

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001160-MR

DANIEL LOVINGS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 00-CI-005433

AKZO NOBEL COATINGS, INC.

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART, AND REMANDING

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BEFORE: BARBER, COMBS, and KNOPF, Judges.

COMBS, JUDGE. Daniel Lovings appeals from a summary judgment entered by the Jefferson Circuit Court dismissing his claims against his former employer, Akzo Nobel Coatings, Inc. (Akzo), filed pursuant to the Kentucky Civil Rights Act, KRS<sup>1</sup> Chapter 344 *et seq.* The circuit court determined that Lovings failed to present sufficient evidence — either direct or circumstantial — to create a genuine issue of material fact relevant to his

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<sup>1</sup> Kentucky Revised Statutes.

claims that the discriminatory treatment he experienced at Akzo was racially motivated. After reviewing the record in a light most favorable to Lovings, we conclude that an issue of fact exists for a jury to decide whether Akzo's failure to promote Lovings and its termination of his employment may have been motivated by an improper purpose. Thus, with respect to the claims of failure to promote and retaliation, we vacate the summary judgment and remand. Lovings has not challenged the dismissal of his claim of hostile work environment or of his claim against John Harris, Akzo's plant manager. Therefore, we shall not address or disturb these issues on appeal.

Akzo is a manufacturer of resin products used in the paint industry. Akzo hired Lovings, who is an African-American, on January 25, 1998. A union employee, Lovings first was assigned to work in the filter room. In September 1998, he bid on the position of Kettle Operator. Harris, the plant manager, told Lovings that he would not qualify for the job and discouraged him from applying. Lovings applied anyway. Because he had more seniority than any other employee competing for the job, he was given the opportunity to train for the position.

Under the contract between Akzo and Lovings's union, a kettle operator trainee was allowed up to 130 days of training on the six different kettles in order to qualify as a kettle operator. Lovings began his training in October 1998. However,

he testified that unlike his predecessors, he spent the entire first month of training in the warehouse and did not begin actual training on the kettles until November 15, 1998. Even after that time, there were significant periods during which Akzo failed to provide Lovings with a trainer. As a result, there was a hiatus in his training. Additionally, he was not rotated to all the kettles. His training for the most part was limited to Kettle-6.

In January 1999, while being trained on Kettle-9 by Ricky Berg, Lovings made a mistake that resulted in a partial loss of the product in the kettle. On February 3, 1999, he was removed from training and was returned to his former job as a filter press operator -- ostensibly because of his one mistake the previous month. On February 8, 1999, Lovings filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Akzo offered Lovings another chance to qualify as a kettle operator in exchange for the dismissal of his discrimination claim with the EEOC. He rejected the offer.

Lovings continued to work at Akzo until he was fired in August 2000 -- supposedly for poor work performance. He filed a complaint in the Jefferson Circuit Court on August 24, 2000, alleging that he had been denied the opportunity for advancement because of his race. He also claimed that he was

fired in retaliation for filing a charge with the EEOC and for filing a grievance with his union.

In a motion for summary judgment, Akzo argued that Lovings had failed to establish a *prima facie* case of discrimination. It contended that Lovings was not able to show that he had been treated differently from similarly situated white trainees who sought to become kettle operators. Akzo claimed that Lovings was dismissed because of frequent, unexplained absences and mistakes in performing his work -- not because of his race.

In response to the motion, Lovings pointed to direct evidence which he believed could persuade a jury that Harris never intended for him to qualify as a kettle operator because of his race. He also cited circumstantial evidence suggesting that the quality of his training was considerably inferior to that which Akzo provided to its white trainees. He presented direct evidence of Harris's bias against blacks, which included Harris's comments when Lovings objected to the poor quality of his training on the kettles:

We've been kissing your ass every since you got here. Boy, we've been giving you a dime a month, and you got to do what I say. That's how you boys are, I take you off the street and give you a job and then you don't want to work.

Ricky Berg, his trainer on Kettle-9, also testified. When he discussed the removal of Lovings as a kettle operator trainee with Harris, Harris told Berg: "We don't need another dumb nigger on the kettles." Berg testified that he had heard Harris use racial epithets at other times as well.

In addition to this direct evidence, Lovings argued that he had also presented sufficient circumstantial evidence to avoid summary dismissal of his claims. He detailed examples of the inferior training he received from Akzo. Lovings argued that he was given only 224 of the 1040 hours allotted for instruction before being disqualified; unlike trainees before him, he spent most of his time in the warehouse and was not rotated among the various kettles. He admitted making a mistake on Kettle-9. However, he had received almost no training on this particular kettle, and his mishap occurred during a time when he was not being closely supervised. He presented evidence that no white trainee had been disqualified for making just one such error. Berg acknowledged his own carelessness as a trainer in failing to monitor the work of Lovings as a trainee.

With respect to the retaliation claim, Lovings denied fault for the errors alleged to be the cause for his termination. Rather, he contended that his work was being sabotaged in order to fabricate an excuse for Akzo to get rid of him.

In granting summary dismissal of Lovings's complaint, the trial court disagreed that Lovings had presented sufficient direct evidence of racial discrimination to overcome the summary judgment hurdle:

The defendants argue that the hearsay remark attributable to Harris is not sufficient to show direct evidence of racism. The Court is aware that the use of racial slurs must be considered in light of the case of LaPointe v. United Auto Workers, Local 600, 8 F3d 376, Sixth Circuit 1993, for the proposition that "isolated and ambiguous statements . . . . are too abstract, in addition to being irrelevant and prejudicial, to support a finding of discrimination." Repeated usage of racial slurs cannot be terms isolated or abstract.

In the record, there seems to be approximately two statements that were racial slurs. One has already been cited by the Court and then there was another incidence of a comment also allegedly made by John Harris that was to the effect that "we have been kissing your ass long enough". Whether or not that was [a] racial comment or was meant to be a racial comment, is questionable. In the case of Talley v. Bravo Pitino Restaurant, Ltd., 61 F3d 1241 (6<sup>th</sup> Cir.Ky 1995), there was proof of repeated racial slurs that were not isolated or abstract. The Court in making a determination regarding direct discrimination, must find facts requiring the conclusion that the unlawful discrimination was at least a motivating factor for the employer's action. There is no proof submitted to the Court by the plaintiff that either the training or the isolated slurs support proof of direct evidence of discrimination. Opinion of May 3, 2002, pp. 9-10.

The circuit court also determined that Lovings had failed to establish a *prima facie* case of discrimination pursuant to the analysis set forth in McDonnell Douglas v. Greene, 411 U.S. 792, 802 (1973).

In this case, the plaintiff is a member of a racial minority. He applied for a job [for] which he was qualified to be trained. However, there is no proof that the plaintiff was qualified to retain the position. The extent of training was not to exceed 130 days; however, the method of training was determined by the company. There has been a legitimate business reason asserted by the defendant for both the manner of training and the plaintiff's subsequent rejection, which was the January, 1999, incident. There is no proof that this reason is merely "pretext" [sic].

The plaintiff was returned to his position and replaced as a kettle operator by someone who also failed to qualify for [the] position after receiving 90 days of training. The parties disagree regarding the issue of whether there were similarly situated non-protected employees who were treated more favorably. There were similarly situated employees, but the treatment in several cases was more severe. However, the Court need not reach this issue since the plaintiff cannot meet the other requirements of McDonnell Douglas. The plaintiff does not dispute the problems with his performance, but argues that his performance was sabotaged. The record does not provide any proof of sabotage. There is no disagreement regarding the plaintiff's numerous un-excused absences. Opinion of May 3, 2002, pp. 8-9.

The trial court dismissed all of Lovings's claims, and this appeal followed.

In considering a motion for summary judgment, a trial court is required to review the record in a light most favorable to the party opposing the motion. Id. at 480. It is not to be granted unless the "right to judgment is shown with such clarity that there is no room left for controversy." Id. at 482. The purpose of summary judgment is to terminate litigation when it appears that it would be impossible for the non-moving party to produce evidence at trial that would support a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

On appeal, we must review an order granting summary judgment *de novo* without deference to the decision of the trial court. Lewis v. B&R Corporation, Ky.App., 56 S.W.3d 432, 436 (2001).

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.

Scifres v. Kraft, Ky.App., 916 S.w.2d 779, 781 (1996).

A plaintiff has two means of proving intentional racial discrimination -- either by direct evidence of discrimination or by circumstantial evidence from which

discrimination can be inferred. Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6<sup>th</sup> Cir.1997).

The direct evidence and the circumstantial evidence paths are mutually exclusive; a plaintiff need only prove one or the other, not both.

Direct evidence is evidence which -- standing on its own -- would be sufficient to prove discriminatory intent. Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1249-1250 (6<sup>th</sup> Cir.1995). Once a plaintiff has produced direct evidence that discrimination "played a motivating part in [the] employment decision," the burden shifts to the employer to prove that it would have taken the adverse employment action regardless of racial factors. Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989).

In this case, Lovings presented direct evidence that he was the victim of discrimination. This evidence consisted of statements uttered by the plant manager, Harris, which were overtly insulting and offensive, clearly and unmistakably revealing Harris's hostile attitude toward African-Americans. These statements include the "ass-kissing" remark and the pejorative reference to the adult Lovings as "boy". Particularly pertinent was the statement which Harris made to Berg contemporaneously with disqualifying Lovings from training:

"we don't need another dumb nigger." This evidence directly coincides with the adverse employment action against Lovings.

In rejecting this evidence, the trial court relied on LaPointe v. United Auto Workers, Local 600, 8 F3d 376 (6thCir.1993), which cited Gagne v. Northwestern National Ins. Co., 881 F.2d at 309, 314, for the proposition that "isolated and ambiguous statements" are too abstract and prejudicial to support a finding of discrimination. Significantly, both LaPointe and Gagne are cases involving age discrimination. As observed by the court in Brown v. East Mississippi Electric Power Association, 989 F.2d 858, 861 (5<sup>th</sup> Cir.1993), such a distinction is not to be disregarded:

Unlike certain age-related comments, which we have found too vague to constitute evidence of discrimination, the term "nigger" is a universally recognized opprobrium, stigmatizing African-Americans because of their race. That Pippen usually was circumspect in using the term in the presence of African-Americans underscores that he knew it was insulting. Nonetheless, he persisted in demeaning African-Americans by using it among whites. This is racism.

The use of racial slurs may constitute direct evidence of discrimination when such conduct is routine. Talley, 61 F.3d at 1249. When such words are utilized by employers in the context of making employment decisions, they are also deemed to constitute direct evidence of discrimination. Hull v. Cuyahoga Valley Board of Education, 926 F.2d 505, (6<sup>th</sup> Cir. 1991),

involved a claim that the person in charge of hiring referred to the plaintiff and another employee, both African-Americans, as "a couple of dumb niggers." In holding that these remarks did constitute direct evidence of race discrimination, the court relied on the timing and context of the comment:

Although isolated remarks made by non-decisionmakers, or a blatantly discriminatory remark that may be perceived as a joke are not sufficient evidence of discriminatory motive, Plance's remark was made by a decisionmaker and cannot be construed as a joke. His use of the word "niggers" cannot be characterized as harmless or casual.

Id. at 514.

In the case before us, the racist language was uttered by the same person who made the decision first to demote Lovings from his position as trainee to become a kettle operator and then to terminate his employment. While the "ass-kissing" remark standing alone might be arguably ambiguous, its derogatory connotation becomes unmistakably clear when conjoined contextually with Harris's comment that Akzo didn't need another "dumb nigger" on the kettles. It is no longer abstract or ambiguous -- nor is it isolated or innocuous. We hold that the trial court erred in disregarding this direct evidence presented by Lovings in his response to the motion for summary judgment.

Akzo has not attempted to address the trial court's characterization of these comments as isolated, abstract, or

vague. It emphasizes instead that a plaintiff must present credible direct evidence in order to overcome a motion for summary judgment. Akzo contends that “[i]t is simply not believable that Harris made that [‘dumb nigger’] statement to Berg.” Appellee brief, page 19. Therefore, Akzo argues that the allegation of the remark does not suffice to create a genuine issue of material fact to defeat summary judgment. We disagree.

Credibility as to the use of racial slurs is an evidentiary issue that is beyond the purview of a trial court on a motion for summary judgment. Issues involving credibility are reserved solely for the fact-finder -- a jury in this case.

Despite the settled authority in the area of summary judgment practice, Akzo quotes the following passage from Talley in support of its argument that Berg’s credibility is an appropriate inquiry at this state of the proceedings:

Of course, if the district court does not believe the plaintiff’s proffered direct evidence, then the evidentiary framework of *McDonnell Douglas* is the proper mode of analysis. . . . Thus, . . . when direct evidence of discrimination has been introduced, the lower court must, as an initial matter, specifically state whether or not it believes plaintiff’s proffered direct evidence of discrimination.

Akzo’s brief, page 18 (emphasis original). However, this quotation has been taken wholly out of context since Akzo fails

to reveal that it was addressed to a lower court functioning as the fact-finder during the trial itself rather than at the stage of summary judgment. Talley does not suggest nor hold that it may be appropriate for a trial court to assess the credibility of a party's witness when ruling on a motion for summary judgment.

Although cited by the appellee, Talley actually tends to support the appellant's argument that he was entitled to a trial on his claim of racial discrimination and retaliation. As in this case, the plaintiff in Talley presented evidence that his managers uttered racial slurs and made disparaging comments about the limited nature of work that they believed African-Americans were capable of performing. Also as in this case, the offensive statements were made to co-workers rather than to the plaintiff himself. The Sixth Circuit concluded that these statements constituted "direct evidence that the plaintiff's termination may have been racially motivated" and accordingly held that they were sufficient to defeat a motion for summary judgment by the employer. Id. 61 F.3d at 1249.

The trial court in this case believed that Harris's comment to Berg constituted inadmissible hearsay. Talley addressed this same hearsay issue -- with the Sixth Circuit Court of Appeals ruling in favor of the employee as follows:

The disparaging and racist comments allegedly made by Mr. DiRaimo and Mr. Pitino were not offered to prove the truth of the statements but to demonstrate the racial attitudes of Mr. DiRaimo and Mr. Pitino. Accordingly, the statements are not hearsay.

Id. We believe that this reasoning is directly on point in this case and hold that the trial court erred in characterizing Harris's statement to Berg as inadmissible hearsay.

In conclusion, we hold that Lovings has offered evidence sufficient to establish a *prima facie* case and that he has presented a question proper for resolution by a jury as to the issue of racial discrimination and retaliation by Akzo. Since we have concluded that Lovings presented sufficient direct evidence as a matter of law to defeat the motion for summary judgment, we need not address the trial court's analysis pursuant to the criteria of McDonnell Douglas, supra.

The judgment of the Jefferson Circuit Court is affirmed with respect to its dismissal of Lovings's hostile work environment claim and the claim against Harris individually (both of which were not contested on appeal). As to his other claims of discrimination and retaliation, the judgment of the Jefferson Circuit Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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