

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002316-MR

FLOYD BUSSELL

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 00-CI-00061

KENTUCKY FINANCE CO., INC.

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE AND McANULTY, JUDGES; JOHN WOODS POTTER, SPECIAL JUDGE.¹

DYCHE, JUDGE. Floyd Bussell initiated this action seeking monetary damages, claiming his discharge from employment with appellee, Kentucky Finance Company ("KFC"), was in violation of the Kentucky Civil Rights Act (KRS 344). Claims of sex and disability discrimination were abandoned, and Bussell's claim

¹ Senior Status John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

for age discrimination was dismissed on motion for summary judgment (CR 56).

Bussell now appeals, claiming that he has made a *prima facie* case of age discrimination under the standards of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to successfully make such a case, he must prove that: he is a member of a protected class (in this case, over forty years of age); an adverse employment action was taken against him; he was otherwise qualified for the position from which the adverse decision arose; and a person not of the protected class replaced him. Barnett v. Department of Veterans Affairs, 153 F. 3d 338, 341 (6TH Cir. 1998).

For the purposes of the motion for summary judgment, KFC admitted the existence of the first three factors, but claimed that Bussell had not established that he was replaced at all, much less replaced by a person under forty years of age. Bussell responded below, as he does here, that he was either replaced by a younger person, or, if not actually replaced, a game of "musical chairs" reallocated his responsibilities, and younger employees were retained, thereby meeting the requirements of Ryder v. Westinghouse Electric Corporation, 879 F.Supp. 534 (W.D. Pa. 1995).

Bussell's problem here, as it was below, is that there is no **evidence** in the record that he was replaced by a younger

person, either directly, or as part of the alleged "musical chairs" scheme. A party responding to a properly supported summary judgment motion must, by counter-affidavit or otherwise, show that evidence is available justifying trial of the issue involved. He cannot merely rest on the allegations in his pleadings. Continental Casualty Co. v. Belknap Hardware & Manufacturing Co., Ky., 281 S.W.2d 914 (1955). Bussell presents no such evidence; he merely asserts the truth of his allegations, with no proof to back up the assertions. The summary judgment of the Harrison Circuit Court is therefore affirmed.

ALL CONCUR.

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