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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000919-MR

KIMBERLY LIKINS — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 03-CI-00399

MARY ELLEN KINSER AND
OLDHAM COUNTY FISCAL COURT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: Kimberly Likins (Appellant) appeals an order of the Oldham County Circuit Court granting Oldham County Judge Executive Mary Ellen Kinser and the Oldham County Fiscal Court's (Appellees) Summary Judgment, thereby dismissing Appellant's claims of disability discrimination under the Kentucky

Civil Rights Act and retaliatory discharge.[1] Upon review of the facts and the law we affirm the grant of summary judgment.

In January of 1995, Appellant began working for the Appellees as an Oldham County Animal Control Officer. She was soon promoted to Animal Control Director. This promotion included an increase in responsibilities.

On March 17, 2003, Appellant was put on five weeks of sick leave due to stress, anxiety, and depression. Appellant contends that the conditions were brought on by an overwhelming workload. Appellant returned from her sick leave on April 21, 2003. When she did so, she had a meeting with Appellee, Kinser, to discuss her work schedule. At this meeting, Appellant was told she was being demoted to her original position of Animal Control Officer. Appellant contends that she was demoted due to her stress-related medical condition. Appellant advised Kinser that she wished to consult counsel before accepting the demotion and was given time to decide whether to accept the demotion or not.

Ultimately, Appellant returned to work as an Animal Control Officer on May 9, 2003, for one day, but did not return thereafter. She claimed the demotion was designed to humiliate and degrade her in hopes of making her resign.

On or about May 20, 2003, Appellant was contacted by Magistrate Bob Leslie and told she was officially being terminated from her position at the Oldham County Animal Control Department.

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[1] While named Judge Executive Kinser as a party to this appeal, she presented no arguments for reversal of the summary judgment granted to her. Any error is, therefore, waived.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Pearson ex rel. Trent v. National Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

When an Appellee asserts multiple reasons to support a grant of summary judgment, the reviewing court must "consider all the grounds raised, and ... affirm the judgment if it should properly have been entered on any of the grounds raised." *Richmond v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 572 S.W.2d 601, 602 (Ky. App. 1978). "[I]t is well settled that a correct decision will not be disturbed merely because it was based upon incorrect grounds." *Id.* at 603.

The circuit court granted summary judgment on Appellant's disability discrimination claim because, even though it believed her employer regarded her as disabled, she did not request an accommodation to perform the requirements of her job. To establish a cause of action for disability discrimination a plaintiff must show:

> (1) that he had a disability as that term is used under the statute (i.e., the Kentucky Civil Rights Act in this case); (2) that he was "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation; and (3) that he suffered an adverse employment decision because of the disability.

Hallahan v. The Courier-Journal, 138 S.W.3d 699, 706-707 (Ky. App. 2004). "'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 an impairment; or (c) Being regarded as having such an impairment." KRS 344.010(4).

Both the trial court and Appellant focused on sub-section (c), the "regarded as" disabled prong. An individual may fall within the "regarded as" provision if: "(1) a[n] [employer] mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a[n] [employer] mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Hallahan* at 707 (citing *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489, 119 S.Ct. 2139, 2149-50, 144 L.Ed.2d 450 (1999)).

To understand this multi-layered argument, we must first address what the limitation of a "major life activity" is. "Major life activities include, among other things, walking, seeing, hearing, performing manual tasks, caring for oneself, speaking, breathing, learning, and working." *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003). The major life activity involved in this case is working.

> The issue of whether a plaintiff's impairment substantially limits the major life activity of working involves a multi-level analysis of the particular plaintiff's job skills and the nature of the jobs he was prevented from performing as well as those he is still able to perform. The inquiry looks to the specific plaintiff's education level, training, job skills, expertise, and knowledge in relation to his actual and potential employment status. A plaintiff's post-impairment work

> history may be relevant. A plaintiff must also show that his impairment significantly restricts his ability to perform either a class of jobs or a broad range of jobs, and not just his current or a single job.

Hallahan at 708-709 (citations omitted). Additionally, the Equal Employment Opportunity Commission's (EEOC) regulations provide, with respect to the major life activity of working, that:

> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
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> (ii) In addition to the factors listed in paragraph (j) (2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
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> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Hallahan at 709 (citing 29 C.F.R. § 1630.2(j) (3)).

To summarize, in order to satisfy the first prong of establishing a *prima facie* case of disability discrimination, the plaintiff must show that she was disabled. In the case at bar, Appellant must establish that the Appellees mistakenly regarded her as disabled. Further, the Appellees must have thought that the purported disability substantially impaired her ability to work. For Appellant's ability to work to be substantially impaired, she must be unable to perform a class of jobs or broad range of jobs, not just the job she has been disqualified from.

The trial court found that she was in fact "regarded as" disabled and proceeded to prong two, "that [s]he was 'otherwise qualified' to perform the requirements of the job, with or without reasonable accommodation." *Id.* at 706. This is the prong that both the trial court and the Appellees believed was not satisfied. The Appellees argued that a request for an accommodation is required to bring a claim for disability discrimination and cite *Hash v. University of Kentucky*, 138 S.W.3d 123 (Ky. App. 2004), to support this proposition. We disagree. Appellees point to language in the *Hash* opinion to the effect that "it is well settled that the individual with the disability has the responsibility to inform the institution that a reasonable accommodation is needed... ." *Id.* at 129. However when the sentence is considered in context, it is clear that Appellees misread the Supreme Court's holding. In *Hash*, one of the arguments set forth by the disabled plaintiff was that his employer failed to "seek suitable means of accommodating a handicapped person." *Id.* The *Hash* court states:

> [I]t is well settled that the individual with the disability has the responsibility to inform the institution that a reasonable accommodation is needed, as it does not become an issue if the person has never requested one. Appellant has failed to include any evidence suggesting that he requested an accommodation or that the University refused to provide an accommodation. Thus, no material issue exists.

Id. (citations omitted).

We believe that the Supreme Court is holding that a disabled plaintiff cannot argue that the employer did not try to reasonably accommodate him when said plaintiff did not ask for an accommodation in the first place, not that the lack of a request for an accommodation is fatal to a claim for disability discrimination. An accommodation only becomes an issue if one is needed or requested. In the instant case, Appellant does not contend that she is disabled, just that she was perceived to be disabled. Requiring her to ask for an accommodation when she was mistakenly regarded as disabled is simply illogical. The trial court erred in holding that the failure to request an accommodation was fatal to Appellant's discrimination claim.

We do find that summary judgment was still the correct result. The Appellees continuously argued that they did not think Appellant was disabled and did not regard her as so. We agree with the Appellees and hold that they did not regard Appellant as being disabled from all employment. As discussed above, to be regarded as disabled, Appellant's ability to work must have been substantially impaired. For her ability to work to have been substantially impaired, the

supposed disability must have prevented her from performing a class of jobs or broad range of jobs. The Appellees offered to keep her in the Animal Control Department, albeit in a different capacity. Additionally, Appellant was able to find employment after she left the Oldham County Animal Control Department.

We believe that the Appellees' attempt to keep her in their employment and her ability to find employment after she left the Animal Control Department demonstrate that she was not unable to perform a broad range of jobs. Of particular importance is the fact that there is no evidence that Appellant was unable to perform the job of Animal Control Officer, as opposed to her original position as Director. Her own testimony was that she felt humiliated, not that she was unable to do the work. Because she was able to perform a broad range of jobs, she was not disabled as defined by KRS 344.010(4). For these reasons, we find that summary judgment was proper for Appellant's disability discrimination claim, albeit for reasons different from those relied upon by the trial court.

Appellant's second argument on appeal is that the trial court erred in granting Appellees' motion for summary judgment on her retaliation claim. Appellant argues that because the Appellees knew she was going to consult with counsel about the demotion and because she requested a hearing concerning her demotion, she was retaliated against for engaging in these protected activities.

In order to make out a case for retaliation, a plaintiff must show that:

> 1) she engaged in a protected activity, 2) she was disadvantaged by an act of her employer, and 3) there was a causal connection between the activity engaged in

> and the employer's act . . . if the employer articulates a legitimate, non-retaliatory reason for the decision, the employee must show that "but for" the protected activity, the adverse action would not have occurred.

Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 701 (Ky. App. 1991). Appellant cannot meet these standards. The evidence presented is that Appellant was demoted before Appellees were informed of her intent to retain counsel. A charge of retaliatory discharge requires that an employee be disadvantaged by her employer after a charge of discrimination or after the employee engages in a protected activity. There can be no retaliation if a demotion is decided upon before an employee can retain counsel or make a complaint about discrimination.

In the case at hand, there is no "but for" causal connection. The Appellees made the decision to demote Appellant before she engaged in any protected activity. Even after Appellant informed the Appellees she was going to consult with counsel, the Appellees still tried to keep her employed as an Animal Control Officer. Summary judgment was properly granted and this claim rightfully dismissed.

For the above reasons we affirm the grant of summary judgment by the Oldham Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEE:

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