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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002667-MR

SYLVIA WRIGHT, RACHEL WHITE
AND REED HAMPTON

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01430

COMMONWEALTH OF KENTUCKY,
OFFICE OF ATTORNEY GENERAL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

TACKETT, JUDGE: Sylvia Wright, Rachel White, and Reed Hampton
appeal from an order of the Franklin Circuit Court granting
summary judgment in favor of the Commonwealth. Appellants filed
an action alleging that they had been the victims of race-based

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

discrimination and denial of opportunities for promotion during their employment with the Office of the Attorney General (OAG) as welfare fraud investigators. The circuit court found that Hampton failed to establish a prima facie case for discrimination and that Wright and White failed to show that the OAG's legitimate, nondiscriminatory reasons for failing to promote them were a pretext to justify racial discrimination. We agree; therefore, the decision of the circuit court is affirmed.

Appellants were all welfare fraud investigators working for the Cabinet of Human Resources (CHR). During the early 1980s, CHR was reorganized and their jobs were transferred to the OAG. Hampton worked out of the Frankfort office; Wright and White were based in Louisville. They filed suit in 1997, accusing the OAG of promoting a "good old boys" network while denying training opportunities, promotions and merit awards to African-American employees. They also alleged that the OAG failed to comply with statutory criteria governing promotions. The OAG filed a motion for summary judgment, and the circuit court dismissed appellants' claims after concluding that there were no genuine issues of material fact presented. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky.App. 1991). This appeal followed.

The United States Supreme Court has established that an employee claiming racial discrimination in hiring or promotion must demonstrate the following:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802; 92 S.Ct. 1817, 1824; 26 L.Ed.2d 668 (1973). Further, once a member of a protected class has made a prima facie showing of racial discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decisions. Then, the minority employee is given an opportunity to show that the employer's nondiscriminatory reason is only a pretext. The trial court found Hampton did not make a prima facie showing of racial discrimination and White and Wright failed to demonstrate that the OAG's stated nondiscriminatory reasons for denying them promotions were pretextual. We will examine the appellants' claims separately as they are factually distinct from one another.

Reed Hampton's claims

Hampton was a high school graduate who studied electronics at a vocational school and attended the police

academy at Eastern Kentucky University. He began working for the state in 1979 and worked for the OAG from 1980 through 1999. After his retirement from the OAG, he returned to state employment to work for the Transportation Cabinet. During his employment with the OAG, Hampton wished to fill a temporary supervisory position which was awarded to a non-minority employee, Craig Birdwhistell. In his deposition, Hampton admits that he never informed his Division Director of his interest in the position. Hampton also never applied for the permanent supervisory position. Moreover, Hampton states that his Division Director encouraged another African-American investigator to apply. Thus, the trial court correctly concluded that Hampton failed to show prima facie evidence of racial discrimination under McDonnell Douglas in that he never applied for the supervisory position for which Birdwhistell was ultimately hired.

In addition, Hampton complained that he was denied training opportunities which would have led to promotions. The example he cited involved training at the FBI Academy in Quantico, Virginia. Hampton was not given the opportunity to participate in this training while two white employees were. In order to make a prima facie showing of racial discrimination, Hampton was required to show that he was similarly situated in all respects to the employees who received the training.

Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992). The employees who received the training were Birdwhistell, Hampton's supervisor, and Michael Duncan, the Division Director. Hampton failed to allege that any non-minorities who were similarly situated attended the Quantico training.

Hampton also alleges that his former supervisor, Julia Owens, reassigned him from working Campbell County in retaliation for his complaints about signing an inaccurate travel voucher. At the time of his reassignment, the OAG was concerned with a backlog of welfare fraud cases and Hampton was among those investigators with a substantial case backlog. Despite being behind, Hampton was investigating a case for which he did not have a referral from CHR, as required by the contract between CHR and the OAG. Owens reassigned Hampton to the Wolfe County region to balance her investigators' case loads. Hampton filed a personnel complaint alleging that the change in his work assignment was made in retaliation because he complained about an inaccurate travel voucher Owens pressured him to sign. He failed to include any claim that the reassignment was racially motivated. The trial court concluded that Hampton was barred by the doctrine of *res judicata* from claiming racial discrimination when he previously failed to do so. More importantly, Hampton complained that Owens reassigned him in retaliation, not that her decision was racially motivated.

Finally, Hampton claimed that the OAG discriminated against him because he never received a Distinguished Service Award (DSA). Hampton compares his work to that of a non-minority employee, Tom Fauver, who received a DSA in 1995. Fauver was not similarly situated to Hampton. While it is true that Hampton recovered more restitution than Fauver during the specific time period cited by Hampton, overall Fauver outperformed Hampton by recovering twice as much money during the forty months preceding his receipt of the DSA. Moreover, Hampton retained a significant case backlog which he repeatedly asked his supervisors for help in clearing up. In fact, Fauver assisted in reducing Hampton's backlog in addition to managing Fauver's own cases. Based on these facts, Hampton failed to show racial discrimination as the basis for his failure to receive a DSA.

Rachel White's and Sylvia Wright's claims

White attended Western Kentucky University and the University of Louisville where she majored in education, but did not complete her degree due to financial constraints. She began working as a welfare fraud investigator in 1978 and continued in that employment until she retired in 2001. White alleged racial discrimination related to two promotions and a written reprimand. She applied for a promotion to supervise the Frankfort office in 1992; the position was filled by Julia

Owens. Division Director Ed Mercer selected Owens for the position because she had a college degree in law enforcement, was familiar with the CHR staff in the office, and knew the prosecutors in eastern Kentucky. White did not have a college degree and, since she worked out of the Louisville office, was not familiar with the employees in eastern Kentucky or their cases. Owens' qualifications for the Frankfort supervisory position are legitimate, nondiscriminatory reasons to hire her instead of White. An obvious disparity in qualifications which favored White would be evidence that the nondiscriminatory reasons were pretextual. Odom v. Frank, 3 F.3d 839 (5th Cir. 1993). No such disparity is evident, and White failed to offer any evidence that the OAG's reasons for promoting Owens instead of herself were a pretext for racial discrimination.

In addition to her claims regarding the OAG's failure to promote her, White also complains that Division Director Michael Duncan gave her a written reprimand for extreme negligence and unsatisfactory job performance in March 1997. White violated an OAG policy requiring investigators to keep their weapons in a secure place in order to prevent non-investigators from having access to them. Instead, White left her service weapon in her car where it was stolen by her nephew, a convicted felon who gave or sold it to a gang member. White failed to report this incident in a timely fashion. Although

she alleges that non-minority employees were not disciplined as she was, White cannot furnish a single example of a non-minority employee in violation of the OAG's policy regarding secured weapons. Thus, she fails to present prima facie evidence of racial discrimination in Duncan's decision to reprimand her.

White and Wright also complain of racial discrimination in the hiring of Neal Brittain to fill a supervisory position for which they both applied. Wright attended Eastern Kentucky University and the University of Louisville graduating with a degree in communications and a minor in social work. She began working for CHR in 1974 as an AFDC and Medicare eligibility worker. She also worked as a welfare fraud investigator before being transferred to the OAG in 1983.

In 1997, both Wright and White applied for the supervisory position in the Louisville office. The position required a bachelor's degree and five years' experience in investigative law enforcement. White did not have a bachelor's degree, but Wright did. Neal Brittain held a bachelor's degree in criminal justice and had extensive experience supervising hundreds of employees during a sixteen-year career with the Kentucky State Police. Duncan made the decision to hire Brittain based on his superior experience as a supervisor and his written communication skills which were better than the

appellants'. Neither White nor Wright offered any evidence that these nondiscriminatory reasons were a pretext for a racially-based hiring decision.

In addition, Wright alleges discrimination in the OAG's decision to hire Robbie Boyce for an administrative position. As Wright never formally applied for the position, she does not meet the McDonnell Douglas criteria for establishing a prima facie case of discrimination.

Both of these appellants allege that they should have received DSAs prior to the filing of this discrimination action. They compare themselves to Dorothy Buchanan-Howard, a non-minority who received a DSA in 1995. Despite her health problems, Buchanan-Howard recovered higher amounts of restitution than either White or Wright. Neither appellant produced evidence that a similarly situated non-minority employee received a DSA. In addressing the appellants' claims of institutional racism, the OAG provided records indicating that minority employees received DSAs in a higher number than their percentage of overall employees.

Finally, Wright and White claim that the OAG failed to follow Kentucky Revised Statute 18A.0751, which requires consideration of an applicant's qualification, record of performance, conduct and seniority in hiring decisions. They allege that Duncan, in hiring Brittain, focused on his

supervisory experience and weighed it more heavily than appellants' overall qualifications. Emphasizing one criterion over the others does not violate the statute as long as all criteria were considered. Appellants' accusation that Duncan gave more weight to Brittain's experience as a supervisor failed to demonstrate that Duncan ignored the other criteria. Wright also alleges that Brittain's hiring violated state policies on internal mobility; however, she offered no evidence that promotions must be interagency rather than intra-agency.

Although White and Wright were able to establish prima facie evidence of discrimination in some hiring and promotion decisions, they were unable to show that the OAG's legitimate, non-discriminatory reasons for those decisions were a pretext. With regard to the other discrimination claims advanced, none of the three appellants established a prima facie case of racial discrimination under McDonnell Douglas. The evidence produced, taken in the light most favorable to the appellants, did not present any genuine issues of material fact allowing the relief requested. For the forgoing reasons, the judgment of the Franklin Circuit Court dismissing the appellants' claims is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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