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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000185-MR

DOUGLAS LANIER APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 00-CI-005257

COMMONWEALTH OF KENTUCKY
and
KENTUCKY COMMISSION ON
HUMAN RIGHTS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Douglas Lanier appeals from a summary judgment of the Jefferson Circuit Court in favor of Commonwealth of Kentucky and Kentucky Commission on Human Rights (hereinafter referred to collectively as KCHR) on Lanier's claims of gender discrimination and retaliation. We affirm.

Lanier was employed in 1994 by KCHR as a "Human Rights Compliance Enforcement Officer I." He has since received two reclassifications for higher pay separate from his annual pay

increases. He has also received two reprimands; one was rescinded and the other remains in his file.

In August 2000, Lanier filed a civil complaint in the Jefferson Circuit Court against KCHR alleging various incidents of gender discrimination and retaliation. The circuit court initially dismissed the case based on election of remedies. A panel of this court reversed the dismissal order and remanded the case to the circuit court.[1]

Following discovery after the case was remanded, KCHR filed a motion for summary judgment as to all claims. The court granted the motion, and Lanier filed this appeal. He has appealed only the portion of the judgment that relates to his gender discrimination claim and not the portion that relates to his retaliation claim.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[2] 56.03. "The record must be viewed in a light most favorable to the party opposing the

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[1] See Lanier v. Commonwealth, 2001-CA-000514-MR (rendered February 22, 2002, not to be published).

[2] Kentucky Rules of Civil Procedure.

motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991). "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, 916 S.W.2d 779, 781 (Ky.App. 1996).

Lanier brought his discrimination claims under the Kentucky Civil Rights Act, KRS[3] Chapter 344. Under the act, "discrimination" is defined as "any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter." KRS 344.010(5). Pursuant to KRS 344.040(1), it is unlawful for an employer to discriminate against an individual because of, among other things, sex.

"The Kentucky Civil Rights Act (KCRA) was enacted in 1966 to implement in Kentucky the Federal Civil Rights Act of 1964." Jefferson County v. Zaring, 91 S.W.3d 583, 586 (Ky. 2002). "The provisions of the KCRA are virtually identical to those of the Federal act." Id. Because the Kentucky statute is

[3] Kentucky Revised Statutes.

modeled after the federal statute, "we must consider the way the Federal act has been interpreted." Harker v. Federal Land Bank of Louisville, 679 S.W.2d 226, 229 (Ky. 1984). We also note that the KCRA has been interpreted as protecting both male and female employees from gender discrimination in the work place. See Gardinella v. General Elec. Co., 833 F.Supp. 617, 620 (W.D.Ky. 1993).

The burdens and order of proof in discrimination cases has been set forth by the U.S. Supreme Court as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. [Internal citation omitted.]

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253.

While the burden of persuasion remains at all times on the plaintiff, the burden that shifts to the defendant is to

rebut the presumption of discrimination created by the plaintiff's prima facie showing. See Burdine, 450 U.S. at 255. The Burdine court went on to say that the "defendant need not persuade the court that it was actually motivated by the proffered reasons. (Citation omitted.) It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiffs." Id. If the employer meets its burden of production, the burden-shifting framework is no longer relevant, as the presumption created by the prima facie case has been rebutted and the burden once again falls on the plaintiff to establish evidence of discrimination. See Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 797 (Ky. 2004).

Lanier claims that KCHR discriminated against him because it failed to promote him and because it denied him training opportunities and an education award. Concerning his discrimination claim based on KCHR's failure to promote him, Lanier had applied for and had been denied four positions while at KCHR. KCHR filled three of the positions with females and one with a male.

Lanier twice sought the position of housing supervisor. The first time it was listed, he and several other qualified candidates were interviewed by a panel of three KCHR supervisors. The panel made its recommendation to the agency

director, who then hired Liz Fust. The second time the position came open, it was not listed and instead was offered directly to Cindy Thornburg. In addition, Lanier also applied for an executive staff assistant position, and this position was offered to Olivia Strickland. In each case, Lanier's name was on the list of qualified candidates maintained by the Kentucky Personnel Cabinet.

Once a prima facie case of discrimination is established, a presumption of discrimination is created. See Brooks, 132 S.W.3d at 797. However, the presumption is "not necessarily justified when the plaintiff is a member of a historically favored group." Zaring, 91 S.W.3d at 591, quoting Notari v. Denver Water Dep't, 971 F.2d 585, 589 (10th Cir. 1992). "A prima facie case of 'reverse discrimination' is established upon a showing that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." Zaring, 91 S.W.3d at 591, quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985). This requirement for showing "reverse discrimination" as a part of a prima facie case of discrimination has been applied in Gardinella, supra; Zambetti v. Cuyahoga Community College, 314 F.3d 249 252 (6th Cir. 2002); and Leadbetter v. Gilley, 385 F.3d 683, 686-88 (6th Cir. 2004). In short, we conclude that the circuit court did not err when it

determined that Lanier had to establish a claim of reverse discrimination in order to establish his prima facie case.

The court in Zambetti set forth several ways to establish a prima facie case of reverse discrimination. One method is by presenting evidence of meaningful statistics relating to the hiring and promotion practices of the employer in question. 314 F.3d at 256. An alternative method is to show that the decision-maker is a member of another class, a class that appears to be favored over others in the employer's hiring and promotion decisions. Id.

The court in Burdine, quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), set out the following as the elements necessary for a plaintiff to show a prima facie case of discrimination:

> (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 the complainant's qualifications.

450 U.S. at 253-54. See also Brooks, 132 S.W.3d at 797; Zaring, 91 S.W.3d at 590-91; Handley, 827 S.W.2d at 699.

Having reviewed the evidence and the inferences from the evidence which must be drawn in favor of Lanier, we conclude, contrary to the conclusion of the circuit court, that

Lanier established a prima facie case. The first prong of the test was met by the fact that the decision-maker, the agency director, was female as were each of the successful candidates for the jobs. The second prong was met in that Lanier applied for and was qualified for each position. Contrary to the conclusion of the circuit court, we believe the third prong was met because Lanier was considered and rejected for each of the three positions that went to female applicants. The fourth prong was met because it is uncontested that the positions remained open until filled by another candidate.

As Lanier had established a prima facie case, KCHR was required to produce evidence of nondiscriminatory reasons for its actions. See Burdine, 450 U.S. at 255. As noted in Burdine, an employer need not persuade the court that it was actually motivated by the proffered reasons; it need only produce evidence of a legitimate nondiscriminatory reason. Id. at 254-56. See also Kentucky Ctr. for the Arts v. Handley, 827 S.W.2d 697, 700 (Ky.App. 1991). KCHR met its burden when it proffered several nondiscriminatory reasons for its actions. First, it informed Lanier that he was needed where he was. Contrary to Lanier's claim that this reason was without factual support, he himself presented evidence as to his history of cases managed and closed as a compliance enforcement officer. Second, KCHR stated it simply had someone else in mind for each

position. In effect, KCHR asserted that it simply chose among qualified candidates.

Once KCHR met its burden of production, the burden then shifted back to Lanier to show that the proffered reasons were merely pretext for discrimination. See Burdine, 450 U.S. at 252-53; Zaring, 91 S.W.3d at 590. The court in Burdine went on to state that the claimant could demonstrate pretext either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. The court in Zambetti stated that pretext could be shown by evidence that "[t]he defendants' nondiscriminatory reason: (1) had no basis in fact, (2) did not actually motivate the defendant's conduct, or (3) was insufficient to warrant the challenged conduct." 314 F.3d at 258.

As the burden of persuasion rests fully on the claimant, he "must do more than simply impugn the legitimacy of the asserted justification[.]" Bush v. American Honda Motor Co., Inc., 227 F.Supp.2d 780, 797 (S.D. Ohio 2002). See also Handley, 827 S.W.2d at 701. Stated another way, the "plaintiff's denial of the defendant's articulated legitimate reason without producing substantiation for the denial is insufficient[.]" Mitchell v. Toledo Hosp., 964 F.2d 577, 585

(6th Cir. 1992). Rather, the claimant must produce "cold hard facts" creating an inference showing that discrimination was a determining factor in the employment action. Harker, 679 S.W.2d at 229. The court in the Handley case noted several examples of circumstantial evidence that could be used to show pretext, including that there was a general attitude of discrimination throughout the employment climate, that statistics indicate that minorities are infrequently or never hired at the place of employment, or that the plaintiff was better qualified for the position but was rejected. 827 S.W.2d at 701, n5.

We agree with the circuit court that Lanier failed to produce cold hard facts of pretext. He offered no specific evidence showing the quantity or quality of the successful candidates' education or experience as it related to his. Instead, he merely expressed his subjective belief that he was as qualified, if not more qualified, than the candidates selected for the three positions. As an employer is free to choose among qualified candidates, this cannot serve as a basis for Lanier's discrimination claim. See Burdine, 450 U.S. at 259. "[A]bsent a showing of discriminatory intent, the court is not here to second guess legitimate employment decisions[.]" Bush, 227 F.Supp.2d at 797. Under these circumstances, we conclude that the court did not err in granting summary judgment

to KCHR on Lanier's discrimination claims based on KCHR's failure to hire/promote him.

In the second part of Lanier's discrimination claim, he asserts that KCHR discriminated against him based on disparate treatment shown to female employees. In particular, Lanier points to KCHR's denial of training opportunities, denial of an education award, and its decision to reprimand him based on complaints by the public that he had been rude.[4]

The elements of a prima facie case of disparate treatment are that "the plaintiff must produce evidence which at a minimum establishes (1) that he was a member of a protected class and (2) that for the same or similar conduct he was treated differently from similarly-situated non-minority employees." Mitchell, 964 F.2d at 582-83.[5] In Hollins v. Atlantic Co., Inc., 188 F.3d 652 (6th Cir. 1999), the court made it clear that "the plaintiff must produce evidence that the relevant other employees are 'similarly situated in all respects.'" Id. at 659, quoting Mitchell, 964 F.2d at 583. Further, in order to be "similarly-situated," the individuals must have dealt with the same supervisor, have been subject to

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[4] Disparate treatment based on the reprimand is not supported by the evidence. Lanier conceded in his deposition that other employees also received warnings and reprimands for such behavior.

[5] Proof of "reverse discrimination" is substituted for the first element of the prima facie case. Zambetti, supra; Zaring, supra.

the same standards, and have engaged in the same conduct without differentiating or mitigating circumstances that would distinguish their conduct or their employer's treatment of them for it. Hollins, 188 F.3d at 659.

Lanier asserts that he established a prima facie case of disparate treatment as it relates to the management-trainee course that Cindy Thornburg was allowed to attend prior to her promotion to housing supervisor. He assumes that, because Thornburg was a compliance enforcement officer and shared a common supervisor, he has met his burden. However, this does not address all the "relevant aspects" of the situation.

Lanier testified during his deposition that he neither requested the management-trainee course nor let any of his supervisors know he was interested in attending it. In addition, he did not present any evidence as to how Thornburg was selected to attend the course. Further, he did not present evidence demonstrating that he was "similarly-situated" with Thornburg in training and education so as to preclude that as a separate basis for the difference in treatment. Under these circumstances, we conclude that the circuit court did not err in rejecting Lanier's discrimination claim based on the management-trainee program.

Lanier has made references both to his opinion that KCHR discriminated against him in training opportunities and in

the denial of an education award. In both instances, he has relied solely on evidence of the requests that he made. He presented no evidence showing the requests made by other employees. Under these circumstances, there is no evidence of record to show that he was treated differently from "similarly-situated" employees. In short, we conclude that the circuit court correctly granted summary judgment on Lanier's discrimination claims based on disparate treatment.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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