

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Tompkins v. Mineral County

302 F. App'x 666 (9th Cir. 2008) · Decided December 2, 2008

SUMMARY

The Ninth Circuit affirmed the disposition against Tompkins on his claims under the Americans with Disabilities Act and the Age Discrimination in Employment Act. The court held that Tompkins's leg injury did not substantially limit a major life activity and that the evidence did not establish a record of disability. It also held that he failed to create a genuine issue of material fact regarding the ages of the allegedly younger employees or age-based discrimination.

OPINION

Tompkins v. Mineral County 302 F. App'x 666

PER CURIAM.

MEMORANDUM **

Tompkins's leg injury does not qualify as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). Because running is not an activity "of central importance to daily life," it is not a major life activity. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002). That Tompkins walks with "some discomfort and a limp" does not establish his ability to walk is "substantially limit[ed]." 42 U.S.C. § 12102(2)(A). Tompkins's testimony demonstrates he is not "significantly restricted," 29 C.F.R. § 1630.2(j)(1)(ii), but rather has for years carried out professional duties and personal interests requiring walking. Tompkins thus fails to create a genuine issue of material fact as to a required element of his ADA claim, namely, whether he has a disability for purposes of 42 U.S.C. § 12102(2). Nor is the evidence sufficient to create a genuine issue of material fact as to whether Tompkins has a record of disability. See 42 U.S.C. § 12102(2)(B). Tompkins alleges he was treated less favorably than younger deputies in violation of 29 U.S.C. § 623(a)(1), but the record does not include the ages of the employees in question. Tompkins's own testimony does not suffice because it lacks a basis in personal knowledge. See *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir.2001). Tompkins therefore fails to create a genuine issue of material fact as to a required element of a prima facie case for an ADEA claim, namely, that he "lost out because of his age." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) (emphasis omitted). **AFFIRMED.** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

