

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000013-MR

LEON ROY

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT  
HONORABLE VERNON E. MINIARD, JR, JUDGE  
ACTION NO. 04-CI-00011

READY MIX CONCRETE OF SOMERSET, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

COMBS, CHIEF JUDGE: Leon Roy appeals from a summary judgment of the Russell Circuit Court that dismissed his unlawful employment termination claims against Ready Mix Concrete of Somerset, Inc. (Ready Mix). After our review, we affirm.

Roy began working for Ready Mix in May 1993 driving a concrete mixing truck. By all accounts, Roy's performance in this capacity was satisfactory. However, his

<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

employment was abruptly terminated on January 27, 2003. His employers learned that Roy had made an inquiry into the purchase of a rival concrete company, and they proceeded to fire him immediately. On January 12, 2004, Roy filed a lawsuit against Ready Mix in the Russell Circuit Court. He alleged that his termination was based on two grounds: (1) unlawful age discrimination, a violation of Kentucky Revised Statutes (KRS) 344.040(1), and (2) retaliation for having previously filed workers' compensation claims against Ready Mix, a violation of KRS 342.197. On December 11, 2006, the trial court entered a summary judgment dismissing Roy's age discrimination and retaliation claims against Ready Mix. In support of its decision, the court held that Roy had failed to provide any direct affirmative evidence of discrimination as to either of his claims and that he had failed to establish that his termination was connected either to his age or to his recourse to the protected activity of invoking workers' compensation coverage. This appeal followed.

At the threshold of our analysis, we note that Roy's reply brief is eight pages in length. Kentucky Rule of Civil Procedure (CR) 76.12(4)(b)(i) unambiguously directs that reply briefs "shall be limited to five pages each ...." An exception to this rule is granted if the appellant is called upon to respond to more than one appellee brief or if he is combining arguments as a cross-appellee. Neither situation is involved in this case. CR 76.12(8)(a) allows us to strike a brief "for failure to comply with any substantial requirement of this Rule 76.12." While the decision as to whether to strike a brief rests within our discretion, the rule setting forth page limits on reply briefs is so clear and the

absence of an exception is so noteworthy that we believe that we are compelled to exercise that discretion in compliance with the rule and to strike Roy's reply brief. Consequently, the arguments contained within the reply brief have not been addressed in our analysis.

Roy first argues that the trial court erred in summarily dismissing his claim that he was discharged because he filed workers' compensation claims. KRS 342.197(1) provides that “[n]o employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim” pursuant to Kentucky's Workers' Compensation Act (KRS Chapter 342). The filing of a workers' compensation claim is an activity expressly protected under KRS 342.197. *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 915 (Ky.App. 2006).

In reviewing a summary judgment, our standard of review must be to determine “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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Our review is *de novo* since we analyze solely questions of law rather than of fact. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.App. 2000). We must view the record in a light most favorable to the party opposing summary judgment, and all doubts are to be resolved in favor of that part adversely affected. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate only when “it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in

his favor.” *Id.* The issue of impossibility is viewed in a practical sense – not an absolute one. *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

Our Supreme Court has held that a party who raises a claim of retaliation in violation of KRS 342.197 must bear a substantial burden of presenting significant evidence in order to withstand the entry of a summary judgment. *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). In setting forth a viable claim of employment retaliation under KRS 342.197, a plaintiff must first establish a *prima facie* case.

The plaintiff can meet this initial burden by proof that: (1) he engaged in a protected activity; (2) the defendant knew that the plaintiff had done so; (3) adverse employment action was taken; and (4) that there was a causal connection between the protected activity and the adverse employment action.

*Upchurch*, 214 S.W.3d at 915. After reviewing the record, we are persuaded that Roy has met the first three criteria of this test. He filed workers' compensation claims; Ready Mix obviously knew that he had done so; and Roy was later discharged from his employment with the company.

The critical issue that remains is whether Roy presented significant evidence that demonstrated “a causal connection between the protected activity and the adverse employment action.” We must determine whether Roy's filing of workers' compensation claims was “a substantial and motivating factor but for which [he] would not have been discharged.” *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 186 (Ky. 1993); *see also Bishop v. Manpower, Inc. of Cent. Kentucky*, 211 S.W.3d 71, 75 (Ky.App. 2006).

It is not necessary that the filing of a workers' compensation claim was the sole or exclusive reason for his discharge. *Zarebidaki*, 867 S.W.2d at 188; *Bishop*, 211 S.W.3d at 76. There must be proof that the employer was aware of the protected activity of the filing of a workers' compensation claim at the time the plaintiff was discharged and that there was a close temporal relationship between the protected activity and the discharge. *See Upchurch*, 214 S.W.3d at 915. "Close temporal proximity" does not mean that an employee must necessarily be terminated within days or even weeks of the filing of a workers' compensation claim in order to state a viable retaliation claim. *Id.* at 916. Instead, "[t]he logical approach is for the court to view the time between the two events in the context of the entire circumstances." *Id.*

Roy's workers' compensation claims were filed in 1998 and 1999; he was not terminated from his employment with Ready Mix until 2003. Thus, a significant amount of time intervened between the filing of his claims and his discharge. In light of the record, we are persuaded that the length of the delay negated any inference that Roy's claims were "a substantial and motivating factor" in the decision to fire him. Roy acknowledges that Ready Mix took no adverse action against him throughout this entire period of time. He was not demoted in any fashion; he did not suffer any pay cuts; and his job duties remained essentially the same. Steven Grider, a former employee of Ready Mix, testified that Roy told him that he was fired for making a telephone call to inquire about buying a rival concrete plant. Moreover, in Roy's notice to Ready Mix of his claim for unemployment insurance benefits, Roy stated the reason for his termination as being

that he was “not allowed free speech” and “not allowed to dream of anything.” There was no mention of retaliation for filing workers' compensation claims.

As proof of a causal connection, Roy cites comments by a former plant manager at Ready Mix, Elvis McKinsey, who teased him about filing his workers' compensation claims by calling him “WC Roy” and by joking that a separate drawer was required for Roy's workers' compensation file. However, Roy admits that he did not report these comments to upper management and that McKinsey did not take any adverse action against him for filing his claims. The record also reflects that McKinsey was replaced as Roy's supervisor in 2000 – some three years before Roy was discharged. No other teasing or taunting comments were ever made with respect to Roy's workers' compensation claims by any other member of Ready Mix management. Therefore, this conduct falls far short of the standard of significant evidence that Roy was terminated in violation of KRS 342.197.

Roy refers to a statement made by McKinsey that Roy “had lasted longer than anybody that he recalled” who had filed a claim. He also cites a statement made by Elwood Foley, another Ready Mix driver, that he had not filed a workers' compensation claim because he did not think that it would have been worthwhile. Roy has not provided any sort of independent evidence elaborating upon these generalized statements – such as testimony from employees who may have suffered retaliation after filing workers' compensation claims. In the absence of some corroborating evidence, we conclude that

these bare, unsubstantiated statements do not constitute the requirement of significant evidence necessary to foreclose entry of summary judgment.

In answers to interrogatories by Ready Mix and in the trial court's summary judgment order, one of the grounds relied upon for his termination was that Roy was clocking in early despite repeated warnings not to do so. According to Al Newell, the operations manager of the plant, checking in early was not actually a reason for Roy's discharge. However, the totality of Newell's testimony indicated that Ready Mix was indeed concerned that Roy was preparing to become its business competitor based on his possession of inside information of company secrets and trade information (*i.e.*, his ready access to the office and its files as a result of his early arrivals) in conjunction with the suspect phone call that he was inquiring as to possible purchase of a rival plant. Thus, the early clocking in was a factor in his termination according to the record. Roy argues that the phone call was a joke and that he did not seriously intend to purchase a rival plant. Therefore, Ready Mix's reason for discharging him was unreasonable.

Nevertheless, “an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.” *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). Legal recourse is available only when the termination was actually based – at least in part – upon a legally impermissible reason; *e.g.*, the filing a workers' compensation claim. Again we note the considerable temporal gap between the filing of Roy's workers' compensation claims and his discharge. We have already discussed this

issue and have determined that the filing of the workers' compensation claims was not demonstrated to be “a substantial and motivating factor but for which [he] would not have been discharged.” *Zarebidaki*, 867 S.W.2d at 186. Thus, since Roy was an at-will employee, and since he has failed to demonstrate retaliatory firing, we conclude that the trial court did not err in dismissing his claim arising from KRS 342.197.

Roy next argues that the trial court erred in summarily dismissing his age discrimination claim. KRS 344.040(1) provides that it is unlawful for an employer to discharge an individual because that individual is 40 years of age or older. In the absence of direct evidence of discriminatory motivation, a plaintiff claiming age discrimination with respect to an employment decision must satisfy the burden-shifting test set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005). The plaintiff must first establish a *prima facie* case of age discrimination by proving that he: (1) was a member of a protected class; (2) was discharged; (3) was qualified for the position from which he was discharged; and (4) was replaced by a significantly younger person. *Id.* at 496. At the time of his discharge, Roy was older than the age of 40 and was, therefore, a member of a protected class. He was also clearly qualified for his position as a truck driver and was replaced by someone who was 26 years of age. Thus, he met the requirements of establishing a *prima facie* case.

After a *prima facie* case has been established, the burden then shifts to the employer to articulate a “legitimate nondiscriminatory reason” for the discharge. *Id.* at

497. An employer is required to “articulate with clarity and reasonable specificity, a reason unrelated to a discriminatory motive, and is not required to persuade the trier of fact that the action was lawful.” *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 700 (Ky.App. 1991). An employer bears a burden of production of evidence **without** having to pass a credibility test. *Williams*, 184 S.W.3d at 497. After reviewing the record, we are persuaded that Ready Mix has met this burden.

We have examined the pre-trial discovery contained within the record. It reflects that the primary ground upon which Ready Mix based Roy's termination was its concern that he was seeking to buy a concrete plant and to go into direct competition with the company while entrusted with access to certain proprietary information. Roy admitted to making a phone call in which he made inquiries into purchasing such a plant. While he contends that this call was part of a joke, such an assertion is a matter of credibility and therefore cannot be considered in our analysis. *Id.*

If a *prima facie* case is rebutted with a “legitimate nondiscriminatory reason” for an employment decision, the burden again shifts back to the plaintiff to produce specific evidence indicating that the reason given by the employer for its decision is pretextual and that the decision was actually motivated by age discrimination. *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226, 230 (Ky. 1984). A plaintiff must present “cold hard facts creating an inference showing age discrimination was a determining factor” in his discharge. *Id.* at 229. The inferences raised by establishing a *prima facie* case alone cannot serve to create a genuine issue of material fact if a

legitimate nondiscriminatory reason for discharge is presented. *Id.* at 230. Unless specific evidence of age discrimination is clearly shown, summary judgment is wholly appropriate. *Id.*

During his deposition, Roy was asked about the facts upon which he was relying in his age discrimination claim. The following exchange took place:

Q. Now you've claimed age discrimination in the Complaint. Could you tell me what you're basing that on? What's happened ...

A. I'm basing that on the performance of my job; the contractors I hauled to, you know, I always done a good job. The performance I did for the company. And then, you know, me [being] over fifty years old and the guy that took my place is twenty-eight, I just feel like that's what it is.

Q. So as far as your claim, that's it. You were over fifty and the guy that replaced you was twenty-eight?

A. Right. And, you know, performing the job I did and, you know, what I did for the company and everything, you know, I felt like that's more or less what it was, yes.

Q. Okay. But nobody at Ready Mix said anything to you about your age?

A. Well, the only one little thing that was said one day that made me feel a little bit that's what happened is Mark Lawless down there one day, my shoulder was hurting a little bit one day, had arthritis bothering it a little bit and I said, my shoulder is hurting me today, it must be going to rain. And he looked at me and he said, me and you is just getting old. He said, I believe we're over the hill. And I said, speak for yourself. I said, I'm not over the hill. And, you know, that's the only little thing that I ever, you know, ever took a look at.

Q. Okay. You think that was directed to you or just a general comment that ...

A. Well, I don't know what it was, I mean I don't really know. I took it that way. I mean I felt like that's what it was.

Q. When was that?

A. Oh, it was shortly before I was terminated. You know, I don't know, it was maybe two or three months before I was terminated or something like that. I don't know. It was before that happened, though, maybe two or three months or something like that.

Q. Okay. Well is there anything else about your age that anybody said to you?

A. No. Not as [] I recall.

Roy bases his claim of age discrimination upon his own personal, subjective belief that his termination was motivated by age because of a comment by a co-worker that both men were “over the hill.” However, a subjective belief cannot be considered as evidence and does not succeed in creating a genuine issue of material fact. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Handley*, 827 S.W.2d at 701. A single off-hand comment by a co-worker remains as the only basis for Roy's age discrimination claim and falls far short of satisfying Roy's burden of producing “cold hard facts creating an inference showing age discrimination was a determining factor” in his discharge. *Harker*, 679 S.W.2d at 229. Accordingly, we hold that the trial did not err in summarily dismissing Roy's age discrimination claim.

We affirm the judgment of the Russell Circuit Court.

ALL CONCUR.

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