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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001053-MR

THE KENTUCKY LOTTERY CORPORATION; LESLIE PEHLKE (NOW FARISON); DAWN NELMS; AND BOB BEISECKER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 99-CI-003552 & 99-CI-004878

URSELLA T. RILES AND JAMES MADDOX III — APPELLEES

AND

NO. 2005-CA-000335-MR

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v.

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OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: The Kentucky Lottery Corporation and three of its officials appeal the jury's award to Ursella T. Riles and James Maddox in the above styled case. The award, which was in excess of a million dollars to each appellee, was for workplace racial discrimination. In this appeal, the Lottery asserts nine claims of trial error. After closely reviewing the parties' briefs and scrutinizing the trial record, we affirm the judgment below.

I. Sufficiency of the Evidence

The Lottery's first claim of error is that the trial court should have directed a verdict in its favor regarding all claims – either before or after the jury's verdict – for insufficient proof of invidious racial discrimination. Because we find that the proof adduced below supports Riles's and Maddox's workplace racial discrimination claims, we reject the Lottery's insufficiency-of-the-evidence defense. Consequently, we also note that the Riles's and Maddox's cross-appeals, which challenge the preservation of the Lottery's insufficiency-of-the-evidence claims, are therefore moot.

On appellate review of the sufficiency of the evidence to support a jury's verdict, we must accept the non-moving parties' proof as true and draw all reasonable inferences from the proof in their favor. *E.g., Lewis v. Bledsoe Surface Mining*, 798 S.W.2d 459, 461 (Ky. 1990). Moreover, before overturning a jury's verdict, we must find

that it is palpably and flagrantly against the proof so as to indicate that it is the result of passion or prejudice. *See NCAA v. Hornung*, 754 S.W.2d 855,858 (Ky. 1988). As stated above, we find the proof at trial sufficient to support the jury's workplace racial-discrimination findings.

Ursella Riles's Proof

The plaintiff Ursella Riles adduced the following proof at trial:

The Director of the Marketing Department (Leslie Pehlke), to which department Riles was assigned, routinely greeted all her subordinates, save Riles, who she routinely ignored. Also, the Director commonly invited her subordinates to meet with her in her office, but never Riles. The apparent reason for this shunning became clear when the Director told Riles that she wanted "no blacks in her department."

Moreover, Riles's immediate supervisor (Dawn Nelms) constantly used Riles as servant, chauffeur, and errand girl, even though Riles was the Department's Promotions Coordinator and she was not classified as personal assistant to her supervisor. Riles's supervisor also used Riles as an escort for trips to the warehouse because the supervisor felt uncomfortable being alone among the predominantly black men working there. Additionally, the supervisor was hyper-critical and overly scrutinizing of Riles's work.

When Riles complained to the Lottery's Affirmative Action Coordinator about the behavior of both the Marketing Director and her immediate supervisor, she received no relief. Instead, she was laterally transferred to the Sales Department, where

her duties changed substantially and her job responsibilities were significantly lessened. When she complained to the Human Resources Director (Bob Beisecker) about this transfer, he dismissed her complaint and told her to get back to her work station. And remarkably, even after the lateral transfer to the Sales Department, her former supervisor from the Marketing Department continued to use her as a driver and an errand girl.

From the time of her lateral transfer, Riles was subjected to taunts and insults from the Marketing Director and her former supervisor from the Marketing Department. In fact, her former supervisor surreptitiously influenced Riles's supervisor in the Sales Department to give Riles a poor job performance evaluation. Eventually, Riles could tolerate the continual harassment from the Marketing Director and her former supervisor from Marketing no longer and resigned, finding other employment at a reduced rate of pay.

James Maddox's Proof

The appellee James Maddox adduced the following proof at trial:

Following Riles's departure from the Lottery, her old position was transferred back from the Sales Department to its original placement in the Marketing Department. After the Marketing Director had practically hired a young, white replacement with little or no work experience, the Lottery's Affirmative Action Coordinator informed her that she was not utilizing qualified black employees already working for the Lottery. In response, the Marketing Director passed over qualified black Lottery employees and promoted James Maddox, a black man working in the Lottery's

warehouse and patently unqualified for a front office position, as the Lottery itself notes in its brief, to fill the vacant Promotions-Coordinator position. Maddox took the position with the understanding that he would receive on-the-job training.

After Maddox moved from the warehouse to the front office, he did not receive the promised on-the-job training. Rather, he was subjected to racial insults from his immediate supervisor – the same supervisor that Riles had worked under. For instance, his supervisor made disparaging remarks about Maddox's mixed-race children (Maddox was married to a Filipino) and about his speech being "too black." In response to this treatment, Maddox complained to the Equal Employment Opportunity Commission and also to the Lottery's internal Affirmative Action Coordinator. Following Maddox's complaint, the Lottery's Affirmative Action Coordinator scheduled a meeting with Maddox, the Marketing Department Director, Maddox's immediate supervisor, and the Human Resources Director. During the meeting, the Human Resourses Director called Maddox a liar and a "boy," and placed him on a 60-day work improvement program. Less than half way through the the 60-day program, the Lottery fired Maddox for alleged incompetence and insubordination.

Conclusion

Taking the evidence adduced by Riles and Maddox as true, and drawing all reasonable inferences therefrom in their favor, we find that a reasonable juror could easily have found that the Lottery was guilty of (1) creating a racially hostile working environment; (2) of retaliatory conduct; and (3) of discriminatory discharge, both actual

and constructive. In sum, the Lottery's insufficiency-of-the-evidence claims are without merit.

II. Joint Trial

The Lottery's second claim of error is that Riles's and Maddox's cases were improperly joined for trial. Civil Rules 42.01 and 42.02 govern the joinder of parties and claims for trial. Generally speaking, parties and claims should be joined for trial when common questions of law or fact are involved and no undue prejudice results. *See e.g.*, *V.S. v. Commonwealth*, 706 S.W.2d 420, 425 (Ky.App. 1986). A trial court's joinder decisions are reviewed for abuse of discretion. *See Massie v. Salmon*, 277 S.W.2d 49, 51 (Ky. 1955).

Here, both Riles's and Maddox's claims were nearly identical and were brought against the same quasi-state agency. And, although their claims did not involve identical time periods, the time periods in question were sequential and the substance of Riles's proof bolsters Maddox's proof. Moreover, the antagonists in both cases – i.e., (1) the Marketing Director; (2) the supervisor in the Marketing Department; and (3) the Human Resources Director – were the same in both cases. Finally, we reject the Lottery's contention that the jury instructions were confusing or that the jury was unable to differentiate between the two different cases at trial. Accordingly, we hold that the trial court did not abuse its discretion in joining all the parties and claims in the trial below.

III. Jury Instructions

The Lottery's third claim of error is that the jury instructions improperly allowed Riles and Maddox to triple recovery for mental anguish – once each for their discharge, hostile work environment, and retaliation claims. We do not address this claim because it is unpreserved for appellate review.

IV. Testimony of Other Employees

The Lottery's fourth claim of error is that the trial court erred by allowing the testimony of three, non-complaining Lottery employees: (1) Charles Crawford; (2) Pandora Sears; and (3) Danita Todd. Based on precedent in *Willoughby v. GenCorp.*, 809 S.W.2d 858, 862 (Ky.App. 1990), we are persuaded that testimony from other Lottery employees is relevant to show the Lottery's motivation in its personnel decisions and to establish whether its working environment was racially hostile. Here, Charles Crawford, a black man, was a Marketing Department employee who voluntarily left the Lottery after clashing with the Marketing Department Director – the same Director who told Riles that she wanted "no blacks in her department." Pandora Sears is a black employee of the Lottery who testified that she had been passed over for promotion 16 times, and who testified that she was not considered for the Promotions Coordinator position given to Maddox despite her superior front-office qualifications. Danita Todd is an employee of the Lottery who had personal knowledge of the mental anguish Riles suffered as a result of the Lottery's discrimination against her and also testified about the racially hostile working environment at the Lottery. In sum, the trial court did not abuse

its discretion in allowing all three witnesses to give testimony that was probative to both Riles's and Maddox's claims and was not unduly prejudicial. *See generally, Robinson v. Runyon*, 149 F.3d 507, 513 (6th Cir. 1997) (circumstantial evidence of discriminatory atmosphere is relevant in civil rights cases).

V. EEOC Right-to-Sue Letters

The Lottery's fifth claim of error is that the trial court improperly excluded letters from the Equal Employment Opportunity Commission (EEOC) finding no probable cause to pursue either Riles's or Maddox's discrimination claims but nevertheless authorizing them to sue the Lottery in civil court. The Lottery also complains that the trial court erred by allowing evidence that numerous other black Lottery employees, not party to this action, had also made complaints to the EEOC.

Under KRE 403, a trial court has discretion to exclude evidence that the EEOC found no probable cause to pursue a complaint, as such evidence might be unduly influential in persuading a jury that no civil rights violation occurred, when in fact EEOC's determination only represents that agency's determination, not the efficacy of the claim itself. *See Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1015 (9th Cir. 1999); *Hall v. Western Production Co*., 988 f.2d 1050, 1057 (10th Cir. 1993). Even the most recent caselaw precedent cited by the Lottery indicates that the question whether to admit an EEOC report lies within the sound discretion of the trial court. *See Barfield v. Orange Co.*, 911 F.2d 644, 650 (11th Cir. 1990). And here, the Lottery has made no compelling

argument that the trial court abused its discretion in excluding the EEOC letters in this case.

Furthermore, we find that the Lottery itself is responsible for raising the issue of other EEOC claims made against it. In an apparent attempt to discredit Riles's and Maddox's claims, the Lottery called a witness that testified about a class-action civil-rights lawsuit brought against the Lottery at the urging of a controversial civil-rights activist. On cross-examination, Riles and Maddox simply asked the Lottery's own witness to enumerate how many EEOC complaints had been made against the Lottery by individual Lottery employees without outside urging. We find that the trial court did not err in allowing this line of cross-examination, as it fairly rebutted the Lottery's attempt to imply that all civil-rights claims against it were the result of hysteria or frenzy. Indeed, having raised the issue of third-party EEOC claims against it, the Lottery cannot be heard on appeal to complain that Riles and Maddox also addressed the issue in rebuttal. *See Harris v. Thompson*, 497 S.W.2d 422, 430 (1973).

VI. Constructive Discharge

The Lottery's sixth claim of error is that Riles failed to adduce sufficient proof that she was constructively discharged. Under well settled law, an employee that voluntarily resigns his employment is nevertheless deemed to be constructively discharged when objective criteria indicates that the employer created intolerable working conditions compelling a reasonable person to resign. *See Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 807 (Ky. 2004). Here, as we

have already noted above in our discussion of the Lottery's general insufficiency-of-the-evidence claim, Riles's proof indicated that she was constantly shunned, constantly harassed, and also retaliated against during her employment with the Lottery for reasons of her race. Consequently, we find that there is no question regarding the sufficiency of the proof to support the verdicts returned by the jury.

VII. Rule 35 Exam

As her complaint sought damages for mental health and emotional distress, the Lottery's seventh claim of error is that the trial court wrongly refused the Lottery's request to examine Riles's mental health under Civil Rule 35. Under CR 35, a trial court may order a mental or physical examination of a party "when the mental or physical condition" of the party is in issue. The general purpose of the Rule is to insure a level playing field by allowing an objective medical examination when one party claims a mental or physical injury. *See Metropolitan Property and Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31, 38 (Ky. 2003). A trial court's decision under this rule is reviewed for abuse of discretion. *See Id.* at 39.

Here, Riles does not claim that the Lottery caused her any permanent mental injury, but rather that its misconduct caused her temporary mental anguish, embarrassment, and emotional distress. We find this type of "mental damage" claim is well within the general purview of a jury, both with regard to its existence, intensity, and also with regard to proper compensation for it. Moreover, as Riles did not call any mental health experts to support her claims of mental anguish, embarrassment, and

emotional distress, we fail to see how the Lottery is prejudiced by the absence of a Rule 35 examination. In sum, we hold that the trial court did not abuse its discretion in overruling the Lottery's request for a Rule 35 examination and that the absence of such an examination did not prejudice the Lottery. *See* CR 60.01.

VIII. Pretextual Termination

The Lottery's eighth claim of error is that the trial court failed to grant it a judgment notwithstanding the verdict on Maddox's discriminatory discharge claim because he failed to adduce sufficient proof that his firing for insubordination and incompetence was pretextual. Once again, we find that Maddox adduced sufficient proof of pretextual termination. Indeed, as the evidence adduced below indicates: (1) that the Lottery knew very well that Maddox was unqualified for the position of Promotions Coordinator when it promoted him to that position; (2) that he was fired only half way through a 60-day work improvement program; and (3) that he was fired only after making an external EEOC complaint and an internal Affirmative Action complaint. Thus, we conclude that, taking this evidence as true, the jury could reasonably have inferred from this circumstantial proof that the Lottery's proffered claims of incompetence and insubordination were mere pretexts for a racially motivated discharge. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000). Once again, we find that Maddox presented sufficient proof to support the verdicts in his favor.

IX. Rebuttal Witness

The Lottery's ninth claim of error is that the trial court improperly disallowed its economic damages rebuttal witness under CR 26.02. Under CR 26.02, a trial court has the discretion to exclude the testimony of a party's expert witness for a flagrant pretrial discovery violation. *See Patel v. Gayes*, 984 F.2d 214, 217 (7th Cir. 1993) (construing federal analog to CR 26). Here, the record indicates: (1) that the Lottery was dilatory in naming its damages expert; and (2) that, when the expert was finally named and scheduled for deposition, the Lottery did not produce the expert's Rule 26 report until the deposition was actually underway. We find that such obstructive behavior and obfuscation by the Lottery was sufficient grounds to support the trial court's decision to exclude its damages expert. Indeed, we cannot say that the trial court abused its discretion in this matter. Moreover, the Lottery has failed to allege that the absence of their expert led to an unduly prejudicial verdict or to any manifest injustice. Accordingly we find that the Lottery suffered no prejudice from the trial court's ruling. *See* CR 61.01.

Conclusion

For the foregoing reasons, we find that the trial court committed no reversible error and hold that the judgment below is affirmed.

KELLER, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE: Respectfully, I dissent. I would reverse and remand this action to the trial court for two reasons. First, I do not believe that the separate actions of Riles and Maddox should have been consolidated and tried together. Riles alleges that she was constructively discharged from her employment with The Kentucky Lottery Corporation (Kentucky Lottery) upon her resignation from employment on March 4, 1998. Maddox did not even begin his employment with Kentucky Lottery until April 27, 1998, whereupon his employment was terminated by Kentucky Lottery for alleged insubordination on December 4, 1998. Riles and Maddox assert various racial discrimination claims arising under Kentucky Revised Statutes (KRS) Chapter 344, Kentucky's Civil Rights Act. However, Judge Mershon's order entered January 24, 2001, consolidating the separate cases asserted by Riles and Maddox against Kentucky Lottery stated that "the two actions present sufficient questions of law and fact to warrant consolidation." However, after an extensive two-week trial, Judge Wine, in denying appellants' motion to alter, amend, or vacate the judgment and motion for judgment notwithstanding the verdict, specifically concluded on page four thereof that the "[Riles's and Maddox's] individual claims each arose out of a separate set of facts and circumstances which resulted in specific damages." Ky. R. Civ. P. (CR) 42.01 permits consolidation if a common question of law or fact exists before the court in separate actions. Judge Wine's finding cited above clearly contradicts any valid reason for consolidating these cases, in my opinion. Since Riles and Maddox were not employed by Kentucky Lottery at the same time, I do not believe that the assertion of racial

discrimination claims against Kentucky Lottery alone was a sufficient basis to consolidate these cases. Each case should have been tried separately, in my opinion.

Secondly, I agree with appellants' argument that the trial court erred in instructing the jury to award multiple emotional distress/mental anguish awards. The majority opinion fails to address this issue on the pretense that it was not properly preserved for appellate review. I disagree. Appellants' tendered proposed jury instructions at trial that basically would have permitted emotional distress damages on the respective discharge claims asserted by Riles and Maddox, but not for claims for retaliation or hostile work environment. This was sufficient, in my opinion, to preserve the issue for review under CR 51(3), whereupon no specific objection was necessary to preserve the right to raise the issue on appeal. *See Surber v. Wallace*, 831 S.W.2d 918 (Ky.App. 1992).

Even assuming for argument that the issue was not sufficiently preserved for appeal, then the error is palpable under CR 61.02 and manifest injustice has occurred as the result of the trial court allowing the jury instructions to reflect multiple emotional distress/mental anguish awards. As noted, Riles's and Maddox's racial discrimination claims are asserted under KRS Chapter 344 and more specifically are permitted under KRS 344.450. This statute permits Riles and Maddox to recover the actual damages sustained. "Actual damages" are compensatory in nature and do not include punitive damages. *Kentucky Dept. of Corrs. v. McCullough*, 123 S.W.3d 130, 138 (Ky. 2003).

I do not believe that an actual damage claim for harassment, humiliation, mental and emotional distress can be bifurcated and thus, separately allocated to every alleged violation under KRS Chapter 344, as permitted by the trial court in this action. Additionally, this would be beyond both the province and ability of a reasonable jury to determine, in my opinion. I believe the jury should have been instructed as to the separate alleged violations made by Riles and Maddox against appellants under the Civil Rights Act. However, as concerns damages for alleged emotional distress and mental anguish, I believe there should have been only one separate instruction for each appellee for which damages could be awarded pursuant to KRS 344.450 upon the jury's finding that violations of the Act had occurred.

For these reasons, I would reverse and remand this case to the trial court for separate trials.

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