

**KENTUCKY SUPREME COURT
MAY 2020**

I. AGE DISCRIMINATION:

**A. Norton Healthcare, Inc. v. Donna Disselkamp
AND**

Donna Disselkamp v. Norton Healthcare, Inc.

[2018-SC-000274-DG](#)

[2019-SC-000102-DG](#)

May 28, 2020

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Nickell, J., not sitting. Appellee Donna Disselkamp began working as an Imaging Services Supervisor for Appellant Norton Healthcare, Inc. in 2001. In 2012, when Appellee was 60 years old, Appellee was terminated following allegations from her immediate supervisor that Appellee falsified data used to prepare “Quality Management Team” reports. Following a jury trial on Appellee’s claims of age discrimination and retaliation in violation of the Kentucky Civil Rights Act, the jury found in favor of Appellant on all claims. The Court of Appeals found reversible error in only one of the five claims of error raised by Disselkamp; holding that the trial court erred in including in the age discrimination jury instruction the requirement that Disselkamp show that she was replaced by a “substantially younger” employee.

The Supreme Court affirmed the Court of Appeals’ decision. The Court held that the trial court misstated the law by including in the age discrimination jury instruction the element that the Appellee was replaced by a substantially younger employee. The Court ruled that in an age discrimination case based on circumstantial evidence, the trial court, not the jury, is to make the factual finding that the plaintiff satisfied its burden of proving each element of the McDonnell Douglas paradigm, including whether the plaintiff was replaced by a substantially younger employee, before the age discrimination claim is submitted to the jury to make the ultimate determination as to whether unlawful discrimination occurred. Based on the previous finding of reversible error, the Appellee’s argument that the trial court erred in refusing to allow Plaintiff to recall a key witness is rendered moot. As to Appellee’s arguments regarding errors contained in the retaliation jury instruction, the Court held that the jury instruction on Appellee’s retaliation claim did not misstate the law by including the name of Appellant’s Human Resource Manager among the list of potential retaliators, as the use of the word “or” between the three potential retaliators listed allowed the jury to find in Appellee’s favor by finding that only one of individuals unlawfully retaliated against the plaintiff. The Court, however, declined to consider Appellee’s argument that the retaliation jury instruction misstated the law by providing that the jury would find in favor of the Appellee if it found that Appellee engaged in a protected activity by complaining to Appellant about “harassment and gender

discrimination” because Appellee failed to preserve this argument for appellate review, as Appellee’s proposed instruction was not so different as to “fairly and adequately present the party’s position as to an allegation of instructional error,” as required under CR 51(3). Finally, the Court held that the trial court did not abuse its discretion in denying Appellee’s request for a missing evidence instruction because Appellee either failed to show that the evidence was material to her case or failed to show that the evidence even existed.

II. CRIMINAL LAW:

A. Rodney Carlisle, Jr. v. Commonwealth of Kentucky 2018-SC-000680-MR May 28, 2020

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, Lambert, VanMeter, and Wright, JJ., concur. Nickell, J., concurs in result only by separate opinion. Rodney Carlisle, Jr. appealed his conviction of three counts of first-degree trafficking in a controlled substance. These charges stemmed from a routine traffic stop for faulty equipment, during which the driver consented to a search of the truck. Based on items discovered in the truck, including a digital scale, syringes, butane, and several cell phones, the officer searched both the driver and the passenger, Carlisle, and discovered a suspected narcotic in a small plastic baggie in Carlisle’s waistband. On appeal, Carlisle argued that the trial court should have suppressed evidence that was found on his person because it was the result of illegal searches and seizures.

The Supreme Court first held that the traffic stop had not concluded at the time the officer inquired into the contents of the truck and asked to search the truck. The Court next considered whether the stop had been improperly prolonged by any unrelated questioning or inquiries by the officer. The Court held that the officer’s questioning of the driver about his travel plans (i.e., where he was from, where he was going, and why) were related to the traffic stop, as was his search of the men’s criminal histories. The Court also found that it was reasonable to detain Carlisle during the search of the truck by instructing him to wait near a police cruiser. Lastly, the Court held that the search of Carlisle’s person had been supported by probable cause and exigent circumstances.

B. Justin Curry v. Commonwealth of Kentucky 2019-SC-000306-MR May 28, 2020

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Hughes, Lambert, and VanMeter, JJ., concur. Keller, J., concurs in part and concurs in result only in part by separate opinion in which Nickell and Wright, JJ., join. Defendant was convicted of one count of murder, one count of being a felon in

possession of a handgun, and was found to be a first-degree persistent felony offender in relation to the fatal shooting of his roommate. The defendant claimed the shooting was in self-defense and that he was therefore entitled to jury instructions on both self-defense and no duty to retreat. As a matter of first impression this Court considered whether being a convicted felon in possession of a handgun was an “unlawful activity” for the purposes of entitlement to an instruction on no duty to retreat under Kentucky Revised Statute (KRS) 503.055(3). This Court reiterated that entitlement to an instruction on self-defense does not automatically entitle a defendant to an instruction on no duty to retreat and held that being a felon in possession of a firearm is an unlawful activity under KRS 503.055(3). Accordingly, the defendant was not entitled to a jury instruction on no duty to retreat. We further held that the trial court did not abuse its discretion in declining to strike two potential jurors for cause.

III. ATTORNEY DISCIPLINE:

A. Kungu Njuguna v. Kentucky Bar Association

[2020-SC-000183-KB](#)

May 28, 2020

Opinion and Order of the Court. All sitting; all concur. In March 2013, Njuguna was found guilty on two counts of admitted violations of the Rules of Professional Conduct and was suspended from the practice of law for a period of 180 days, with 90 days to be probated for a period of five years under multiple conditions. Because Njuguna failed to file an affidavit of compliance with the terms of his suspension within 180 days, the provisions of SCR 3.510(3) were invoked, requiring referral to the Character and Fitness Committee for proceedings under SCR 2.300 upon filing of his application for reinstatement. On March 18, 2018, less than five years from his suspension date, Njuguna moved to be reinstated and the matter was referred to the Character and Fitness Committee. Following a detailed investigation, the Committee determined the root cause of Njuguna’s disciplinary issues stemmed from a severe addiction problem which he had successfully addressed after a long and difficult process. On March 2, 2020, the Character and Fitness Committee rendered its Findings of Fact, Conclusions of Law and Recommendation finding Njuguna had complied with all conditions of his 180-day suspension, was worthy of the public trust, possessed sufficient professional capabilities, presently exhibited good moral character, and showed contrition, remorse, and sufficient rehabilitation to return to the practice of law. The Committee unanimously recommended reinstatement with conditions imposed including execution of a Conditional Admission Agreement, pursuant to SCR 2.042, concerning his continued involvement with KYLAP and a fiscal planning and debt repayment program. After reviewing the entire record, by a vote of 19-0 with two members absent, the Board of Governors concluded Njuguna had fully complied with the administrative steps, met all standards and requirements for reinstatement, and unanimously recommended reinstatement.

We agree with and accordingly accept the Board's recommendation that Kungu Njuguna's Application for Reinstatement to the practice of law be approved with conditions. It is therefore ORDERED: 1. Kungu Njuguna's Application for Reinstatement to the Kentucky Bar Association is approved pursuant to SCR 3.510, subject to paragraphs 2 and 3 below. 2. Njuguna shall comply with the conditions for admission set forth hereinabove as paragraphs a. through f., as recommended by the Board and as amended on request of the Office of Bar Counsel.