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1. Asbury College v. Powell, 2014 Ky. App. Unpub. LEXIS 75

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Asbury College v. Powell

Court of Appeals of Kentucky
January 31, 2014, Rendered
NO. 2012-CA-000653-MR

Reporter: 2014 Ky. App. Unpub. LEXIS 75; 2014 WL 354638

ASBURY COLLEGE, NOW ASBURY UNIVERSITY, APPELLANT v. DEBORAH POWELL, APPELLEE

Notice: THIS OPINION IS DESIGNATED ″NOT TO BE PUBLISHED.″ PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, *CR 76.28(4)(C)*, THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Prior History: **[*1]** APPEAL FROM JESSAMINE CIRCUIT COURT. HONORABLE C. HUNTER DAUGHERTY, JUDGE. ACTION NO. 09-CI-00140.

Core Terms

retaliation claim, gender discrimination, trial court, retaliate, adverse employment action, protected activity, quotient verdict, mixed-motive, coach

Counsel: BRIEF FOR APPELLANT: Debra H. Dawahare, Leila G. O'Carra, Lexington, Kentucky.

BRIEF FOR APPELLEE: Debra Ann Doss, Bryan Begley Daley, Lexinton, Kentucky.

Judges: BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES. ALL CONCUR.

Opinion by: CLAYTON

Opinion

OPINION AFFIRMING

CLAYTON, JUDGE: This action comes before us as an appeal from a jury verdict in the Jessamine Circuit Court. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellant, Asbury University, hired appellee, Deborah A. Powell, as its part-time head women's basketball coach in 2002. Powell was given a fulltime position in 2003. The full-time position combined coaching duties with Intramural Coordinator duties.

In 2008, Asbury terminated Powell's employment. Asbury asserts that it was due to student athletes who complained that Powell was seen caressing her assistant coach at various times while involved in her coaching duties. Asbury is a Christian school and the Provost, Jon Kulaga, asserted that the student athletes were uncomfortable with Powell's behavior in their presence. Prior to Kulaga, Ray Whiteman was Provost at **[*2]** Asbury. Powell filed a gender discrimination grievance against

Whiteman, asserting that she was being discriminated against in that she was given extra intramural duties. Asbury contends that these extra duties were a result of her fulltime employment.

In her grievance, Powell proposed a restructuring of her intramural job duties. In 2007, Athletic Director Kempf offered Powell a position on the Kentucky Intercollegiate Athletic Conference as representative of the Asbury coaches in the conference.

On March 3, 2008, Kulaga terminated Powell's employment. Powell then filed suit in Jessamine Circuit Court. The trial court dismissed Powell's defamation claim prior to trial. On February 2, 2012, the jury found in favor of Asbury on Powell's gender discrimination claim, but awarded Powell $380,000.00 on her retaliation claim. The court denied Asbury's Motion for Judgment Notwithstanding the Verdict/New Trial in its supplemental order entered March 19, 2012. Asbury then filed this appeal.

DISCUSSION

Asbury first contends that the jury instructions improperly included a mixed-motive analysis for Powell's retaliation claim. We review allegations of jury instruction error *de novo* as they are questions **[*3]** of law. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). The jury instruction at issue provides as follows:

To prevail on her claim of retaliation, Deborah Powell must prove that:

> 1. She engaged in protected activity by complaining about gender discrimination;
>
> 2. She had a good-faith, reasonable basis for her complaints;
>
> 3. She suffered material adverse employment action in connection with her employment;
>
> 4. Asbury University officials responsible for the actions against her were aware of her complaints of gender discrimination;
>
> 5. Her complaining about gender discrimination was a substantial and motivating factor in the adverse employment action; and
>
> 6. But for her complaining about gender discrimination she would not have suffered the adverse employment action.

Asbury asserts that the above instruction misstates the law and allows the jury to find for Powell under a mixed-motive theory of retaliation and that such an instruction is never proper in a Title VII or Kentucky Civil Rights Act (KCRA) retaliation claim.

Asbury argues that Title VII does not permit a mixed-motive retaliation claim. *E.g.* *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997); *Hayes v. Sebelius*, 762 F. Supp. 2d 90 (D.C. Cir. 2011). **[*4]** It goes on to assert that there is no statutory framework, under either state or federal law, under which a mixed-motive retaliation claim may be brought. Asbury also contends that there is no statute under which Powell would be able to recover lost wages and damages for humiliation, embarrassment, and/or emotional distress under a mixed-motive theory of liability. Powell, on the other hand, asserts that her retaliation claim is separate and distinct from her gender discrimination claim.

Title VII provides as follows:

> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices[:]
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national

> origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 United States Code (U.S.C.) § 2000e-2(m). *Kentucky Revised Statutes (KRS) 344.280(1)* provides that ″[i]t shall be an unlawful practice for a person, or for two (2) or more persons to conspire. . . [or] retaliate or discriminate in any manner against a person because he has **[*5]** opposed a practice declared unlawful by this chapter, or because he has made a charge, [or] filed a complaint[.]″

In order to set forth a prima facie case of retaliation, a plaintiff must show:

> (1) that plaintiff engaged in an activity protected by Titled 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.

Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 803 (Ky. 2004). Powell argues that this statute provides independent statutory authority for a retaliation claim and that it requires different elements of proof than those required to prove a claim of gender discrimination.

In *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006), the United States Supreme Court held that a reviewing court was not required to consider ″the **[*6]** nature of the discrimination that led to the filing of the charge. . . . Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint.″

Asbury asserts that Powell's retaliation claim fails as a matter of law in the absence of any underlying violation of the KCRA. We review questions of law *de novo*. *Medley v. Board of Education of Shelby County*, 168 S.W.3d 398 (Ky. App. 2004).

We have also been asked to review the jury instructions for error, although neither party has made those instructions part of the record. The instructions are quoted by the parties and make reference to the video record.

Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d. 440, 449 (Ky. App. 2006). ″The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.″ *Knight v. Silver Fleet Motor Express*, 289 KY. 661, 159 S.W.2d 1002 (Ky. App. 1942). **[*7]** ″In this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error. . . We also note that when we 'cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed.'″ *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 276-278 (Ky. App. 2006), *also citing Prichard v. Kitchen*, 242 S.W.2d 988, 992 (Ky. 1951).

Asbury requested to file supplemental authority, specifically *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 186 L. Ed. 2d 503 (U.S. 2013).

Although that request was denied, we are aware of this case which was decided four months after the Powell trial concluded. We agree with Asbury that this case clarifies several issues. First, the U.S. Supreme Court makes clear that retaliation is a separate cause of action and requires different proof from status based (i.e., race, color, religion, sex, national origin) claims. Kentucky cases also treat retaliation claims separately, see *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003). **[*8]** Therefore, we hold that the retaliation claim can go forward even if the underlying discrimination claim fails. The retaliation claim has been brought based upon a complaint of discrimination, not the discrimination itself. Powell is correct in her argument that in order to support her claim of retaliation, she had to produce evidence from which an inference of pretext could be drawn. *McCullough* at p. 134. Powell asserted numerous instances of behavior on the part of Kulaga and Kempf including the destroying by Kulaga of emails regarding his investigation into her assertions as well as his failure to follow protocol in dealing with the allegations of gender discrimination.

Second, the Supreme Court in *Nassar* held that Title VII retaliation claims must be proved according to traditional principles of ″but-for causation,″ not the lessened causation motivating standard test stated in *Sec. 2000e-2(m)* for the aforementioned status based claims. *Nassar* at p. 2533.

The claim for retaliation fails unless the complainant shows ″but-for causation,″ meaning that the employer would not have taken the adverse action but for a determination to retaliate. As the dissent in *Nassar* notes, this stricter **[*9]** causation standard is contrary to the previous decisions of the Supreme Court. The court's instructions in this case do not mirror the requirements discussed in *Nassar*. The relevant portion of the third instruction given by the court was:

> 5. Deborah Powell's complaining about gender discrimination was a substantial and motivating factor in the adverse employment action; and
>
> 6. But for her complaining about gender discrimination she would have not suffered the adverse employment action. (VR 8: 2/02/12: 03:34:35).

Powell argues that the instructions were proper and did not misstate the law.

Even if the instructions were in error, that is not the end of the inquiry. The next question must be whether the instructions were prejudicial resulting in reversal. Upon examination of the record, we believe that the instructions were not improper and that Asbury was not prejudiced by the instruction. The lesser standard, ″substantial and motivating factor,″ which was the law at the time, was used by the trial court. Interestingly, the stricter standard was also included. The instructions required that Powell establish that her protected activity was the ″but-for″ cause of the alleged adverse action **[*10]** by Asbury. We do not believe that the jury was misled. Thus, there was no error by the trial court.

Asbury next argues that the evidence at trial did not support the jury's retaliation verdict. In order to claim retaliation based on circumstantial evidence, the plaintiff must prove that the employer was aware of the protected activity at the time when a materially adverse decision was made. There must also be proof that there is a ″close temporal relationship″ between the protected activity and the adverse action. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 804 (Ky. 2004). As set forth above, the jury instruction asked the jury to find such and Powell provided evidence from which the jury could reasonably infer that this occurred.

Asbury also contends that the trial court improperly allowed Powell to introduce her

everyday workplace ″gripes″ as evidence of discrimination. The retaliation claim, however, dealt with the grievance Powell filed. As for the assertion by Asbury that the trial court improperly admitted into evidence the testimony of Rita Pritchett, the testimony from Pritchett's deposition which was read into evidence was not in error. Asbury **[*11]** contends that she had no knowledge of the events reported by the students; however, the questions dealt with Powell's responses to her when she was confronted with the allegations. This is a topic on which Pritchett could testify. Thus, there was no error.

Asbury next asserts that the trial court erred in failing to give an ″at-will″ employment jury instruction. We disagree that there was error in failing to give an ″at-will″ instruction when there was evidence of retaliation.

Asbury next argues that the verdict was a ″quotient verdict″ and that it was the result of passion or prejudice. The evidence in support of the ″quotient verdict″ is the Affidavit of Janet B. Dean, an Associate Professor at Asbury, who alleges that she spoke to Susan Morgan, a member of the jury, following the trial. According to Dean's affidavit, Morgan stated the jurors put in various figures for damages and then averaged them out in violation of the holding of *Louisville & N.R. Co. v. Marshall's Adm'x*, 289 Ky. 129, 158 S.W.2d 137, 143 (Ky. App. 1942).

In *Wilkerson v. Williams*, 336 S.W.3d 919, 922 (Ky. App. 2011), a panel of our Court held that, ″we are unaware of any prohibition against a jury altering its verdict during **[*12]** the course of its deliberations. The concept of a quotient verdict is not applicable to these factual circumstances. A quotient verdict occurs when a jury agrees in advance to arrive at a verdict by averaging the individual amounts arrived at by each juror.″ We hold that the allegations were not sufficient to support a claim that the result was a quotient verdict. As to the passion and prejudice allegation against the jury, there is no evidence provided by Asbury which would indicate such was the case.

Finally, Asbury asserts that the trial court erred in awarding Powell's attorneys' fees of over $200,000.00, considering Asbury had successfully defeated two of her claims. In reviewing an award of attorneys' fees, we must determine whether the trial court abused its discretion. Pursuant to *KRS 344.450*, a reasonable attorney fee may be awarded in addition to actual damages sustained and loss incurred. *See Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). In determining whether to award fees, a court should consider: (a) the amount and character of the services rendered; (b) labor, time, and trouble involved; (c) the nature and importance of the litigation in which the services **[*13]** were rendered; (d) the responsibility imposed on counsel; (e) the amount of money or the value of the property affected by the action; (f) the skill and expertise required; (g) the professional character and standing of the attorneys; and (h) the results secured. *Custom Tool and Manufacturing Co. v. Fuller*, 2007 Ky. App. Unpub. LEXIS 626, 2007 WL 121827 (Ky. App. 2007). *See also Boden v. Boden*, 268 S.W.2d 632, 633 (Ky. 1954). Daley's affidavit set forth a total of 103.50 hours expended on the action for a total of $31,050 at a $300.00 hourly rate. Doss's affidavit set forth 844.5 hours at that rate for a total of $253,350.00. The trial court made verbal findings at the hearing on March 8, 2012, and then restated its decision in its order entered March 19, 2012. There was no error by the trial court.

Based upon the above, we affirm the jury's verdict.

ALL CONCUR.