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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000573-MR

MELISSA K. PENNINGTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 07-CI-005314

WAGNER'S PHARMACY, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CLAYTON, AND VANMETER, JUDGES.

COMBS, JUDGE: Melissa Pennington appeals the order of the Jefferson Circuit Court which granted summary judgment to Wagner's Pharmacy, Inc. After our review of the record, the facts, and the pertinent laws, we vacate the order and remand.

Pennington worked for Wagner's as a food truck operator in the backside area of Churchill Downs for approximately ten years. She was approximately five feet four inches in height and weighed four hundred twenty-five pounds. She also suffered from diabetes, which caused her to have pronounced dark circles under her eyes. On one of her off-duty days in 2007, Pennington went to the office of Brenda Smyth, manager of Wagner's, to pick up her paycheck. She was in the process of moving from one residence to another, and, as she admitted, she was not at her best appearance. However, she testified that she never went to work looking as she did that day, calling it "an anomaly."

Soon after, on April 26, 2007, Smyth asked Pennington's supervisor, Martha Parrish, to terminate Pennington due to her "personal appearance." Parrish did not testify that Smyth specified what was meant by "personal appearance" -- whether it was Pennington's disheveled appearance on one occasion (when she was ***off duty***) or whether it was Pennington's morbid obesity. However, two of Pennington's coworkers submitted affidavits stating that Parrish "tearfully" told them that Smyth said that Pennington was fired because she was "overweight and dirty."

On June 7, 2007, Pennington filed a lawsuit alleging that Wagner's had unlawfully discriminated against her due to her disability of morbid obesity. In its answer, Wagner's alleged that it had dismissed Pennington because of her failure to generate sales. On June 3, 2011, Wagner's filed a motion for summary judgment, which the trial court granted on October 21, 2011. Pennington filed a motion to alter, amend, or vacate the order on October 31, 2011. The motion was

denied, and this appeal follows.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to overcome a motion for summary judgment, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. *See also* Kentucky Rules of Civil Procedure (CR) 56.03. On appeal, our standard of review is "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). Because summary judgments do not involve fact-finding, we review *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.3d 188, 189 (Ky. App. 2006).

It is unlawful for an employer to discriminate against an employee due to a disability. Kentucky Revised Statutes (KRS) 344.040(1) and 207.150. The Kentucky statutes are fashioned after the Americans with Disabilities Act (ADA),

and federal law is utilized in their interpretation. *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003).

In order to establish a discrimination claim, the plaintiff must prove a *prima facie* case by demonstrating:

> (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 (Ky. App. 2004). In this case, the parties do not dispute that Pennington was qualified to perform her job. She had worked for Wagner's for ten years prior to her dismissal. There can be no dispute that the act of termination is the ultimately adverse employment decision. Therefore, the only issue remaining as to whether Pennington established a *prima facie* employment claim is whether she was disabled according to statute.

The pertinent statute is KRS 344.010(4). It sets forth as follows:

> "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.

Established precedent directs us to refer to the definitions in the regulations for the Equal Employment Opportunity Commission (EEOC) in order to elaborate upon the criteria entailed in the statute. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 194, 122 S.Ct. 681, 689, 151 L.Ed.2d 615 (2002).[1] In pertinent part, the regulations – as they applied in 2007, when the alleged discrimination occurred – define *physical or mental impairment* as:

> [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine[.]

29 C.F.R. § 1630.2(h)(1). *Major life activities* are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

The regulations then address the term *substantially limits* as meaning:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which the average person in the general population can perform that same major life activity.
>
> (2)The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

[1] The holding of *Williams* was overruled by Congress's Amendments to the Americans with Disabilities Act in 2008; however, the Amendments are not retroactive and thus cannot apply to the case before us. However, the Amendments indicate a trend in the law to treat morbid obesity as a disability *per se*. *See BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012).

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j).

Pennington contends that her impairment is her condition of morbid obesity. *Morbid obesity* is defined as a person's weighing either double his normal weight or at least one-hundred pounds more than his normal weight. *See Hazeldine v. Beverage Media, Ltd*., 954 F.Supp. 697 (S.D.N.Y. 1997) (citing *The Merck Manual of Diagnosis and Therapy*, 981 (Robert Berkow, ed., 16th ed. 1992)). There is no dispute that Pennington has suffered from this condition for most of her life. The record indicates that she weighed in excess of two-hundred pounds at the age of nine. Her burden is to demonstrate that merely being overweight is not a disability – absent more.

The trial court found that Pennington's obesity was not a disability pursuant to the statutory definition because it was not caused by an underlying physiological condition. It relied on *EEOC v. Watkins Motor Lines, Inc*., 463 F.3d 436, 440-443 (6th Cir. 2007), in which the court held that, "to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition." It noted that the Second Circuit had observed that "a cause of action may lie against an employer who discriminates against an employee on the basis of

the perception that the employee is morbidly obese . . . or suffers from a weight condition that is the symptom of a physiological disorder." *Francis v. City of Meriden*, 129 F.3d 281, 286 (2nd Cir. 1997). The trial court found that Pennington had not presented proof of an underlying physiological order; therefore, it held that the evidence was insufficient to support a *prima facie* case of discrimination.

We disagree. The record includes the deposition of Dr. Edwin Gaar, who has performed thousands of bariatric (weight loss) surgeries. Dr. Gaar testified in detail as to the causes of morbid obesity. He stated that while the exact cause is not known and varies from patient to patient, morbid obesity is

> a metabolic ***disease*** of diverse etiologies involving genetic neuro-humeral, environmental [sic] that all come together to result in a condition of decreased energy utilization and increased fat storage, and that in itself sets off a cascade of dominos leading to a host of other co-morbidities[.]

He clarified that neuro-humeral means "dysregulation of hormones, dysregulation of sibling cytokines within the body which stimulate or suppress appetite." Before the end of the deposition, Dr. Gaar reiterated that "morbid obesity like [Pennington's] is ***caused by*** a cluster of often unknown ***physiological abnormalities*** and that morbid obesity like ***hers is in itself*** an abnormal physical condition or disease." (Emphases added.) In light of this evidence, it was clear error for the trial court to find that Pennington's condition did not have an underlying physiological cause.

We also must determine whether her impairment has affected one or more of the body systems as enumerated in 29 C.F.R. § 1630.2(h)(1). Pennington has developed diabetes, which is a result of the morbid obesity according to Dr. Gaar's testimony. Diabetes is a disorder of the endocrine system, a major body system as set forth by the regulation. Therefore, Pennington has established that her morbid obesity is an impairment contemplated by the statutory scheme and has established that merely being overweight is not a disability in itself.

The next question is whether Pennington's impairment substantially limits one (or more) major life activity. KRS 344.010(4). Pennington suffers from sleep apnea, a condition causing difficulty in breathing during sleep. There is no dispute that breathing is a major life activity.[2] The regulation 29 C.F.R. § 1630.2(j)(ii) sets forth that a person is substantially limited if impaired in his or her ability to perform a major life activity compared to average persons in the general population. Among the major life activities listed is "caring for oneself." Dr. Gaar testified that hygiene is difficult for patients with morbid obesity. He also said that a simple activity such as tying one's shoes is complicated and difficult due to the condition. Additionally, Dr. Gaar testified that morbid obesity shortens a person's life expectancy by approximately fifteen years. He testified that most morbidly obese people are unable to lose weight without drastic intervention – such as bariatric surgery. In light of this evidence, we must conclude that Pennington has a

[2] Though not listed specifically in 29 C.F.R. § 1630.2(i), sleep is commonly recognized as having significant impact on the human organism tantamount to constituting a major life activity.

disability according to law, and she has established a *prima facie* case of discrimination.

If and when an employee has established her *prima facie* case of discrimination, the burden shifts to the employer to rebut it with "a legitimate, nondiscriminatory reason." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). If the employer provides a nondiscriminatory reason, the burden shifts back to the employee to prove that the "proffered reason was not the true reason for the employment decision." *Id*. at 256, 1095.

In this case, as recounted by the trial court, Pennington's supervisor testified that she was told to dismiss Pennington due to her unsatisfactory "personal appearance" and all the ramifications flowing from her morbid obesity. However, in its answer to Pennington's complaint, Wagner's claimed that Pennington had been dismissed because of her failure to generate sales. We agree with Pennington that this testimony has created a genuine question of fact as to the true reason for her dismissal: whether she was dismissed because of her personal appearance or whether the alleged failure to generate sales was pretextual. The resolution of this issue is a matter wholly within the purview of a jury.

The Eleventh Circuit has addressed the nuances underlying subjective *versus* objective reasons for termination. Subjective reasons can be just as valid as objective reasons.

> Nonetheless, we are mindful of the requirement articulated by the Supreme Court in *Burdine* that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific" so that "the plaintiff be afforded a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 258, 101 S.Ct. at 1096 (quotation omitted). A subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion. Continuing our example of a sales clerk or wait staff position, it might not be sufficient for a defendant employer to say it did not hire the plaintiff applicant simply because "I did not like his appearance" with no further explanation. However, if the defendant employer said, "I did not like his appearance because his hair was uncombed and he had dandruff all over his shoulders," or "because he had his nose pierced," or "because his fingernails were dirty," or "because he came to the interview wearing short pants and a T-shirt," the defendant would have articulated a "clear and reasonably specific" basis for its subjective opinion – the applicant's bad (in the employer's view) appearance. That subjective reason would therefore be a legally sufficient, legitimate, nondiscriminatory reason for not hiring the plaintiff applicant.

Chapman v. AI Transp., 229 F.3d 1012, 1033-35 (11th Cir. 2000). The Fifth Circuit has held that "as a matter of law . . . justifying an adverse employment decision by offering a content-less and nonspecific statement, such as that a candidate is not 'sufficiently suited' for the position . . . is . . . a non-reason." *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004). It rationalized that a nonspecific reason is just as likely to be discriminatory as nondiscriminatory. *Id*.

In this case, the record does not reflect that Pennington was ever given ***any reason*** concerning what aspect of her personal appearance was the basis of her

dismissal at the time of her termination. Throughout her ten years of employment, Wagner's had never complained about her performance or asked her to change anything about her appearance. It is reasonable to take judicial notice of the fact that morbid obesity is very likely the most obvious and noteworthy aspect of one's physical appearance. Pennington also acknowledges that the dark circles around her eyes that resulted from diabetes could have been perceived as "dirty." Again, Wagner's did not articulate a specific reason, and it is not our role to speculate.

Additionally, because this is a summary judgment case, it is important for us to note that:

> when an employer gives one reason at the time of the adverse employment decision but later gives another [reason] which is unsupported by documentary evidence, a jury could reasonably conclude that the new reason was a pretextual, after-the-fact justification.

O'Neal v. City of New Albany, 293 F.3d 998, 1005-06 (7th Cir. 2002). The record reflects that Wagner's first dismissed Pennington because of her personal appearance but later asserted that the dismissal was due to failing sales. We are also reminded that:

> The role of the jury in interpreting the evidence and finding the ultimate facts is an American tradition so fundamental as to merit constitutional recognition. U.S. Const.Amend. VII; Ky. Const. Sec. 7. The conscience of the community speaks through the verdict of the jury, not the judge's view of the evidence. It may well be that deciding when to take a case away from the jury is a matter of degree, a line drawn in sand, but this is all the more reason why the judiciary should be careful not to overstep the line.

Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 385 (Ky. 1985). Accordingly, we hold that Pennington is entitled to determination by a jury as to whether her dismissal was the result of discrimination due to her disability of morbid obesity.

Although we are remanding for a trial, we believe it is important to address Pennington's other argument. The trial court found that the affidavits of Pennington's coworkers were inadmissible as double-hearsay. The affidavits are crucial to Pennington's proof as to whether Wagner's asserted a pretextual basis for her dismissal.

Double hearsay is a statement that contains hearsay within hearsay. It is admissible if each part is admissible pursuant to an exception to the exclusion against hearsay. Kentucky Rules of Evidence (KRE) 805.

The affidavits are examples of double hearsay; Pennington's two coworkers both testified that they saw Parrish crying, and Parrish stated that Smyth told her to dismiss Pennington because Pennington was overweight and dirty. In her deposition, Parrish denied making the statement to the two coworkers.

We agree with Pennington that each portion of the hearsay is subject to an exception to exclusion. The first part is Smyth's statement to Parrish, and the second part is Parrish's statement to the coworkers. KRE 801A(b)(4) provides a hearsay exception for an admission by a party if it is "[a] statement by the party's ***agent or servant*** concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" (Emphasis added.)

Smyth's statement fits soundly within this exception. She was an agent of Wagner's, and the statement concerned Pennington's employment during the time that Smyth and Pennington were both employed by Wagner's. Therefore, the first portion of hearsay in the affidavits is admissible.

KRE 801A(a)(1) applies to Parrish's statement to the coworkers. It permits hearsay to be considered if it is a prior inconsistent statement of a witness. Parrish testified in her deposition that Pennington was dismissed due to her personal appearance -- not because she was dirty and overweight. However, two witnesses testified that Parrish's statement to them was the opposite. In discussing the same combination of KRE 801A(b)(4) and KRE 801A(a)(1) exceptions, our Supreme Court has remarked that "any prior inconsistent statement of a witness is admissible for substantive purposes." *Thurman v. Commonwealth*, 975 S.W.2d 888, 893-94 (Ky. 1998). We are persuaded that the Rules of Evidence clearly allow for affidavits of Pennington's coworkers to be considered by the jury.

In summary, because Pennington proved a *prima facie* case of discrimination by utilizing admissible evidence, we vacate the order of the Jefferson Circuit Court and remand for further proceedings consistent with this opinion.

CLAYTON, JUDGE, CONCURS IN RESULT.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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