Andrews v. Harrison Med. Ctr.

Court of Appeals of Washington, Division Two

June 28, 2010, Oral Argument; November 18, 2010, Filed

No. 39554-1-II

Reporter
2010 Wash . App. LEXIS 2594 *

LARRY ANDREWS ET AL., *Appellants*, v. HARRISON MEDICAL CENTER, *Respondent*.

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Subsequent History: Reported at *Andrews v. Harrison Med. Ctr., 2010 Wash. App. LEXIS 2643 (Wash. Ct. App., Nov. 18, 2010)*

Prior History: [*1] Appeal from Kitsap Superior Court. Docket No: 07-2-01630-1. Judgment or order under review. Date filed: 06/26/2009. Judge signing: Honorable Theodore F Spearman.

Counsel: For Appellant(s): *Kenneth Wendell Masters, Charles Kenneth Wiggins*, Wiggins & Masters PLLC, Bainbridge Island, WA.

For Respondent(s): *Jeffrey Allen James, Jennifer Ann Parda*, Sebris Busto James, Bellevue, WA.

Judges: AUTHOR: Richard Lynn Brosey, J.P.T. We concur: Joel Penoyar, C.J., Lisa Worswick, J.

Opinion by: Richard Lynn Brosey

Opinion

¶1 Brosey, J. [1] — The trial court granted Harrison Medical Center's (HMC) summary judgment motion dismissing Larry and Martha Andrewses' discrimination claim. The Andrewses appeal, arguing that genuine

[1] Judge Richard Brosey is serving as a judge pro tempore of the Washington State Court of Appeals pursuant to ***CAR 21(c)***.

issues of material fact exist as to whether HMC's antinepotism policy intentionally discriminated against them based upon their marital status. We agree with the Andrewses and vacate the trial court's order and remand for trial. Accordingly, we do not reach the Andrewses' constitutional arguments.

FACTS

¶2 Larry Andrews worked as an operating room (OR) technician for HMC beginning in 1992. Martha Andrews began **[*2]** working as an OR nurse for HMC in 2001. Martha [2] had some supervisory authority over Larry.

¶3 Larry and Martha began living together in August 2004. Despite this relationship, HMC knowingly permitted Larry and Martha to work together in the same OR. HMC also permitted other couples in a committed intimate relationship [3] to work together in the OR.

¶4 Since 1993, HMC has had an antinepotism policy designed to avoid potential liability and/or potential conflicts of interest that might otherwise occur from employing relatives. Under the policy, HMC would not offer employment, promotions, or transfers that would permit one relative to: (a) directly supervise or control the work of another, (b) evaluate or audit the work performance of another, (c) make or recommend salary decisions affecting **[*3]** the other, and/or (d) take disciplinary action affecting the other. The antinepotism policy did not apply where placement would not result in the working relationships listed. HMC defined "related persons" as a spouse, aunt or uncle, child/stepchild, niece or nephew, father or mother, stepparent, brother or sister, stepbrother or stepsister, grandparents, and others to be considered on an individual basis. [4] CP at 47-48. Each employee was responsible for self-reporting when he or she entered into a relationship that gave rise to a conflict under the antinepotism policy.

¶5 The policy did not explicitly apply to couples in a committed intimate relationship. HMC felt that: (1) it would be too hard to collect and keep updated data on employees in such relationships, (2) it would have to rely on people being truthful and volunteering information, (3) committed **[*4]** intimate relationships could change too quickly, and (4) non-married couples do not have a legal interest in their partner's earnings. HMC applies its policy to married couples, in part, because they could use the spousal privilege to refuse to testify, thus hampering HMC's ability to defend a medical malpractice lawsuit. Also, HMC did not feel that spouses should supervise each other as the supervisory spouse has responsibilities to the hospital.

¶6 When Larry and Martha announced in

[2] We refer to the Andrewses by their first names where necessary for clarity and intend no disrespect.

[3] Although the Andrewses use the phrase "meretricious relationship," our Supreme Court now uses the phrase "committed intimate relationship" because of the former's inherently negative connotations. ***Olver v. Fowler, 161 Wn.2d 655, 657 n.1, 168 P.3d 348 (2007)***. We similarly use "committed intimate relationship."

[4] HMC amended its antinepotism policy in April 2007 and added a spouse's parent, grandparent, child, grandchild, brother, or sister to the definition of immediate family members covered by the policy. In 2007, HMC also amended its antinepotism policy to include state-registered domestic partners in the definition of immediate family members.

July 2006 their intention to marry, HMC informed Larry that, under HMC's antinepotism policy, he and Martha would not be able to work in the same OR after their marriage. After Larry and Martha married in August 2006, HMC enforced its antinepotism policy and no longer permitted the Andrewses to work together in the same OR. Larry and Martha continued to work the same schedule they had worked before their marriage, Monday through Friday, 6:30 AM to 3:00 PM, but in different ORs. In addition, HMC kept Larry and Martha on the same on-call weekend schedule but it assigned them to different call teams. On May 1, 2008, HMC granted Larry's request to transfer to its Silverdale campus; Martha continued to work at **[*5]** HMC's Bremerton campus.

¶7 On August 13, 2007, the Andrewses filed an amended complaint, alleging that HMC violated the Washington law against discrimination (WLAD), *RCW 49.60.180*, by discriminating against them based on marital status. [5] Specifically, they alleged that HMC discriminated against them by prohibiting them from working in the same OR based on their marital status.

¶8 On January 22, 2009, HMC moved for summary judgment, arguing that no genuine issues of material fact existed because the Andrewses admitted that Martha supervised Larry and that HMC acted pursuant to its antinepotism policy. In addition, HMC argued that it was entitled to judgment as a matter of law because its antinepotism policy fell within **[*6]** the permissible marital discrimination exception set forth in *WAC 162-16-250(2)(b)(i)-(iv)* and which our Supreme Court approved in *Washington Water Power Co. v. Washington State Human Rights Commission, 91 Wn.2d 62, 70, 586 P.2d 1149 (1978)*.

¶9 The Andrewses responded that genuine issues of material fact existed, namely that HMC's reasons for not applying its antinepotism policy to committed intimate relationships were pretextual. The Andrewses contended that this raised an issue of disparate treatment of married couples, as opposed to the treatment of other classes, such as unmarried couples in a committed intimate relationship. The Andrewses argued that the business reasons supplied by the hospital for barring married couples from working together also applied to couples in a committed intimate relationship.

¶10 The trial court granted HMC's motion for summary judgment and dismissed the Andrewses' complaint with prejudice.

ANALYSIS

MARITAL DISCRIMINATION

¶11 We review an order granting summary judgment de novo, and engage in the same inquiry as the trial court. *Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321, review denied, 136 Wn.2d 1016 (1998)*. Summary

[5] Larry made a claim with the Washington State Human Rights Commission (WSHRC), alleging that HMC had discriminated against him based on his marital status. The WSHRC determined that Larry's action did not describe discrimination because he was married, and he alleged that other married coworkers were treated more favorably. The WSHRC further stated that favoritism, by itself, is not protected under discrimination law. The WSHRC declined to issue a complaint on Larry's behalf.

judgment is appropriate if the pleadings, **[*7]** depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *CR 56(c)*. A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)*. If the moving party is a defendant and meets this initial showing, the inquiry shifts to the plaintiff. *Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)*. If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial, then the trial court should grant the defendant's summary judgment motion. *Young, 112 Wn.2d at 225*.

¶12 We must consider all reasonable inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)*. But the nonmoving party must set forth specific facts to defeat a motion for summary judgment, rather than rely on bare allegations. *Young, 112 Wn.2d at 225-226*.

¶13 The **[*8]** Andrewses contend that they met their burden of proof to show a prima facie case of discrimination based on marital status, [6] and they concede for the purposes of this analysis that HMC likely met its burden to show a legitimate, nondiscriminatory explanation for the adverse employment policy. The Andrewses argue that the issue is whether they offered sufficient circumstantial evidence to raise a genuine issue of material fact that HMC's stated reason for the adverse employment action was pretextual.

¶14 Under the WLAD, it is an unfair practice for any employer to refuse to hire any person because of marital status unless a bona fide occupational qualification applies. Former *RCW 49.60.180(1)* (2006). In addition, it is an unfair practice for any employer to discharge **[*9]** or bar from employment or discriminate in compensation or other terms or conditions of employment because of marital status. *RCW 49.60.180(2)-(3)*. "Marital status" means the legal status of being married, single, separated, divorced, or widowed. Former *RCW 49.60.040(7)* (2006).

¶15 Initially, the parties appear to disagree what test applies when determining whether to grant a summary judgment motion in a WLAD case. The Andrewses apply the three-part *McDonnell Douglas* [7] test, while HMC applies a two-part test. But at oral argument, the Andrewses conceded that the *McDonnell Douglas* test did not apply because there is direct evidence of discrimination. *See Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 354, 172 P.3d*

[6] The Andrewses contend they suffered disparate treatment; therefore, we do not analyze whether HMC's policy has any disparate impact. Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or other protected characteristic. ***Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 354 n.7, 172 P.3d 688 (2007)***.

[7] *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*.

688 (2007) (*McDonnell Douglas* test used where no direct evidence of discrimination).

¶16 Where there is direct evidence of discriminatory intent, the plaintiff must provide direct evidence that the employer acted with a discriminatory motive and that the discriminatory motive was a significant or substantial factor in the employment decision. *Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993*). **[*10]** Once the plaintiff establishes these factors, the defendant must show that it would have reached the same decision absent the discriminatory factor, such as when business necessity motivated the action. *Magula v. Benton Franklin Title Co., 131 Wn.2d 171, 176, 930 P.2d 307 (1997)*; *Kastanis, 122 Wn.2d at 491*. At that point, the case goes to the jury. *Kastanis, 122 Wn.2d at 491*.

¶17 Once the plaintiff establishes a prima facie case and the defendant produces evidence of a non-discriminatory reason for its action, the burden-shifting scheme drops from the case. *Kastanis, 122 Wn.2d at 491*. The plaintiff then bears the burden of proving the ultimate fact--that the defendant intentionally discriminated against him or her. *Kastanis, 122 Wn.2d at 492*.

A. Marital Status Discrimination

¶18 Antinepotism policies discriminate based on marital status. *Magula, 131 Wn.2d at 179* (citing *Edwards v. Farmers Ins. Co., 111 Wn.2d 710, 763 P.2d 1226 (1988)*; *Wash. Water Power Co., 91 Wn.2d at 68-69*). As the Andrewses established, and HMC conceded, by its antinepotism policy, HMC engaged in marital status discrimination. HMC then had the burden of producing a legitimate business necessity. *Magula, 131 Wn.2d at 176*.

B. **[*11]** Business Necessity

¶19 HMC defends its antinepotism policy as lawful and claims a recognized business necessity justified applying it.

¶20 There are narrow exceptions to the rule that an employer may not discriminate based on marital status, such as if a bona fide occupational qualification applies or if a business necessity supports enforcement of a documented conflict of interest policy. *WAC 162-16-250(2)*. [8] The phrase "business necessity" is not defined in the WAC or the RCW. To establish a business necessity defense, an employer must prove that the challenged employment practice used significantly correlates with the fundamental requirements of job performance. *Hegwine, 162 Wn.2d at 355* (citing *Shannon v. Pay 'N Save Corp., 104 Wn.2d 722, 731, 709 P.2d 799 (1985)). WAC 162-16-250(2)(b)* lists several examples of business necessities that would justify enforcing a documented antinepotism policy:

> (i) Where one spouse would have the authority or practical power to supervise, appoint, remove, or discipline the other;

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[8] It is appropriate to look to the Washington Administrative Code when interpreting and applying *RCW 49.60.180* because the WSHRC is statutorily charged with interpreting and enforcing the WLAD. ***Hegwine, 162 Wn.2d at 349***. Moreover, so long as the WSHRC interpretations do not conflict with the legislative intent underlying the WLAD, we give "great weight" to those interpretations. ***Hegwine, 162 Wn.2d at 349***.

(ii) Where one spouse would be responsible for auditing the work of the other;

(iii) Where other circumstances exist which would place the spouses in a situation of actual or reasonably **[*12]** foreseeable conflict between the employer's interest and their own; or

(iv) Where, in order to avoid the reality or appearance of improper influence or favor, or to protect its confidentiality, the employer must limit the employment of close relatives of policy level officers of customers, competitors, regulatory agencies, or others with whom the employer deals.

Contrary to the Andrewses' contention, HMC did not merely recite *WAC 162-16-260(2)(b)*'s examples. HMC listed four reasons for enforcement of its antinepotism policy against married couples with direct supervising authority: (1) committed intimate relationships change too quickly, and reporting requirements would be too cumbersome; (2) persons in committed intimate relationships do not have a financial interest in each other's wages; (3) married couples may refuse to testify against each other due to spousal privilege, thus harming the hospital's ability to defend itself in a medical malpractice lawsuit; and (4) it is not appropriate to have spouses supervising each other. The Andrewses concede for the purposes of this analysis that these reasons satisfy HMC's intermediate production burden. [9] The burden then shifted to the Andrewses **[*13]** to raise a question of fact that HMC intentionally discriminated against them. *Kastanis, 122 Wn.2d at 492*.

C. Proof of Intentional Discrimination

¶21 The Andrewses argue that they demonstrated pretext [10] because HMC's stated reasons do not justify its antinepotism policy and because that policy does not apply to couples in a committed intimate relationship. HMC argues there are no disputed issues of material fact and that its antinepotism policy need not be similarly applied to couples in a committed intimate relationship.

¶22 The Andrewses raise several challenges to HMC's justifications of its antinepotism policy that create genuine issues of fact for the jury. For instance, they argue that HMC's reasons are pretextual because the policy does not apply to couples in a committed intimate relationship. They argue that because other couples in a committed intimate relationship would have the same conflicts of interest, the policy is pretextual. While HMC argues that the administrative burden of applying its antinepotism policy to committed intimate relationships is too great, a rational trier of fact could agree with the Andrewses that HMC could simply ask couples in a committed intimate relationship to self-report without a

[9] While HMC has the burden of production here, the Andrewses, as the plaintiffs, retain the ultimate burden of proving that HMC intentionally discriminated. ***Hegwine, 162 Wn.2d at 356***; ***Kastanis, 122 Wn.2d at 492***.

[10] While the direct evidence test does not use the pretext language **[*14]** of the *McDonnell Douglas* test, it does require the plaintiff to prove that the defendant intentionally discriminated even though the defendant showed a legitimate business necessity. This requirement appears to be the same as the *McDonnell Douglas* pretext requirement.

substantial burden. In fact, all employees who enter into relationships that cause conflicts of interest under HMC's antinepotism policy must self-report. While HMC says there is no legal duty to report committed intimate **[*15]** relationship status, they also fail to cite any authority that an employee has a legal duty to report sibling relationships, or any of the relationships its antinepotism policy covered.

¶23 The Andrewses also argue that HMC's policy is discriminatory because couples in a committed intimate relationship may have a legal interest in their partner's earnings. They correctly argue that at the end of a committed intimate relationship, the property acquired during the relationship is subject to this state's community property laws. *Connell v. Francisco, 127 Wn.2d 339, 347, 898 P.2d 831 (1995)*. HMC may believe that couples in a committed intimate relationship have less of an interest in each other's earnings than married couples, but this is an issue of fact for the jury.

¶24 The Andrewses further contend that HMC has no basis to rely on marital privilege to support its antinepotism policy. They argue that the privilege would not prohibit a spouse's testimony because the privilege prevents only the examination for or against his or her spouse. In sum, the Andrewses have thus raised questions as to the validity of HMC's reasons for its antinepotism policy. *Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 624, 60 P.3d 106 (2002)* **[*16]** (evidence rebutting the accuracy or believability of an employer's stated reasons for the adverse employment action are sufficient to create competing inferences for the jury). We may not weigh these competing inferences; that is the jury's province. *Renz, 114 Wn. App. at 624*.

¶25 We hold that although HMC showed legitimate business necessity for its antinepotism policy, the Andrewses raised genuine issues of material fact regarding whether HMC intentionally discriminated. The trial court erred in granting HMC's summary judgment motion. We vacate the trial court's summary judgment order and remand. The Andrewses concede that if we remand, we need not reach their constitutional arguments. *Brunson v. Pierce County, 149 Wn. App. 855, 862, 205 P.3d 963 (2009)* (we avoid reaching constitutional issues when able to decide cases on nonconstitutional grounds). As such, we do not reach the Andrewses' constitutional arguments.

¶26 Vacated and remanded for trial.

¶27 A majority of the panel has determined this opinion will not be published in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

Penoyar, C.J., and Worswick, J., concur.

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