Rich v. Bellevue Sch. Dist.

Court of Appeals of Washington, Division One

July 12, 2004, Filed

No. 51538-1-I

Reporter
2004 Wash . App. LEXIS 1429 *

CAROL RICH, Respondent/Cross-Appellant, vs. BELLEVUE SCHOOL DISTRICT, Consolidated with Appellant/Cross-Respondent, and GLORIA LEE and THERESE J. McANDREWS, Plaintiffs.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Rich v. Bellevue Sch. Dist., 122 Wn. App. 1024, 2004 Wash. App. LEXIS 2250 (Wash. Ct. App., July 12, 2004)*

Prior History: Appeal from Superior Court of King County. Docket No: 99-2-23341-7. Date filed: 11/30/2002. Judge signing: Hon. Douglass a North.

Disposition: Affirmed.

Counsel: For Appellant(s): Michael Alexander Patterson, Lee Smart Cook, et al, Seattle, WA. Marc Rosenberg, Lee Smart Cook, Martin & Patterson, Seattle, WA.

For Respondent(s): Mary Ruth Mann, Law Offices of Mary R. Mann & Associates, Seattle, WA. Kenneth Wendell Masters, Attorney at Law, Bainbridge Island, WA. Charles Kenneth Wiggins, Attorney at Law, Bainbridge Island, WA.

Judges: Authored by William W. Baker. Concurring: H Joseph Coleman, Mary Kay Becker.

Opinion by: WILLIAM W. BAKER

Opinion

BAKER, J. -- Carol Rich was 54 years old when the Bellevue School District placed her on the Peer Assistance and Review (PAR) program. She remained on the PAR program until she took a long-term medical leave. She later was told that if she returned to work, she would continue to be on the PAR program. Instead of returning, she joined two other teachers to sue the District for race, disability, and age discrimination. The trial **[*2]** court granted the District's motion for summary judgment dismissing the race, disability, and disparate impact age discrimination claims. The other two teachers resolved their claims, but Rich went to trial on the basis of disparate treatment age discrimination, claiming that the District used the PAR program to discriminate against her. The jury awarded her damages and back pay. The jury also awarded out-of-pocket expenses which the trial court later struck. The District unsuccessfully moved for judgment notwithstanding the verdict or a new trial. The District appeals on several grounds. Rich cross-appeals the dismissal of her disability discrimination claim. Although the trial court allowed Rich to present a large quantity of noncomparator evidence, we do not find the trial court abused its discretion, and therefore affirm. We also affirm the dismissal of the disability claim.

I

After teaching within the Bellevue School District for five years, Carol Rich transferred to Eastgate Elementary for the 1997-98 academic year. The new principal of Eastgate, Judy Buckmaster, had been appointed that year by the superintendent, Michael Riley. Rich received a negative job evaluation from **[*3]** Buckmaster, a surprise to Rich because she had previously received positive evaluations. Buckmaster continued to be unhappy with Rich's work and referred her for review by a Consulting Peer Educator (CPE). A CPE evaluates a teacher to decide whether the teacher needs to be placed on the PAR program. The CPE recommended that Rich be placed on the PAR program and, after an appeal, the PAR panel followed that recommendation. The panel is made up of four union members and four administration members.

Persons on the PAR program can be placed into a formal or informal program or a program for new staff members. During the 1997-98 school year, nine teachers were placed on the formal PAR program. Of the nine, eight were over 50 years of age and all were over 40. At the same time, only 60 percent of the staff was over 40 years of age.

II

We first address the District's argument that it should have been granted judgment notwithstanding the verdict. In 1993, "motions for judgment notwithstanding the verdict" were renamed "motions for judgment as a matter of law." [1] A trial court may grant a motion for judgment as a matter of law when, "viewing the evidence most favorable to the nonmoving **[*4]** party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference

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[1] ***Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001)***.

to sustain a verdict for the nonmoving party." [2] Substantial evidence exists when a fair-minded, rational person can be persuaded of the truth of the declared premise. [3] An appellate court applies the same standard as the trial court when reviewing a motion for judgment notwithstanding the verdict (judgment as a matter of law). [4]

The District asserts that Rich must show that she (1) was in a protected class; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by someone not in the protected class. [5] The District is correct that proving these **[*5]** elements would establish a prima facie case for age discrimination based on disparate treatment. [6] But rigid adherence to that template is not required. In *Grimwood v. University of Puget Sound, Inc.*, [7] our Supreme Court explained that "these four elements are not absolutes." [8] The court in *Grimwood* quoted a federal case to explain that the burden shifting scheme "was intended to be neither 'rigid, mechanized or ritualistic,' nor the exclusive method for proving a claim of discrimination." [9] **[*6]** The federal court specifically noted that the element of replacement by a person outside the protected group was not an absolute. [10]

Rich argues that to prove age discrimination, she must show that (1) she belongs to a protected class, (2) she was treated less favorably in the terms and conditions of her employment (3) than similarly situated, nonprotected employees, and (4) she and the nonprotected "comparator" were doing substantially the same work. Rich adapts these elements from a race discrimination case, and we agree that they serve well for an age discrimination claim. [11]

Rich argues that she satisfied the first element by showing that she was 54 when placed on the PAR program. The District counters that simply being over 40 is not sufficient to prove membership in a protected class. The District further argues that RCW 49.60.205 **[*7]** and *Kilian v. Atkinson* [12] require Rich first to prove a violation of RCW 49.44.090 to qualify as a member of a protected class. But the District misconstrues the purpose of RCW 49.60.205 and the holding in *Kilian*.

RCW 49.60.205 does not require a person alleging age discrimination to prove a violation of RCW 49.44.090 as a

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[2] ***Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)***.

[3] ***Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)***.

[4] ***Guijosa, 144 Wn.2d at 915***.

[5] ***Chen v. State, 86 Wn. App. 183, 189, 937 P.2d 612 (1997)*** (citing ***Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 362-64, 753 P.2d 517 (1988)***).

[6] ***Chen, 86 Wn. App. at 183*** (citing ***Grimwood, 110 Wn.2d at 362-64***).

[7] ***110 Wn.2d 355, 753 P.2d 517 (1988)***.

[8] ***Grimwood, 110 Wn.2d at 362***.

[9] ***Grimwood, 110 Wn.2d at 363*** (citations omitted) (quoting *Loeb v. Textron, Inc., 600 F.2d 1003, 1016-17 (1st Cir. 1979)*).

[10] ***Grimwood, 110 Wn.2d at 363*** (referring to an age discrimination case) (citing *Loeb, 600 F.2d at 1013*).

[11] *Johnson v. DSHS, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996).*

[12] ***147 Wn.2d 16, 50 P.3d 638 (2002)***.

prerequisite to establishing that she is in a protected class. Instead, *RCW 49.60.205*, as interpreted by *Kilian*, limits the statutory prohibition against age discrimination to the confines of the employment context. [13] In *Kilian*, the court declined to extend Washington's protection against age discrimination to cover an independent contractor because Washington's age discrimination protection does not apply to the independent contractor context. [14] Rich alleges discrimination within **[*8]** the employment context. Because she was over 40, she established the first element.

She also established the other elements of a prima facie case. Rich offered evidence that, other than new staff (a different category of PAR), the staff placed on the formal PAR program in 1997-98, were all over 40 years of age despite the fact that approximately 40 percent of the staff was under 40 years of age. Viewing this evidence in a light most favorable to Rich, it would allow a jury to conclude that because of her age, Rich was treated less favorably than younger teachers by being placed on the PAR program, a condition of employment.

After the plaintiff establishes a prima facie case, the "evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action." [15] The District met its burden of production by presenting evidence that **[*9]** Rich was performing unsatisfactory work and that she was placed on the PAR program to help her improve.

If the defendant meets this burden of production, "the burden of proof shifts back to the plaintiff, who must then 'be afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext.'" [16] Rich offered evidence that the District did not use the program to improve older teachers' abilities, but instead used the program to target older teachers. She presented evidence that the evaluators in the PAR program were instructed to write reports emphasizing only negative matters, without reporting on any positive aspects of a teacher's performance or providing any constructive criticism for improvement. Her evidence implied that the PAR program was wrongly utilized to administratively harass older teachers into retirement or transfer out of the district.

[*10] The jury may have decided that the PAR program was utilized as a legitimate tool used to improve the performance of substandard teachers or, failing that, giving due process to their termination. But taking this evidence in a light most favorable to Rich, substantial evidence supported her assertion that the District's reasons for placing her on the PAR program were pretext. The jury's verdict was supported by the evidence. We affirm the trial court's denial of the motion for judgment as a matter of law.

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[13] ***Kilian, 147 Wn.2d at 26***.

[14] *Kilian, 147 Wn.2d at 28-29*.

[15] *Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 181, 23 P.3d 440 (2001)*.

[16] *Hill, 144 Wn.2d at 182* (quoting *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*).

New trial

The District argues that the trial court erred by not granting its motion for new trial. We review an order denying a motion for new trial under the abuse of discretion standard. [17]

"Pattern and practice" testimony

The District argues that the court erred by allowing "pattern and practice" testimony. Specifically, the District challenges the testimony of 12 of Rich's witnesses as irrelevant and prejudicial. **[*11]** We apply an abuse of discretion standard when reviewing a trial court's admission of testimony. [18]

The District argues that the trial court abandoned any standard when it allowed Rich to present these witnesses. But the trial court consistently held that the testimony of other teachers was relevant to "the question of what the District's intent was here." The court explained that "if somebody is blatantly discriminating on the basis of age, they don't usually announce it in a memo . . . ." Moreover, "[e]vidence of an employer's other discriminatory acts is admissible in appropriate circumstances." [19] **[*12]** And "[t]he trial court has broad discretion to determine when the circumstances are appropriate." [20]

Later, the court allowed a counselor to testify that teachers sought her services "as a result of what was going on in the PAR program, what their ages were . . . [and] what their complaints were . . . ." The District objected to the testimony as inappropriate "pattern and practice" testimony. But the court found the testimony relevant. In discrimination cases, "[c]ircumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden." [21] Although sometimes stretching the bounds of relevancy, the testimony allowed by the trial court related to a main part of Rich's disparate treatment argument: that the district administration used the PAR program to weed out older teachers. The court did not abuse its discretion.

[*13] Testimony about unidentified clients

The District argues the trial court erred by allowing Patricia Starr and Carolyn Dion, employee assistance counselors for the District, to testify beyond their expertise. But the court ruled that Starr and Dion could testify to that which was within their personal knowledge. No abuse of discretion has been shown.

The District argues the court erred by admitting the testimony of the counselors

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[17] ***Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)***.

[18] ***Kirk v. Washington State Univ., 109 Wn.2d 448, 459, 746 P.2d 285 (1987)***.

[19] ***Lords v. N. Auto. Corp., 75 Wn. App. 589, 610, 881 P.2d 256 (1994)***, *overruled on other grounds by* ***Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995)***.

[20] ***Lords, 75 Wn. App. at 610*** (citing ***Burnside v. Simpson Paper Co., 66 Wn. App. 510, 521, 832 P.2d 537 (1992)***, *aff'd,* ***123 Wn.2d 93, 864 P.2d 937 (1994))***.

[21] ***Sellsted v. Washington Mut. Sav. Bank, 69 Wn. App. 852, 860, 851 P.2d 716 (1993)***, *overruled on other grounds by* ***Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995)***.

about clients, and by admitting a report the counselors prepared based on interactions with those clients. The District argues that because those clients were unnamed, it was denied the right to cross-examination.

But the court restricted the counselors' testimony to their personal knowledge and conclusions. The court rejected the report originally and did not admit it until all hearsay statements had been redacted. The court only admitted the sections of the report that were the conclusions of the counselors. Allowing witnesses to give testimony of their own personal observations is not an abuse of discretion. The District had ample opportunity to cross-examine the two counselors about their observations and their conclusions.

Time limits

The **[*14]** District argues that the trial court erred by enforcing rigid, arbitrary time limits that prejudiced the District's ability to present its case. But a trial court has "considerable latitude in managing its court schedule to insure the orderly and expeditious disposition of cases." [22]

At the start of trial, the plaintiff requested 12 trial days and the defendant 3. Originally the court granted them 24 hours and 19 hours respectively. The court ultimately allotted 23.5 hours and 20 hours respectively. The issues did not change after the parties requested their allotment of time. About midway through the trial, the court warned the parties that they had spent "more time on peripheral witnesses than . . . is merited." The court further warned that it would "not . . . look **[*15]** favorably upon requests for more time at the end of this case." Given the court's latitude and these facts, we find no abuse of discretion.

Jury instructions

The District argues that the trial court erred by failing to instruct on the essential elements of age discrimination and by failing to instruct on the District's defenses. A trial court has discretion to decide the number and specific language of the instructions. [23] We use three factors to test for the sufficiency of instructions: "(1) that the instructions permit the party to argue that party's theory of the case; (2) that the instruction(s) is/are not misleading; and (3) when read as a whole all the instructions properly inform the trier of fact on the applicable law." [24] "No more is required." [25] **[*16]** A trial court "is not required to give instructions that are cumulative" and "is not required to instruct negatively on a proposition already stated positively." [26]

The District wanted the trial court to instruct on the factors which compose the burden-shifting scheme set forth by the United

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[22] ***Idahosa v. King County, 113 Wn. App. 930, 937, 55 P.3d 657 (2002)*** *rev. denied,* ***149 Wn.2d 1011, 69 P.3d 874 (2003)*** (citing ***Woodhead v. Disc. Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995))***.

[23] ***Douglas v. Freeman, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991)***.

[24] ***Douglas, 117 Wn.2d at 256-57***.

[25] ***Douglas, 117 Wn.2d at 257***.

[26] ***Carle v. McChord Credit Union, 65 Wn. App. 93, 106-07, 827 P.2d 1070 (1992)***.

States Supreme Court in *McDonnell Douglas Corp. v. Green*. [27] But those rules "were never intended as a charge to the jury." [28] **[*17]** The *McDonnell Douglas* burden-shifting scheme is merely a way of establishing a prima facie case. [29] After "the plaintiff has established a prima facie case and the defendant has produced evidence of a nondiscriminatory reason for its action, the burden-shifting scheme 'drops from the case.'" [30] Once the scheme drops from the case, "[t]he plaintiff then bears the burden of proving the ultimate fact--that the defendant intentionally discriminated against the plaintiff." [31]

The trial court instructed the jury regarding age discrimination as follows:

> Discrimination in employment on the basis of age is prohibited.
>
> To recover, plaintiff has the burden of proving that she is over 40 years of age and that her age was a significant or substantial factor in defendant's decision to take adverse actions toward her. Plaintiff does not have to prove that age was the only factor or the main factor in the decision, or that plaintiff would not have been subjected to the adverse personnel actions but for her age.

The jury verdict form asked "Has Carol Rich proven her claim of age discrimination?"

The District argues that the trial court should have instructed the jury about defenses against claims for age discrimination. But the District's proposed instructions were merely restatements of the elements of a prima facie case, which the trial court is not obligated to include in the jury instructions. **[*18]** The District also argues that the trial court erred by refusing an instruction that Rich must prove discharge or constructive discharge. But under the holding in *Martini v. Boeing Co.*, [32] even though Rich does not prove discharge or constructive discharge, a jury may award her back pay. [33]

We conclude that the instructions sufficiently permitted the parties to argue their theories of the case, were not misleading, and when read as a whole, properly informed the jury of the applicable law.

Finally, the District argues that the court erred by not admitting documents into evidence even when the author was testifying, and further erred by allowing **[*19]** improper rebuttal testimony. Assuming arguendo that the trial court erred in either regard, such error would not have been of the magnitude to justify a new trial.

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[27] *411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*.

[28] *Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993)*.

[29] ***Kastanis, 122 Wn.2d at 491***.

[30] ***Kastanis, 122 Wn.2d at 491***.

[31] ***Kastanis, 122 Wn.2d at 492***.

[32] *137 Wn.2d 357, 971 P.2d 45 (1999)*.

[33] *Martini, 137 Wn.2d at 364-72* (where after a thorough analysis of Washington's law against discrimination (WLAD) (*Ch. 49.60 RCW*) and the case law, our Supreme Court concluded that the WLAD permits recovery of front and back pay without proof of discharge or constructive discharge).

Summary

A reasonable jury could accept as valid the theory offered by Rich that the school administration was motivated by age discrimination animus and reach the ultimate fact that the District intentionally discriminated against Rich. We conclude that the substantial evidence supports the jury's verdict.

Cross-appeal of dismissal of claim for disability discrimination

When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court. [34] On cross-appeal, Rich argues that the trial court erred by dismissing her disability discrimination claim on summary judgment. She alleged that the District failed to accommodate her stress-related disabilities. The court dismissed the claim.

[*20] In Washington, to establish a prima facie case of failure to reasonably accommodate a disability, a plaintiff must show that she has a sensory, mental, or physical abnormality that substantially limited her ability to perform the job. [35] The only Washington case that addresses the issue of work-related stress is *Snyder v. Medical Service Corporation of Eastern Washington*. [36] In *Snyder*, the court questioned, in dicta, whether Snyder, who complained of work-related anxiety, truly suffered from a handicap within the WLAD. [37] The court cited three federal cases that held that stress suffered because of co-workers or supervisors did not qualify as a disability. [38] **[*21]** Our courts may look to the federal courts for guidance because Washington's disability discrimination law parallels federal law. [39]

Following the federal cases, we hold that stress from participation in the PAR program is not a disability under the WLAD. Stress associated with supervisors, co-workers, and performance reviews is common in the workplace and should not be considered an abnormality, as is required to qualify as a disability under the WLAD. Thus, stress associated with participation in the PAR program is not disabling within the meaning of the WLAD and we affirm the trial court's order granting summary judgment on this issue.

Attorney fees

Although RCW 49.60.030(2) does not expressly provide for attorney fees on review, the statute has been construed as authorizing such an award. [40] We award

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[34] ***Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996)***; ***Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321 (1998)***.

[35] ***Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 192-93, 23 P.3d 440 (2001)***.

[36] ***98 Wn. App. 315, 988 P.2d 1023 (1999)*** *aff'd,* ***145 Wn.2d 233, 35 P.3d 1158 (2001)***.

[37] ***Snyder, 98 Wn. App. at 326 n.1***.

[38] *Snyder, 98 Wn. App. at 326 n.1* (citing *Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 n. 3 (3d Cir.1998)*; *Siemon v. AT&T Corp., 117 F.3d 1173, 1176 (10th Cir.1997)*; *Weiler v. Household Fin. Corp., 101 F.3d 519, 524-25 (7th Cir.1996)*).

[39] ***Goodman v. Boeing Co., 75 Wn. App. 60, 77, 877 P.2d 703 (1994)***, *aff'd,* ***127 Wn.2d 401, 899 P.2d 1265 (1995)***.

[40] ***Xieng v. Peoples Nat'l Bank of Washington, 120 Wn.2d 512,***

reasonable attorney fees to Rich, the prevailing party.

[*22] AFFIRMED.

WE CONCUR:

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533, 844 P.2d 389 (1993) (citing ***Allison v. Hous. Auth. of Seattle, 118 Wn.2d 79, 98, 821 P.2d 34 (1991))***.