RENDERED: AUGUST 9, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001105-MR

COLUMBIA GAS OF KENTUCKY, INC. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 99-CI-03699

JAMES M. WELLS
AND ROBERT L. ABELL — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Columbia Gas of Kentucky, Inc. ("Columbia"), seeks review of a judgment of the Fayette Circuit Court entered on a jury verdict in favor of the Appellee, James M. Wells ("Wells"), in this age discrimination case. Wells's attorney, Robert L. Abell, is also named as an appellee.

On October 20, 1999, Wells filed a complaint in the Fayette Circuit Court against Columbia, Judith Christopher and Kay Hardin. According to the complaint, Wells, a 58 year old male, worked for Columbia from May 1961 until April 1, 1999. Wells alleged that Hardin, a Columbia residential customer, and

Christopher, a dispatcher for Columbia[1], had made untrue statements to agents and employees of Columbia that Wells had sexually harassed them. Wells further alleged that Columbia decided to terminate his employment based upon this untrue information as a pretext to hide the real reason for Columbia's decision — Wells's age within the meaning of KRS 344.040[2]

The jury found for Wells, being satisfied from the evidence that his age was a substantial and motivating factor in Columbia's decision to fire him. The jury awarded Wells the sum of $165,377.00 representing $90,377.00 in lost wages and benefits, $25,000.00 for embarrassment and humiliation or emotional distress and mental anguish, and $50,000.00 in punitive damages.

Columbia raises several issues on appeal. First, Columbia asserts that the "trial court had four chances to grant . . . judgment as a matter of law, but erroneously declined them all" - when Columbia moved for summary judgment, twice, at trial, when Columbia moved for a directed verdict at trial, and after trial, when Columbia moved for judgment NOV. Denial of a

---

[1] Hardin filed a counterclaim against Wells for abuse of process; she filed a cross-claim against Columbia for fraudulent misrepresentation, negligence, breach of contract, and breach of implied covenant of good faith dealing. Hardin's claims were subsequently dismissed. Wells subsequently withdrew his complaint against Christopher. Neither Hardin, nor Christopher, is a party to this appeal.

[2] KRS 344.040(1) provides that it is an unlawful practice for an employer "[t]o fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, ..."

motion for summary judgment is not reviewable on appeal. Bell v. Harmon, Ky. App., 284 S.W.2d 812, 814 (1955). Nor is there any appellate review of whether the plaintiff submitted a prima facie case of discrimination. Following trial on the merits in a Title VII action, a reviewing court should look to the ultimate question — whether the plaintiff has proven that the discharge was intentionally discriminatory. Gray v. Toshiba America Consumer Products, Inc., 263 F.3d 595, 599 (6th Cir. 2001)[3] The court explained:

> This does not mean, however, that plaintiff's failure to present evidence sufficient to make out a prima facie case is not relevant to our review of that ultimate question. In employment discrimination cases, if the plaintiff presents sufficient evidence to make out a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, non-discriminatory reason for the action taken; this burden is one of production only, not of persuasion. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If the employer does so, the burden returns to the plaintiff to prove that the employer's stated reason is pretextual. *Id.* at 255, 101 S.Ct. 1089 . . . .
>
> . . . .
>
> The Supreme Court has recently revisited the question of what is the plaintiff's evidentiary burden in an employment discrimination case. In *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) . . .
>
> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of

[3] Columbia moved for leave for consideration of this decision as additional authority; the motion was granted by order of this Court entered January 30, 2002.

> intentional discrimination, and it may be quite persuasive. *See* [*St. Mary's Honor Ctr.*, 509 U.S.] at 517, 113 S.Ct. 2742 . . . . Thus, *a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false,* may permit the trier of fact to conclude that the employer unlawfully discriminated.

Toshiba, at 599-600 (Emphasis original.)

The fact-finder must review all of the facts together to determine whether evidence of pretext is sufficient to support a finding of discrimination, rather than analyze each piece of evidence in isolation. An employer's changing rationale for making an adverse employment decision can be evidence of pretext. Thurman v. Yellow Freight Systems, Inc. 90 F.3d 1160, 1167 (6th Cir. 1996). Kentucky's age discrimination statute is specially modeled after the Federal law. Consequently, in this particular area, the court must consider the way the Federal act has been interpreted. Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 229 (1984). In age discrimination cases, a plaintiff can establish a prima facie case by demonstrating that (1) he was a member of a protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was replaced by a younger person. Roush v. KFC Nat. Management Co., 10 F.3d 392, 396 (6th Cir. 1993).

In the case *sub judice,* evidence was presented that Wells was 57 and a half years old when he left Columbia in 1999. Lori Johnson, Director of Human Resources, testified that "Mr. Wells was an employee who held an important job with Columbia,

had — we had invested years of training him to perform that job." Johnson explained that Columbia was going to give Wells a termination letter, because of his actions at the home of a customer — Kay Hardin. Columbia did not give Wells the termination letter because his union representative asked if Wells could be allowed to retire instead, and Columbia agreed that he could. Wells explained that his request to retire was "granted with some restrictions." He was asked to give up his pending union grievance over his suspension.[4] Wells's position at Columbia was filled by a younger employee — a man named Orwin Whitt — who was assumed to be "almost 40" according to Lori Johnson.[5]

"[T]he considerations governing a proper decision on motion for a judgment notwithstanding the verdict are exactly as those first presented on a motion for a directed verdict at the close of all of the evidence." We "must draw all fair and rational inferences from the evidence in favor of the plaintiff, and the evidence of such party's witnesses must be accepted as true." Cassinelli v. Begley, Ky., 433 S.W.2d 651, 655 (1968).

---

[4] Lori Johnson testified that Wells had the right, under the union contract, to have drawn retirement and at the same time pursue a union grievance. Johnson admitted that the grievance could have led to Wells' reinstatement.

[5] In its reply brief, Columbia states that Wells' post was offered to all the "older employees, who turned it down because they disliked the night shift." The record actually reflects that in order to fill the vacancy created by Wells' "departure," "[t]he supervisor had to poll the employees who were eligible by classification to do this work by seniority, and the most senior ones, as normally would, turned it down." Nothing was said about "older workers, as Columbia would have us believe. Years of service and age are analytically distinct concepts. Hazen Paper Co. v. Biggins, 507 U.S. 604, 611; 113 S.Ct. 1701, 1707; 123 L.Ed. 338, 348 (1993).

Here, the evidence was in conflict. Sufficient evidence was presented from which the jury could have concluded that Columbia's preferred reason for terminating Wells's employment was false.

Wells observes that what was initially reported to Columbia — that he tried to hug Hardin, and she had to push him off — never happened. At trial, Hardin testified that Wells touched her on the shoulder as he was going out the door. He did not try to hug her. He did not try and pull her toward him.

Greg Hatton, an operations supervisor for Columbia, testified that he received a complaint from Hardin, on February 16, 1999. According to Hatton, Hardin said that Wells had hugged her and made her very uncomfortable.[6] Hatton did not recall Hardin's telling him anything else that violated any Columbia policy, besides the report of hugging. Hatton took the matter to Mary Tigges, in human resources.

Tigges testified that Hatton brought her some notes about a customer who called in and complained about how Wells had behaved in her home. At trial, Tigges explained that the allegations were that Wells had touched Hardin and that she was uncomfortable around him. Hardin was concerned that Wells might come to her work (a Bob Evans restaurant) because he had asked if would she take good care of him if he came there. In her earlier deposition testimony, Tigges gave a different account of the matter. Tigges had testified that Hardin complained Wells had

[6] Hatton was not aware Hardin had denied that Wells hugged her in her testimony.

"tried to hug her, put his hand on her shoulder and she had to push him away." According to Lori Johnson, Greg Hatton is the only person with Columbia whoever had any conversation with Hardin about the substance of events involving Wells.

Tigges testified that Hardin had advised her, at a later date,[7] that she wanted to withdraw her complaint; nevertheless, Tigges told Hardin that she still had the obligation to investigate it, "as our policy states that if the complaint is brought to you, you have an obligation to investigate it."

Lori Johnson was questioned about Columbia's policy on servicemen's conduct towards customers. Johnson explained that the policy is the same across the board for all servicemen who work in Kentucky, regardless of location or supervisor. Johnson testified about the handling of a complaint made in March 2000 against another Columbia gas serviceman, Johnny Farris. In Johnson's words, the customer advised her that Farris "had touched his genital area and made a statement — during the course of the conversation, at one point he touched himself and made a statement about how easy it is for him to whip it out, and then something about the type of underwear that he wore being silk." Johnson testified that Farris was suspended with pay during the investigation. She could not recall Wells's "pay status," when he was suspended; however, Wells testified that he was suspended

[7] Tigges explained she had called Hardin to verify if she had called 911 to have Wells removed from her home, because an employee reported having heard something to that effect. Hardin denied calling 911. Tigges never spoke to Hardin about the alleged touching or hugging.

without pay. According to Johnson, Farris was in his late 40's at the time.[8] Actually, he was about 46 years old. Eligibility for early retirement at Columbia is age 55. The Farris matter was dropped because the customer was unwilling to stand behind the statements she had made. According to Johnson, had she pursued the matter, Farris would have been terminated, and the union arbitration process would have required that the customer testify, but she was unwilling to do so. When asked if she was aware that Hardin wanted to withdraw her complaint prior to Wells's termination, Johnson replied that she did not remember.

Wells testified that Hatton, his immediate supervisor at the time, had asked him about his retirement plans on two occasions. Wells explained that he could not recall a specific date — the first time was during a period when quite a few employees were retiring. Wells told Hatton he did not want to retire until he was 59 and a half. Possibly six months later, Hatton again asked Wells if he had thought about retiring. According to Wells, this occurred three to five months before he left.

Under the circumstances, we believe that a reasonable jury could have found that Columbia's reason for terminating

[8] At trial, on March 20 2001, Farris testified that he was 45 years old, although his birth date was 1/29/54, making him 47 years old, at the time. Assuming the date of birth is correct, Farris would have been 46 years old at the time of the incident. Farris testified that he did not lose any pay over the incident or get a write up, he just went back to doing his normal job, because the customer did not want to pursue it.

Wells was not worthy of belief.[9] We therefore conclude that the court did not err in denying Columbia's motions.

Columbia asserts that admitting any evidence of the "Farris incident" constituted reversible error, because (1) the incident was irrelevant, having arisen a year after Wells's retirement in lieu of termination; (2) Farris was identified on a supplemental witness list, a month after the final witness lists were due; and (3) Farris' testimony, on direct — that he was under the impression he would be punished if he testified on Wells's behalf — was inflammatory.

The standard of review for a trial court's evidentiary rulings is abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000). We affirm the trial court's rulings relating to Farris. We agree with Wells that Farris's testimony was relevant to the issue of policy and enforcement by management, especially in light of testimony that Columbia had a "zero tolerance" policy

---

[9] "Columbia argues that a plaintiff must "adduce cold hard facts" in an age discrimination case, citing Harker, supra; however,the quotation from Harker is in the context of withstanding a summary judgment motion. "As a general rule, the plaintiff need not establish a *prima facie* case simply because there is a motion for summary judgment. In an age discrimination case there is a different standard on summary judgment. . . . . rather than requiring that the pleadings and depositions foreclose the possibility that plaintiff can prove a case at the time of trial, the special rule for age discrimination summary judgments is whether the plaintiff has proof of "cold hard facts creating an inference showing age discrimination was a determining factor" in the discharge." Harker, at 229.

for sexual harassment. KRE 401, 402. We find no merit in Columbia's argument that the trial court abused its discretion in allowing Farris's name to be added to the witness list. Wells observes that Columbia declined the trial court's "invitation to move for a continuance." Columbia does not dispute this in its reply brief. Nor do we find any merit in Columbia's argument that the trial court erred in allowing Farris's testimony that he might get in trouble, if he testified on Wells's behalf. Columbia maintains that this testimony was "very prejudicial and inflammatory." We disagree. Farris admitted on cross-examination that his supervisor, Charles Knuckles, never specifically said that if Farris testified on behalf of Wells he would get into trouble. Farris admitted that he did not believe that Knuckles would retaliate against him. There is no ground for reversal.

Next, Columbia asserts that the trial court erred in excluding evidence that Columbia maintains would have shown the "full scope" of its investigation. Columbia advises that the jury did not hear from "key participants" such as Judith Christopher and Wilson Hensley, regarding other complaints about Wells. Wells responds that Joseph Kelly, Columbia's CEO, testified that nothing other than Hardin's complaint was considered in reaching the decision to terminate Wells; thus, the excluded testimony was not relevant to this case. We agree. The trial court did not abuse its discretion in excluding the evidence.

Columbia asserts that the trial court erred in refusing to instruct the jury about the "business judgment rule." Columbia acknowledges that Kentucky law does not require that the rule be included in jury instructions but urges us to adopt the Eighth Circuit's position. Wells notes that Columbia presented its "business judgment" argument to the jury in summation. As Wells argues, the trial court's function is confined to setting forth the bare essentials for the jury. Counsel's duty to see to it that the jury clearly understands what such instructions mean, or do not mean. Collins v. Galbraith, Ky. App., 494 S.W.2d 527, 531 (1973). Accordingly, we agree with the trial court's findings.

Columbia asserts that the trial court also erred by failing to give a separate instruction on mitigation of damages. We disagree. Columbia provides no authority that a separate instruction is required in this instance. Wells responds that the jury was properly instructed that it should reduce any award of back pay by "any compensation, including fringe benefits, during that period of time that he has received from other employment or could have earned through the exercise of reasonable diligence to secure other employment." Whether separate instructions should be submitted to jury rests in trial court's discretion. Massie v. Salmon, Ky. App., 277 S.W.2d 49, 52 (1955).

Columbia asserts that the trial court erred in giving a punitive damages instruction and that the punitive damages

awarded were excessive.[10] Insofar as the instruction, Columbia argues that Wells produced "absolutely no evidence" of any evil intent, malicious spirit, or conscious wrongdoing on Columbia's part, a requirement under "longstanding Kentucky law."

In City of Middlesboro v. Brown, Ky., 63 S.W.3d 179, 181 (2001) the Supreme Court explained that:

> *Kentucky Instructions To Juries* articulates the standard for awarding punitive damages as "if D acted ... in reckless disregard for the lives, safety or property of others." Gross negligence should be defined as "reckless disregard for the [rights] [lives and safety] of other persons." The comment to this section states that "though 'gross negligence' in the abstract is defined as the absence of slight care, in order to serve as a basis for punitive damages it must be specifically defined to include the essential element of reckless indifference or disregard for the rights of others."

In the case *sub judice*, the jury was instructed that "[i]f you find for plaintiff James M. Wells and awarded him damages under Instruction No. 2 and if you are further satisfied from the evidence that in discriminating against James M. Wells defendant Columbia Gas acted in reckless disregard for his rights, you may, in your discretion award punitive damages

---

[10] The issue of whether punitive damages are available under KRS 344.450 has not been raised on this appeal. Nevertheless, we note that the issue has not been resolved by the Kentucky courts. In *Kentucky Dep't of Corrections v. McCullough,* Nos.1998-CA-001403-MR. 1998-CA-001422-MR, 2000 WL 707953, pending on appeal before the Kentucky Supreme Court, this Court held that punitive damages are available under the Kentucky Civil Rights Act. Kentucky federal district courts have held that punitive damages are not available under KRS 344.450. See *Messick v. Toyota Motor Mfg., Kentucky, Inc.,* 45 F. Supp. 2d 578, 581-82 (E.D.Ky.1999).

. . . ." Wells provides numerous references to the evidence from which "the jury could find that appellant systematically violated its own policies and procedures in proceeding to fire Wells and recklessly disregarding his rights." We agree.

Columbia also asserts that the punitive damages awarded were excessive under the "first blush rule." In May 2001, the United States Supreme Court decided Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), which held that courts of appeal should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards. The three "guideposts" a reviewing court must consider in determining whether a punitive damages award is excessive are: (1) the "degree of reprehensibility" of the wrongdoing, (2) "the disparity between the harm or potential harm suffered and the punitive damages award," and (3) the difference between this remedy and civil penalties comparable cases. See E.E.O.C. v. Harbert-Yeargin, Inc., 266 F.3d 498, 514 -519 (6th Cir. 2001).

Applying this analysis, we conclude that the award of $50,000.00 in punitive damages was not excessive and affirm. Columbia's conduct was sufficiently reprehensible. While priding itself on a "zero tolerance" policy for sexual harassment, Columbia engaged in its own brand of prohibited conduct in violation of KRS Chapter 344, under the guise of handling of a (questionable) customer complaint. The disparity between the harm suffered and the punitive damages award was not great. The punitive damages award was substantially less than the award of

compensatory damages. As Wells notes, the Kentucky Supreme Court has rejected arguments that punitive damage were excessive where the awards were a multiple of compensatory damages.

Columbia asserts that the evidence was insufficient to support the jury's verdict. We have reviewed the evidence presented in great detail as outlined above. The verdict has a substantial evidentiary basis. NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). Thus, we affirm.

Columbia asserts that it should not have to pay attorney fees for Wells's abandoned claims, for time spent prosecuting his suit against Hardin, or for costs which were not sufficiently documented.

KRS 344.450 is mandatory and provides that:

> Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.

In Meyers v. Chapman Printing, Co., Inc., Ky., 840 S.W.2d 814, 826 (1992), the Supreme Court held that:

> [T]he controlling case in deciding upon an appropriate award of attorneys' fees where authorized by statute to insure effective access to the judicial process for persons with civil rights grievances is Hensley v. Eckerhart, 461 US 424, 103 SCt 1933, 76 LEd 2d 40 (1983). This case was decided under the Civil Rights Attorney's Fees Awards Act of 1976 . . . patterned in part on Title VII of the Federal Civil Rights Act. . . . . [T]he attorney's fee awarded should consist of the product of counsel's reasonable hours, multiplied by a reasonable hourly rate, which provides a "lodestar" figure, which may then be adjusted to account for various special

> factors in the litigation . . . none of the arguments presented begins to approach a substantial showing the trial court made any significant miscalculation, much less that it abused its discretion.

In the case *sub judice,* the argument presented does not approach a substantial showing that the trial court made a significant miscalculation or abused its discretion. The trial court provided a detailed explanation of the attorney fee award. The court found "that the 238.5 hours is reasonable *taking into consideration an appropriate reduction for unsuccessful claims from the total time expended by Plaintiff's counsel.*" (Emphasis added.)

We cannot agree with Columbia that certain costs should be disallowed because they were not sufficiently documented. Although the better practice would have been to attach statements or receipts for each item, the trial court found that these items were "reasonable and compensable" based upon an itemization contained in a sworn affidavit. We affirm the trial court's judgment.

We affirm the judgment of the Fayette Circuit Court and the order awarding attorney fees and costs.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

SCHRODER, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Debra H. Dawahare
Wyatt, Tarrant & Combs, LLP
Lexington, Kentucky

BRIEF FOR APPELLEE:

Robert L. Abell
Lexington, Kentucky