are complex and university grievance procedures are meant to correct any problems encountered in the review process. Thus, tenure review decisions do not become final until all other in-house procedures are exhausted. Because Hadley ultimately received tenure, as well as full compensation for the period of the time during which tenure was denied, we agree with the circuit court's finding that her initial denial of tenure did not constitute a "final or lasting adverse employment action."

We are not persuaded by Hadley's argument that

⁴See *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

⁵*Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000). *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997).

⁶ 185 F.2d at 545.

Dobbs-Weinstein is not persuasive as the facts of that case differ substantially from hers. Hadley asserts that Professor Dobbs-Weinstein did not receive retaliatory treatment while the grievance process was being pursued, and that the reasons for the initial denial of tenure to Dobbs-Weinstein were legitimate and non-discriminatory. Hadley also asserts that the court in *Dobbs-Weinstein* did not address issues raised by Hadley, including claims that she incurred economic loss due to discrimination and that she was treated unequally to other associate professors. However, before issues of retaliation or loss may be considered a claimant must first establish a *prima facie* case of employment discrimination. Since, as noted above, Hadley did not make the necessary showing, issues of retaliation and loss were not properly before the trial court. Thus the noted factual differences between *Dobbs-Weinstein* and the instant proceeding are immaterial to the issue on appeal.

Similarly, in the absence of a *prima facie* case of discrimination, there is no merit to Hadley's contention that she is a victim of employment discrimination who is entitled to be made whole under Title VII or the Kentucky Civil Rights Act (KCRA). Further we note that even if Hadley had made the necessary showings to establish her claim, a

prima facie case of retaliation requires a plaintiff to demonstrate "(1) that plaintiff engaged in an activity protected by Title

VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, **thereafter**, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action."⁷

Hadley admitted in her affidavit that, due to her low scholarly output, her course load had begun to increase prior to her tenure review and before she filed a grievance. More specifically, she stated that her "course load was increased in Spring 1999 to 3-2, with the implication that this increase would continue." Hadley's increased course load could not be considered retaliation for a subsequent grievance procedure.

Finally, Hadley claims that the University's reasons for initially denying tenure were pretextual. As Hadley did not establish a prima facie showing of discrimination, the validity of the reasons underlying the initial denial of tenure are not properly before us on appeal.

For these reasons, we affirm the Jefferson Circuit Court's order granting summary judgment in favor of the University.

ALL CONCUR.

⁷Brooks, 132 S.W.3d at 803 (emphasis added).

BRIEF FOR APPELLANT:

Herbert L. Segal
Louisville, Kentucky

BRIEF FOR APPELLEE:

Donna King Perry
Matthew R. Westfall, Jr.
Louisville, Kentucky