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Personnel Board

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001855-MR

DAWN M. WILKERSON

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 16-CI-00631

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF JUVENILE JUSTICE; AND
KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, KRAMER AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Dawn Wilkerson appeals from an order of the Franklin Circuit Court which upheld a decision of the Kentucky Personnel Board (hereinafter referred to as Board). The Board ruled that the Kentucky Justice and Public Safety Cabinet, Department of Juvenile Justice (hereinafter referred to as

DJJ) properly rescinded a conditional offer of employment issued to Wilkerson and did not discriminate against her based on her disability. Wilkerson argues that the Board and circuit court failed to fully analyze the disability issue. In addition, Wilkerson argues that the circuit court erred by using the incorrect standard of review. We find that the Board's decision was based on substantial evidence and was not arbitrary. We also find that while the circuit court used the incorrect standard of review, the reasons it set forth were sufficient to meet the correct standard; therefore, we affirm.

Wilkerson was employed by the DJJ from 2001 until 2005, at which time she left the DJJ in order to complete her bachelor's degree. She returned to the DJJ in 2006 and continued working there until she quit her job in 2013 in order to take a job in the private sector. While Wilkerson was employed by the DJJ, she was twice convicted of operating a motor vehicle under the influence of alcohol, more commonly known as driving under the influence or DUI. Her first offense occurred in 2009 and her second in 2011. Wilkerson pleaded guilty to both offenses. In addition, both offenses occurred while she was off duty and driving her personal automobile. In accordance with DJJ policy, Wilkerson informed her supervisors of her convictions and the DJJ took no disciplinary action against her.

After her first DUI, Wilkerson began treatment with an alcohol and addiction treatment specialist and was officially diagnosed with moderate alcohol

abuse or dependence. She again went for treatment after her second DUI. In addition to seeking treatment with the addiction specialist, she also began attending Alcoholics Anonymous, or AA. According to her testimony, she has not drunk alcohol since 2012; she considers herself a recovering alcoholic; and still attends AA.

In July of 2014, Wilkerson applied for an open position with the DJJ. She listed both of her DUI convictions on her application. Kevin Warford was one of the people in charge of interviewing applicants for the open position. Warford had also previously worked with Wilkerson during her previous employment with the DJJ. In August of 2014, Warford invited her to an interview for the position. Warford and two others interviewed Wilkerson. Wilkerson and the interviewers discussed her DUIs during the interview, but Warford indicated Wilkerson had already told him about the DUIs during one her of prior stints as an employee of the DJJ. Wilkerson also told the interviewers the steps she has taken to overcome her alcohol problems.

After completing the interview process, Warford believed Wilkerson to be the best candidate for the position. Warford's supervisor concurred and on September 2, 2014, Warford extended a conditional offer of employment to Wilkerson. The conditional offer was subject to approval from the DJJ

Commissioner Bob Hayter. Commissioner Hayter ultimately decided to rescind the offer due to Wilkerson's DUIs.

Upon learning of Hayter's decision to rescind the offer, Warford spoke to Hayter. Warford wanted to ascertain why the offer was rescinded, but suspected it was because of the DUIs. Warford explained to Hayter the steps Wilkerson had taken to address her alcohol issues and did not believe it would be a problem going forward. Additionally, Warford explained that the DJJ had other people employed with DUIs and alcohol issues. According to Warford, Hayter made statements about "drunks" and that he stated something to the effect of "I wish I had a dime for every drunk that told me they weren't drinking and then went off in the closet somewhere and had a drink." Hayter testified that he said something to this effect.

During the hearing in this matter, Hayter indicated that the reason he rescinded the employment offer was because the position involved a lot of travel and that the ultimate recipient of the position would receive a state vehicle. Hayter believed it would not be prudent to give a state vehicle to someone who had received two DUIs because this could put the state at financial risk if Wilkerson drank while on the job. Hayter also testified that Wilkerson was free to apply for other positions with the DJJ so long as they did not require driving.

Wilkerson sought review of Hayter's decision with the Board. Wilkerson argued that she was discriminated against due to her alcoholism in violation of the Americans with Disability Act (ADA). Under the ADA Amendments Act of 2008, "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C.A. § 12112(a).

An evidentiary hearing was held before a hearing officer where Wilkerson, Hayter, and Warford testified. After examining all the testimony and evidence presented, the hearing officer determined that Wilkerson was denied employment due to her disability, alcoholism. The hearing officer believed Hayter's reasons for rescinding the offer, *i.e.*, that he was concerned about giving her a vehicle because of her DUIs, were disingenuous and that Wilkerson was discriminated against in violation of the ADA.

The Board adopted most of the hearing officer's recommended findings of fact and conclusions of law, but ultimately held that Hayter had legitimate reasons for rescinding the employment offer and that Wilkerson was not discriminated against. Wilkerson then appealed to the circuit court, which affirmed. This appeal followed.

This Court's standard of review for an administrative adjudicatory decision is the clearly erroneous standard. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986). A decision is clearly erroneous if it is not supported by substantial evidence. *Id.*

Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation.

Thompson v. Kentucky Unemployment Ins. Comm'n, 85 S.W.3d 621, 624 (Ky. App. 2002) (footnotes omitted). We also review the Board and circuit court's decisions regarding questions of law *de novo*. *Epsilon Trading Co. v. Revenue Cabinet*, 775 S.W.2d 937, 940 (Ky. App. 1989).

Wilkerson's primary argument on appeal is that the circuit court and Board failed to fully analyze the ADA disability discrimination issue, specifically whether or not the reasons set forth by the DJJ and Hayter as to why they rescinded the offer were merely a pretext for discriminating against her due to her alcoholism. We will focus on the actions of the Board because it is the factfinder

in this case. The circuit court, like this Court, simply reviews the matter and does not substitute its opinions for those of the administrative agency.

Because there was no direct evidence of disability discrimination, Wilkerson relied on indirect evidence. This required the hearing officer and the Board to utilize the burden-shifting analysis set out in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-26, 36 L.Ed.2d 668 (1973). “Under this framework, a plaintiff must first make out a *prima facie* case for the violation; next, the burden shifts to the defendant to articulate a nondiscriminatory reason for the adverse action. The burden then shifts back to the plaintiff to prove that the defendant’s explanations are pretextual.” *Choate v. Advance Stores Co., Inc.*, 169 F. Supp. 3d 724, 729 (M.D. Tenn. 2015), *aff’d*, 656 Fed. App’x 88 (6th Cir. 2016) (citations omitted).

Wilkerson’s *prima facie* case for disability discrimination must satisfy a five-element test. “The five-element test would require Plaintiff to show that (1) she was disabled; (2) she was otherwise qualified for the position; (3) she suffered an adverse employment decision; (4) Defendant knew of or had reason to know of her disability; and (5) she was replaced.” *Choate*, at 730 (citations omitted). There is no argument in this case that Wilkerson has not met her *prima facie* case. It is also undisputed that the DJJ and Hayter proffered a legitimate, nondiscriminatory reason for the adverse employment action. Hayter testified that Wilkerson’s two

DUIs showed poor judgment, that the position Wilkerson applied for required a lot of driving in a state vehicle, and that giving a state vehicle to someone with two DUIs could expose the state to potential liability.

We now turn to the crux of this appeal, the pretextual issue. To establish pretext, Wilkerson must show that the proffered reason: (1) had no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to motivate that action. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994), *overruled on other grounds by Gross v. GBL Fin. Servs. Inc.*, 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009). These three elements are just guideposts and should not be applied in a formulaic manner. *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 n.4 (6th Cir. 2009). The ultimate issue is that the ADA bars discrimination “because of” an employee’s disability, meaning that it prohibits discrimination that is a “but-for” cause of the employer’s adverse decision. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012). This “but-for” question is the main issue here. In other words, but for Wilkerson’s alcoholism, would Hayter still have rescinded the job offer?

The hearing officer held that the DJJ and Hayter’s reason for rescinding the offer was pretextual and that Hayter denied Wilkerson employment due to her alcoholism. The hearing officer supported this holding by finding that the DJJ has other employees who have been convicted of DUIs and that if Hayter

truly believed the two DUIs showed poor judgment that he would not be willing to hire Wilkerson for other positions as he testified.

The Board disagreed with the hearing officer's findings. The Board held that Hayter did believe Wilkerson's DUIs showed poor judgment and that he was legitimately concerned about extending her a job offer for a position that involved driving. The Board also found credible Hayter's testimony that he would not hire someone with a record of two or more DUIs. Further, the Board found that while there may be other people working for the DJJ with DUI convictions, in this instance, Hayter decided for legitimate reasons to rescind the job offer. The Board rejected the idea that other employees with DUIs were material to the case because no evidence was introduced as to the circumstances of their hire. The Board ultimately held that the DJJ had a legitimate, nondiscriminatory reason for rescinding Wilkerson's job offer.

On review, the circuit court held that the Board properly concluded, based on substantial evidence, that the DJJ and Hayter had a legitimate, nondiscriminatory purpose for revoking Wilkerson's job offer. The court held that Hayter's testimony that he would not hire someone with a criminal history of two or more DUIs for positions which required frequent driving, regardless of alcoholism, was sufficient to defeat the allegation of discrimination.

On appeal, Wilkerson first argues that the Board and the circuit court did not make the necessary findings regarding pretext. We disagree. The Board adopted most of the recommended findings of fact and conclusion of law entered by the hearing officer. This includes the discussion of the ADA and the burden-shifting analysis set forth above. The Board also examined the hearing officer's findings regarding pretext and disagreed with them. It is clear that the Board considered the pretext issue. As for the circuit court, the court examined the Board's order and found it was supported by substantial evidence. Although the court's order did not use the word pretext, the court's job was to review the Board for clear error and it did so.

Wilkerson's next argument is that the Board and trial court should have found that the evidence in her favor regarding the pretext issue was overwhelmingly in her favor. She brings to our attention the fact that other people who have been convicted of a DUI are still employed by the DJJ, that she was not disciplined for previous DUIs while she was employed by the DJJ, and that Hayter believed she might get intoxicated while on the job and injure someone with her vehicle because she was a "drunk." We disagree.

We find that the evidence supports the Board's decision. Hayter testified that he did not want to open the state up to liability should Wilkerson injure someone with her state car and that her having two DUIs showed she had

bad judgment. In addition, the evidence regarding the similarity between Wilkerson and other employees with DUIs was lacking specificity. No evidence was submitted regarding whether there existed employees with multiple DUIs and no evidence was submitted showing that another employee with a DUI had duties that included extensive travel and the use of a state vehicle. Furthermore, the other employees were already employed by the DJJ and Wilkerson was applying for employment. Lastly, simply because there was evidence to support Wilkerson's position does not mean we must reverse the decision of the Board and circuit court. We must defer to the Board's ability to weigh the evidence and judge the credibility to the witnesses. Here, the Board found Hayter to be credible and found that the evidence favored the DJJ. We find no error.

Wilkerson also argues that the Board and circuit court erred by only considering indirect evidence of discrimination and by not considering direct evidence of discrimination. Wilkerson argues that Hayter's comments about drunks is direct evidence of discrimination. The DJJ argues that this issue was not preserved and, in the alternative, that there was no evidence of direct discrimination.

"Direct evidence of discrimination is 'that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Wexler v. White's Fine Furniture*,

Inc., 317 F.3d 564, 570 (6th Cir. 2003) (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)). Direct evidence “does not require the fact finder to draw any inferences to reach that conclusion. For example, proof of ‘a facially discriminatory employment policy or a corporate decision maker’s express statement of a desire to [avoid hiring] employees in the protected group is direct evidence of discriminatory intent.’” *Amini v. Oberlin Coll.*, 440 F.3d 350, 359 (6th Cir. 2006) (citations omitted).

We agree with the DJJ that this issue was not preserved.

Under Chapter 13B [of the Kentucky Revised Statutes], the filing of exceptions provides the means for preserving and identifying issues for review by the agency head. In turn, filing exceptions is necessary to preserve issues for further judicial review. *Cf. Eiland v. Ferrell*, Ky., 937 S.W.2d 713, 716 (1997) (failure to file objections to a domestic relations commissioner’s report adopted by the trial court precluded challenging, on appeal, whether the trial court’s order was supported by sufficient evidence). Under Kentucky law, this rule of preservation precludes judicial review of any part of the recommended order not excepted to *and* adopted in the final order. *Cf. United States v. Central Bank & Trust Co.*, Ky., 511 S.W.2d 212, 214 (1974). (The failure to file written objections to a commissioner’s report precluded aggrieved party from “questioning on appeal the action of the circuit court in confirming the commissioner’s [report].”) Thus, when a party fails to file exceptions, the issues the party can raise on judicial review under KRS 13B.140 are limited to those findings and conclusions contained in the agency head’s final order that differ from those contained in the hearing officer’s recommended order.

Rapier v. Philpot, 130 S.W.3d 560, 563-64 (Ky. 2004) (emphasis original). The hearing officer made no findings regarding direct evidence of discrimination and the recommended order only discussed the indirect evidence issue. Wilkerson filed no exceptions to the hearing officer's recommended order arguing that direct evidence was present and should have been considered; therefore, this issue is not preserved for review.

Wilkerson's last argument on appeal is that the circuit court used the wrong standard when it reviewed the Board's decision. As discussed above, the "but-for" standard in *Lewis*, 681 F.3d at 321, is the appropriate standard to utilize when looking to pretext. Prior to *Lewis*, courts utilized a "sole cause" standard as found in *Maddox v. Univ. of Tennessee*, 62 F.3d 843 (6th Cir. 1995) *abrogated by Lewis*, 681 F.3d 312. This standard meant that there was a violation of the ADA only if the disability was the sole reason for the adverse employment action. The circuit court in this instance cited to *Lewis*, but recited the sole cause standard.

Wilkerson is correct that the court used the wrong standard; however, we do not believe it affects the outcome here. The court held that the Board relied on substantial evidence to affirm Hayter's employment decision. The court held that the DJJ appropriately considered Wilkerson's criminal conduct, without regard to alcoholism, when it issued the employment decision. As stated previously, we also find that the Board had sufficient evidence to support its decision. While the

circuit court might have used the wrong standard, it came to the correct conclusion.¹

Based on the foregoing, we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Benjamin S. Basil
Louisville, Kentucky

BRIEF FOR APPELLEE JUSTICE
AND PUBLIC SAFETY CABINET,
DEPARTMENT OF JUVENILE
JUSTICE:

William Codell
Elise Dellinger Marti
Frankfort, Kentucky

¹ Appellate courts can affirm a lower court's decision on different grounds. *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 496 (Ky. 2014).