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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001086-MR

HERMAN STEIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 02-CI-003133

BELLARMINE UNIVERSITY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Herman Stein appeals from separate orders of the Jefferson Circuit Court awarding judgment to Bellarmine University, Inc., on Stein's breach of contract and age discrimination claims. Stein had been a tenured professor at Bellarmine until it terminated his employment from that position. We conclude that the circuit court properly awarded judgment in Bellarmine's favor, and we thus affirm.

Stein received his Ph.D. from Columbia University in New York, and he has a distinguished background in business. He

joined the faculty of the W. Fielding Rubel School of Business at Bellarmine University in Louisville, Kentucky, in 1985. He was awarded a tenured assistant professorship in 1988. Stein taught classes in the areas of management, policy, statistics, and finance.

Not long after Stein received tenure, the business school administration began to notice a drastic decline in his scholarly output. During the last four years of his employment at Bellarmine, the administration documented additional issues regarding Stein's teaching, service, and scholarship.

Starting in the 1997-98 academic year, Stein began to receive very poor marks by the Chair of the business department and by his students. His teaching became a significant concern to the administration. Dean Edward Popper documented reports of disrespectful and harmful remarks by Stein toward his students. In later academic years, the Chair of the business department, Dr. Michael Mattei, documented similar incidents. One report alleged that Stein rudely refused to help students with class assignments and another alleged that Stein called a student "stupid" in front of the class. By the end of the 2000-2001 academic year, Stein was being mentioned by name as a glaring weakness of the business department by almost one-fourth of the students who submitted answers to surveys. No other faculty members were mentioned by name in the surveys' answers.

On April 4, 2001, Dr. John Oppelt, the Provost of Bellarmine, sent Stein a letter confirming his continued appointment as a tenured assistant professor. Shortly thereafter, in response to student complaints, lack of scholarship, and other problems, Dr. Mattei recommended to Dean Dan Bauer that Stein's tenure and employment be terminated. After reviewing Dr. Mattei's report, Dean Bauer concurred and sent a memo to that affect to Provost Oppelt on July 19, 2001.

Provost Oppelt sent Stein a letter dated July 31, 2001, informing him that the 2001-2002 academic year would be his last at Bellarmine. Provost Oppelt said that the action to terminate Stein's tenure was being taken in accordance with Sections 7.4.6.2 and 7.4.5 of the Faculty Handbook. As a condition to his employment for the 2001-2002 academic year, Stein was required to attend anger management therapy and required to assist his students in a positive manner.

On August 13, 2001, an attorney notified Provost Oppelt by letter that Stein had retained his firm as counsel regarding Stein's termination. The letter said, in pertinent part, as follows:

> We have been retained as attorneys for Dr. Herman C. Stein. He is in receipt of your letter of July 31, 2000 and certainly disagrees with the content of that letter. Under Bellarmines [sic] Procedure Book 7.4.7.1 we are hereby formerly [sic] beginning the informal resolution procedures

> as set out in that section. Please contact the undersigned so we can begin this first step in the grievance policy.

Lynn Bynum, Director of Human Resources at Bellarmine, testified that a Rank and Tenure Committee hearing had been planned, but that it was cancelled due to Stein's attorney's request for the informal grievance process. Bynum testified that during her years at Bellarmine, neither a Rank and Tenure Committee hearing nor an informal grievance process had been initiated.

On November 12, 2001, Stein petitioned to initiate the formal grievance procedure under Section 7.4.7.2 of the Faculty Handbook. A grievance committee was convened, and a hearing was held in December 2001. Stein was allowed to present witnesses, question Bellarmine's witnesses, and have the assistance of Dr. Tom Bennett, who was appointed as Stein's faculty facilitator. The committee concurred with the recommendation of Dr. Mattei and Dean Bauer to terminate Stein. Stein then filed a civil complaint in the Jefferson Circuit Court, alleging breach of contract and age discrimination.

Stein alleged he was wrongly denied a Rank and Tenure Committee hearing. Bellarmine responded that Stein waived such a hearing when he invoked the grievance process, although no section of the Faculty Handbook so provides. After Stein's lawsuit was filed, Bellarmine offered to convene the Rank and Tenure Committee for a hearing to determine whether the

termination was for adequate cause. Stein did not accept the offer.

Stein subsequently filed a motion for summary judgment, and Bellarmine filed a cross-motion for summary judgment. In an order entered on June 17, 2003, the circuit court granted Bellarmine's motion for summary judgment on Stein's age discrimination claim, but it denied the motion as it related to Stein's breach of contract claim. After a bench trial, the court dismissed Stein's breach of contract claim in an order entered on May 11, 2004. This appeal by Stein followed.

BREACH OF CONTRACT CLAIM

Concerning the rejection of Stein's breach of contract claim by the circuit court after a bench trial, Stein alleges that the court made eight erroneous findings of fact. In cases tried upon the facts without a jury, the court's findings of fact "shall not be set aside unless clearly erroneous." CR[1] 52.01. This standard of review requires that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Id. A finding of fact is not clearly erroneous if it is supported by substantial evidence. See Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409,

[1] Kentucky Rules of Civil Procedure.

414 (Ky. 1998). "Substantial evidence is that which when taken alone or in light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men." Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972).

The first contested finding is that Bellarmine cancelled the review by the Rank and Tenure Committee because of a request from Stein's attorney for informal resolution procedures under Section 7.4.7.1. Stein points to the fact that Provost Oppelt wrote a memo to Dr. Margaret Mahoney, Chairperson of the Rank and Tenure Committee, after the letter had been received from Stein's attorney, conveying Stein's request for a Rank and Tenure Committee hearing. Thereafter, Dr. Mahoney responded with suggesting dates for the hearing. Stein argues that his attorney's letter could not have caused Bellarmine to cancel the Rank and Tenure Committee hearing because Provost Oppelt's memo was written after the request for informal review.

On the other hand, Lynn Bynum testified that at the time the letter was received, the process for convening a Rank and Tenure Committee hearing was underway pursuant to Section 7.1.1.5. Once Stein's request for informal resolution was received, the Rank and Tenure Committee hearing process was halted. Bynum further testified that there was a significant

amount of confusion as to how to proceed after Bellarmine received Stein's request.

We conclude there was substantial evidence to support the court's finding that the Rank and Tenure Committee process was cancelled due to the receipt of the letter from Stein's attorney. The letter referenced Section 7.4.7.1 of the policy handbook which "provides for an informal resolution when a faculty member, whether full-time, tenured, or tenure-track, has a grievance based on an administrative decision." Pursuant to this specific request by Stein through his attorney, and considering Bynum's testimony concerning the confusion as to how to properly proceed when an informal resolution process was requested rather than a Rank and Tenure Committee hearing, we conclude there was substantial evidence to support the court's finding as to why Bellarmine cancelled the Rank and Tenure Committee hearing.

Second, Stein disputes the court's finding that he elected to invoke the grievance procedure. He asserts that he was not given the option of deciding between a resolution of his grievance by a grievance committee or by the Rank and Tenure Committee. We conclude that the court's finding was supported by substantial evidence in the form of the letter from Stein's attorney as well as Stein's petition to initiate the grievance procedure.

Third, Stein challenges the court's finding that the policy handbook contained no guidance as to the type of hearing to be commenced in the case of an involuntary termination of employment. He asserts that the handbook clearly provides for a hearing before the Rank and Tenure Committee. However, the handbook also provides that grievances may be addressed by a grievance committee if a petition is filed by the faculty member. Stein filed such a petition.

Although the handbook provided for a Rank and Tenure Committee hearing, Stein requested that his grievance be addressed by the grievance committee, as evidenced by the petition he filed. He did not request a Rank and Tenure Committee hearing. It is true, as found by the trial court, that the handbook provided no guidance under these circumstances. Therefore, we conclude that there was substantial evidence to support this finding.

Fourth, Stein challenges the court's finding that he asked for a hearing before the Rank and Tenure Committee only after he had been unsuccessful before the grievance committee. He points to several memos that he claims are evidence of his request for a Rank and Tenure Committee hearing. However, the words "Rank and Tenure Committee hearing" do not appear in any of those requests. Stein further asserts that he challenged the jurisdiction of the grievance committee before it heard any

testimony and made a decision. Although Dr. Bennett made some mention of a Rank and Tenure Committee hearing immediately prior to the hearing before the grievance committee, we conclude there was substantial evidence to support the court's finding that Stein did not request a Rank and Tenure Committee hearing until after he had received an adverse decision by the grievance committee.

Fifth, Stein argues that the court erred when it found that Bellarmine did not dispute the language of the handbook and attempted to follow the handbook guidelines. Based upon the testimony by Bynum and Provost Oppelt, the court had substantial evidence to support its finding that Bellarmine was prepared and ready to conduct a Rank and Tenure Committee hearing for Stein in accordance with the handbook, but that it ceased those efforts when Stein's attorney requested the grievance process.

Sixth, Stein challenges the court's finding that "[n]othing could be clearer to the Court [than] that Dr. Stein had a choice of remedies available, and he chose the more informal route of the Grievance Procedure." As we have noted above, we agree with the court's finding that the policy handbook provided Stein with the option of having his grievance handled by a grievance committee rather than by the Rank and Tenure Committee.

Seventh, Stein states that the court's finding that Bellarmine offered him a hearing before the Rank and Tenure Committee after he filed his suit should not have been considered. He asserts that this offer of such a hearing was not a "bona fide" offer because it was made after suit had been filed and was thus in violation of Supreme Court Rule 3.130, Rule of Professional Conduct 4.2. We agree with Bellarmine that there is nothing in the rule that prohibits the parties from contacting each other. Because the offer was made to Stein by Provost Oppelt, we find no error in this regard.

Eighth, Stein challenges the court's finding that he received sufficient notice of his pending termination. He maintains that the notice of termination provided to him by Bellarmine fell short of the notice requirements by approximately two months. He states that "[i]t is mathematically impossible for a notice given on July 31, 2001, to provide the 12 months notice required by the handbook on a contract already issued and scheduled to expire on May 15, 2002."

Provost Oppelt testified that a contract letter is a contract for a professor who typically teaches nine months. Thus, the contract is viable from August 15 to May 15, but the appointment to the position is viable from August 15 to August 15, the next contract date. Oppelt further testified that

because he considered Stein's termination to be August 15, 2002, Stein had received the proper notice. We conclude that this testimony constituted substantial evidence to support the court's finding.

In addition to the eight aforementioned fact-findings challenged by Stein, he also challenges the court's determination that he waived his right to a Rank and Tenure Committee hearing by electing to pursue the grievance process. He argues that he did not waive the right to be heard by the Rank and Tenure Committee and that he was never given a choice between having a hearing before the Rank and Tenure Committee or the grievance committee. He asserts that "[t]herefore, no election could have occurred."

The circuit court cited Brown v. Diversified Decorative Plastics, LLC, 103 S.W.3d 108, 113 (Ky.App. 2003), and held that because Stein knew there were two modes for redress for his termination, he waived his right to a Rank and Tenure Committee hearing when he chose the grievance process. As noted by Bellarmine in its brief, the two modes of redress were provided in the handbook. We agree with Bellarmine that Stein was aware of his rights and options under the provisions of the handbook and that there was nothing therein imposing a duty upon Bellarmine to affirmatively inform Stein of his various options.

In connection with this argument, Stein also contends that he attempted to withdraw his grievance from consideration by the grievance committee before there was an adjudication of his claim. He argues that this fact is "inharmonious with the finding in Brown because Dr. Stein made a timely attempt to withdraw before a final determination was made." As noted by Bellarmine, however, the withdrawal of the claim must be "without prejudice." Brown, 103 S.W.3d at 113. Because the grievance committee had been convened and all parties were present and ready to conduct the hearing, we conclude that Stein's attempted withdrawal at this point would not have been "without prejudice." In short, we conclude that the court did not err in its finding.

AGE DISCRIMINATION CLAIM

Prior to the bench trial on the contract claim, the circuit court granted Bellarmine's summary judgment motion on Stein's age discrimination claim. Stein argues that the court erred in denying his summary judgment motion and in granting Bellarmine's motion. CR 56.03 provides in part that "[t]he judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and any 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."

"The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor." Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky.App. 2004). "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue de novo because only legal questions and no factual findings are involved." Id. The standard of review of the appellate court is to determine whether the trial court erred by concluding that there were no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

The standard of review for a summary judgment in an age discrimination case is different from the usual summary judgment standard. "Rather than requiring that the pleadings and depositions foreclose the possibility that plaintiff can prove a case at the time of trial, the special rule for age discrimination summary judgments is whether the plaintiff has proof of 'cold hard facts creating an inference showing age discrimination was a determining factor' in the discharge." Harker v. Fed. Land Bank of Louisville, 679 S.W.2d 226, 229 (Ky. 1984).

KRS[2] 344.040(1) prohibits employment discrimination based on age (among other things). "[I]t is accepted practice to look to federal case law construing Title VII in construing KRS 344." Brewer v. Hillard, 15 S.W.3d 1, 10 (Ky.App. 1999).

The only "cold hard fact" that Stein cites in support of his age discrimination claim is his testimony that Provost Oppelt stated to him, "[i]sn't it about time you retired?" Citing Peters v. Lincoln Elec. Co., 285 F.3d 456, 478 (6th Cir. 2002), Stein argues that this comment supports an inference showing that age discrimination was a determining factor in his discharge.

The circuit court held that "[o]ne remark by one Bellarmine administrator about retiring will not suffice" to create an inference that Stein was discharged due to his age. We agree. The circuit court correctly determined that Stein's opinion that this was a "retire or be fired" situation was not supported by any evidence. In short, we agree with the court that summary judgment in favor of Bellarmine on Stein's age discrimination claim was appropriate because Stein failed to present "cold hard facts" to support the claim.

The orders and judgment of the Jefferson Circuit Court are affirmed.

[2] Kentucky Revised Statutes.

ALL CONCUR.

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