COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000526-DR

NORTON HEALTHCARE, INC. — APPELLANT

Court of Appeals
Case No. 2012-CA-000217-MR

v.

Appeal from Jefferson Circuit Court
Case No. 08-CI-002274

LUAL A. DENG
(formerly known as JACOB L. AKER) — APPELLEE

REPLY BRIEF OF APPELLANT

Respectfully submitted,

Donna King Perry
Jeremy S. Rogers
Alina Klimkina
DINSMORE & SHOHL LLP
101 S. Fifth Street
2500 National City Tower
Louisville, KY 40202
Telephone: (502) 540-2300
Fax (502) 585-2207
Counsel for Appellant,
Norton Healthcare, Inc.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals via Hand Delivery: Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Audra J. Eckerle, Jefferson Circuit Judge, Division Seven, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, KY 40202-4724; and Everett C. Hoffman, Priddy, Cutler, Miller & Meade, PLLC, 800 Republic Building, 429 W. Muhammad Ali Blvd., Louisville, KY 40202 on this 29th day of December, 2014.

Jeremy S. Rogers

STATEMENT OF POINTS AND AUTHORITIES

Page No.

ARGUMENT

I. Norton Has Preserved Its Arguments, But Aker Has Not Preserved His "Futile Gesture" Argument.

Aker incorrectly argues that Norton "should be barred from claiming on appeal that Aker failed to establish adverse action, since Norton failed to oppose Aker's adverse action claim in circuit court." (Aker Brf., pp. 34–38.) The issue was raised to the trial court. In its Opinion and Order, the trial court specifically recited Norton's contention that Aker failed to make the required showing of an adverse employment action. (R. 317-327, Op. & Ord. at 4.) The trial court then held that Norton's "declination to rehire him is not actionable" because Aker's employment had already been terminated, he was not a Norton employee, and had not applied for employment. (Id. at 10.)

Further, Norton is permitted to raise any argument in *support* of the trial court's judgment dismissing Aker's retaliation claim, even if such argument was not made at the trial court. Aker cannot raise new arguments in an effort to *overturn* the trial court's judgment. See Dean v. Commonwealth Bank & Trust Co.,434 S.W.3d 489, 496 (Ky. 2014).

Aker claims that he argued to the trial court that he was subjected to an "adverse action," which he claims was Norton's failure to consider him further for "reinstatement" to an unspecified job after he filed this lawsuit. Aker claims that this should be enough to preserve for appeal his request to be excused from the requirement to apply for a particular job with Norton, because it would have been a "futile gesture" to do so. Aker never raised that argument below; the Court of Appeals majority erroneously raised the argument *sua sponte* for Aker. (See Aker Appellant Brf. to Ct. of App., p. 1; Aker Reply Brf. to Ct. of App., p. 3.) This Court should reverse the Court of Appeals' decision.

II. Aker Failed to Establish the Required "But For" Causation Element.

Aker fails to address the fact that a retaliation claim – unlike a discrimination claim – requires a heightened showing of "but for" causation pursuant to University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 186 L.Ed. 2d 503 (2013). Aker's brief does not even acknowledge the existence of the Nassar holding.

Instead, Aker relies upon lower court decisions that pre-date the Supreme Court's holding in Nassar. (Aker Brf., pp. 38-39) (*citing* Young-Losee v. Graphic Packaging Int'l, Inc., 631 F.3d 909 (8th Cir. Iowa 2011); Imwalle v. Reliance Med. Prods., 515 F.3d 531 (6th Cir. 2008)). Those decisions are inapposite here. See, e.g., Imwalle, 515 F.3d at 544 (applying the "motivating factor" test abandoned by the U.S. Supreme Court in Nassar).

Current law requires Aker to establish that his "protected activity was a but-for cause of the alleged adverse action by the employer." Montell v. Diversified Clinical Servs.,757 F.3d 497, 504 (6th Cir. 2014) (*citing* Nassar, 133 S.Ct. at 2534). Aker has not done so, and he is foreclosed from doing so under the facts of this case. Aker has essentially conceded that Norton would not have "reinstated" him to an unspecified job but for his *pro se* Complaint. In support of his "futility" argument, Aker cites the fact that he made "repeated unsuccessful efforts to gain reinstatement." (Aker Brf., p. 31.) Those efforts pre-date Aker's *pro se* Complaint and settlement demand. Thus, Aker argues that it was futile for him to apply for any job at Norton even *before* he filed this lawsuit. As such, Aker's argument in that respect completely thwarts his ability to make the required showing that his filing the *pro se* Complaint was the but-for cause of his not being "reinstated" to an unspecified job.

Because Aker failed to make the required showing of causation, his *prima facie* claim fails as a matter of law. The Court should reverse the Court of Appeals decision and affirm the trial court's summary judgment dismissal of Aker's retaliation claim.

III. Aker Failed to Make a *Prima Facie* Claim of Retaliation Because There Was No Materially Adverse Employment Action.

Aker argues extensively and incorrectly that he was entitled to be "reinstated" as a Norton employee. (See Aker Brf., *passim.*) In order to circumvent the legal deficiencies of his sole remaining retaliation claim, Aker contends that this is not a "failure to hire" case but, instead, is a "failure to reinstate" case. (Id. at 24, *et seq.*)[1]

Even if accepted, Aker's characterization of this case as a "failure to reinstate" case only serves to *weaken* his claim because it has been conclusively established that Aker had no right to reinstatement. A U.S. District Court in New York recently dismissed a failure-to-reinstate claim brought under the Americans with Disabilities Act and explained that a "denial of a request for reinstatement cannot be deemed a new and separate discriminatory act." Dawson v. New York City Transit Auth., 2014 U.S. Dist. LEXIS 149346, *17 (S.D.N.Y. 2014) (internal citations and quotation marks omitted). The court distinguished between "a new application for employment and a demand for reinstatement which seeks to redress the original termination." Id. at *16 (citations and quotation marks omitted). Quoting NLRB v. Textile Machine Works, 214 F.2d 929, 932 (3d Cir. 1954), the Dawson court held that "[a] discharged employee who seeks to be reinstated is really litigating the unfairness of his original discharge because only if the

[1] As set forth in its principal Brief, Norton contends that this case is more accurately characterized as involving the "failure to settle." Aker initiated this lawsuit *pro se* as a means to coerce Norton into hiring him. Aker's claim of retaliation is based on the fact that Norton did not acquiesce to the demand by Aker's attorney to hire him into an unspecified job in exchange for dismissal of the lawsuit.

original discharge was discriminatory is he entitled to be reinstated as if he had never ceased working for the employer." Dawson, *supra* at *16.

For Aker to contend that this is a "failure-to-reinstate" case only highlights the absence of the required "adverse action" element from Aker's *prima facie* retaliation claim. Aker previously claimed that Norton was legally obligated to reinstate his employment, but the trial court dismissed that claim on summary judgment, and the claim is not before this Court. The fact that Aker ceased to be employed by Norton and that Norton had no obligation to reinstate him were primary bases for the trial court's summary judgment of Aker's retaliation claim.

> [Aker] asserts that Defendant's declination to rehire him due to his pro se lawsuit was a retaliatory action. However, Plaintiff's suit was not filed until over three months after his eventual and final termination. ... Plaintiff was properly fired in November, 2007. His eventual suit in February of 2008 did not alter his status. Plaintiff was not employed on this date by Defendant, and therefore Defendant's declination to rehire him is not actionable.

(1/5/12 Op. & Ord., p. 10.)

Aker's "reinstatement" argument is that Norton was obligated to "consider" him for employment in a position he cannot identify and for which he never applied. (See Aker Brf., pp. 27-31.) Yet, that was Aker's contract claim, which was dismissed and cannot be re-litigated under the guise of a retaliation claim. Norton had no obligation to "reinstate" Aker or even to "consider" hiring him in an unspecified job for which he never applied. (See Aker Brf., p. 39) (claiming that the adverse employment action in this case was "Norton's decision to no longer consider him for a position."). Further, even if Norton were to have "considered" Aker for a job, there is no suggestion that Aker would have been hired for the job, particularly where Aker never identified any vacant

job for which he was qualified (let alone, one for which he was more qualified than any successful applicant for such job).

Aker's retaliation claim requires him to specify a particular vacant position for which he was qualified and for which he either applied or otherwise concretely sought by way of the functional equivalent of a job application. See, e.g., Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006); Pina v. Children's Place, 740 F.3d 785, 801 (1st Cir. 2014) (*citing* Velez, *supra*). Aker has not done so. His demand that Norton "reinstate" him to an unspecified job in exchange for dismissal of the lawsuit does not suffice. Id.; see also Easterling v. Connecticut, 356 F. Supp. 2d 103, (D. Conn. 2005) (holding that plaintiff's submission of resume and inquiry regarding open positions failed to establish that she had applied for a position and her Title VII retaliation claim failed).

When Aker filed this lawsuit against Norton, Aker was not a Norton employee. Instead of applying for (or otherwise seeking) any specific job at Norton, he used his lawsuit as a means to amplify his "continuing claim to reinstatement in a new [and unspecified] position." (Aker Brf., p. 31.) Norton's refusal to submit to Aker's coercion does not amount to a new and distinct adverse employment action sufficient to support a retaliation claim. The Court should reverse the decision of the Court of Appeals.

IV. Powell's Alleged Statements to Sherman Were Made in the Context of Compromise Negotiations.[2]

There can be no serious dispute that Powell's alleged statements were made in the context of settlement discussions as contemplated by KRE 408. Sherman's affidavit itself supports that conclusion – Sherman would have no other reason to suggest that Aker dismiss his lawsuit if Norton would rehire him. (See Sherman Aff., ¶ 7.)

Aker asserts that Powell and Sherman were "doing nothing more than exchanging demands and refusals," which is not considered to be "compromise negotiations." (Aker Brf., p. 41.) That contention, however, is meritless, and Aker's citation to Kraemer v. Franklin & Marshall College, 909 F. Supp. 267 (E.D. Pa. 1995), is inapposite. As noted in Kraemer, 909 F. Supp. at 268, "[w]hile litigation 'need not have commenced for Rule 408 to apply,' there **must be some dispute which the parties are attempting to resolve through discussion.**" (internal citations omitted) (emphasis added). Here, there clearly was such a dispute: Aker's *pro se* Complaint. When Sherman contacted Powell, he sought to resolve the dispute by requesting that Norton give Aker a job in exchange for dismissal of the lawsuit. (Sherman Aff. at Exh. 3, 3/6/08 ltr.) This clearly qualified as an attempt "to resolve" a dispute "through discussion" by two litigants. Id.

The alleged communication between Powell and Sherman was not limited to setting forth a party's factual position and asserting legal claims, as was the case in Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher, 123 F.R.D. 237, 242 (S.D.

---

[2] Aker incorrectly contends that Norton concedes the accuracy of Aker's recitation of the facts underlying the retaliation claim before this Court. As it has consistently maintained in its earlier pleadings, Norton disputes that Powell made the statement attributed to him by Sherman and relied upon by Aker in support of his claim of retaliation. Without conceding Aker's version of the facts, Norton acknowledges that the applicable legal standard requires the courts to view all disputed facts in the light most favorable to Aker. See CR 56; City of Florence v. Chipman, 38 S.W.3d 387, 390 (Ky. 2001).

Ohio 1987). In fact, the alleged communications at issue here contained a specific offer of compromise – to dismiss Aker's lawsuit in exchange for a job at Norton. Cf., Sunstar, Inc. v. Alberto-Culver Co., 2004 U.S. Dist. LEXIS 16855 (N.D. Ill. Aug. 20, 2004) (letters setting forth parties' factual positions and making legal demands which "fail to contain any suggestion of compromise" not compromise negotiations); Atronic Int'l., GmbH v. SAI Semispecialists of America, Inc., No. 03-CV-4892, 2006 U.S. Dist. LEXIS 66078, at *7 n.4 (E.D.N.Y. Sep. 15, 2006) ("Where a letter provides solely demands and lacks any suggestion of compromise, such a document would not be excludable by Rule 408.").

The purpose of both KRE 408 and FRE 408 is to allow for "open discussion" so parties can "make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts," such as the ones in this case. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003). The alleged statement by Powell in this case was clearly made within the context of a settlement discussion for purposes of KRE 408.

V. Powell's Alleged Statement Is Inadmissible Under KRE 408 to Establish a "Separate" Retaliation Claim.

Aker cites a number of federal cases for the proposition that a "letter written by an employer's legal counsel relating to settlement of underlying race discrimination claims [are] admissible to prove a retaliation claim arising from those very letters." (Aker Brf., p. 42). Yet, those cases do not support Aker's argument under the facts of this case.

For example, the decision in Carney v. American Univ., 151 F.3d 1090 (D.C. Cir. 1998), hinged on the fact that the employer sought to condition the payment of benefits to which the employee was already entitled upon the employee's release of a race

discrimination claim against the employer. The Court in Carney held that the settlement correspondence "can be used to establish an independent violation (here, retaliation) **unrelated to the underlying claim** which was the subject of the correspondence (race discrimination)." Id. at 1095 (internal citations omitted) (emphasis added).

Unlike the plaintiff in Carney, Aker was not entitled to any vested benefits and had no right to be re-hired by Norton. More importantly, Aker's underlying claim in the *pro se* Complaint, which was the subject of the settlement discussion, centered on the very same quest for "reinstatement" to a new job at Norton that his current retaliation claim centers upon. Norton's refusal to acquiesce to Aker's settlement demand was not "unrelated to" the claim under discussion. See id. Aker's brief to this Court forcefully refutes any suggestion that the claim to reinstatement underlying his original *pro se* Complaint is "unrelated to" his remaining retaliation claim. They are one and the same.

The decision in Burress v. City of Franklin, 809 F. Supp. 2d 795 (M.D. Tenn. 2011), is also distinguishable. That case involved a specific settlement offer to a plaintiff that included reinstatement, conditioned on passing a physical and a mental test. After the plaintiff filed suit, the plaintiff underwent the medical test and passed, but the City withdrew its offer of reinstatement claiming that it disagreed with the test results. The plaintiff argued that the withdrawal of the offer to reinstate him was the "adverse employment action." The court specifically noted that "evidence of the reinstatement offer and discussions centered around that offer ... is admissible to prove retaliation based on the withdrawal of the offer." Id. at 819–820 (emphasis added). Unlike Burress, Norton (1) never made an express offer to re-hire Aker to a particular job and (2) never withdrew an express offer to re-hire Aker. Moreover, Aker's retaliation claim in

this case is not based on the withdrawal of an offer to re-hire. Rather, Aker's retaliation claim is based merely on his own belief that he should have been reinstated by Norton after he filed suit (just as he claims he should have been reinstated before filing suit). Unlike the employer in Burress, who committed a "wrongful" act by withdrawing an express offer to reinstate the plaintiff after he filed a charge, Norton never made a promise to re-hire Aker which it subsequently withdrew.

Aker's reliance on Uforma/Shelby Bus. Forms v. NLRB, 111 F.3d 1284 (6th Cir. 1997), is also misplaced. Uforma involved a claim under the National Labor Relations Act ("NLRA"), which makes it an unfair labor practice to threaten to lay off employees in order to discourage protected union activities. Id. at 1291. The Sixth Circuit rejected the employer's request to exclude evidence that its managers threatened to lay off employees if the labor union pursued a grievance against it, even if the threats were made during settlement negotiations concerning the potential grievance. In Uforma, the threat itself was the wrongful act, and the Court held that "wrongful acts are not shielded" by FRE 408 if they "[take] place during compromise negotiations." Id. at 1293 (internal citations omitted).

Here, by contrast, Powell's alleged statement – that Norton was not willing to re-hire Aker in an unidentified job for which Aker had not applied – was not wrongful in and of itself because Norton had no obligation to re-hire him. The limited holding articulated in Uforma – "that Rule 408 does not exclude evidence of alleged threats to retaliate for protected activity when the statements occurred during negotiations focused on the protected activity and the evidence serves to prove liability either for making, or

later acting upon, the threats" – is inapplicable.[3] The Kentucky Civil Rights Act does not impose the same kind of unequivocal liability on an employer for allegedly refusing to hire an employee who had filed suit but has not applied for employment and who has not been promised a position.

Powell's alleged statement was made in the context of a settlement discussion concerning Aker's claim that he had a right to reinstatement and his claim that Norton's failure to reinstate his employment was unlawful. Both as a matter of law and as a matter of logic, the alleged statement should not be admissible as the sole and exclusive evidence to support Aker's claim that Norton's "continuing" failure to reinstate Aker to a new unspecified job was in retaliation for his filing the *pro se* Complaint. The Court should reverse the Court of Appeals decision.

CONCLUSION

For all the reasons set forth herein and in Norton's initial Brief, the Court should reverse the Court of Appeals' decision as to Aker's KCRA retaliation claim.

Respectfully submitted,

Donna King Perry
Jeremy S. Rogers
Alina Klimkina
DINSMORE & SHOHL LLP
101 S. Fifth Street, 2500 National City Tower
Louisville, KY 40202
Telephone: (502) 540-2300
Counsel for Appellant, Norton Healthcare, Inc.

[3] Aker also cites Scott v. Goodman, 961 F. Supp. 424 (E.D.N.Y. 1996), for the same proposition. Like Uforma, that case involved union activity which was protected under the NLRA as well as by the First Amendment. Thus, the employer's conduct during settlement negotiations in that case was "wrongful" because it violated both the NLRA and the First Amendment.