

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000280-MR

PHILIP D. OVERSTREET

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 97-CI-03124

THE LEXINGTON-FAYETTE URBAN COUNTY  
GOVERNMENT

APPELLEE

### OPINION AFFIRMING

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BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

DIXON, JUDGE: Philip Overstreet appeals the Fayette Circuit Court's order granting summary judgment in favor of the Lexington-Fayette Urban County Government ("LFUCG"). After reviewing the record on appeal, we affirm.

Overstreet graduated from high school in 1981 and joined the Army in 1982. He completed a four month program at the United States Department of Defense Mapping School and worked as a construction surveyor for the Army. At the conclusion

of his military service, he worked as a civil draftsman at three different engineering firms and took classes in architectural technology at the Lexington Technical Institute.

Overstreet was hired by the LFUCG's Department of Engineering as an Engineering Technician II on July 27, 1989.

In September 1997, Overstreet filed a lawsuit in Fayette Circuit Court alleging the LFUCG engaged in race discrimination in violation of the Kentucky Civil Rights Act.<sup>1</sup> Although he was still employed by the LFUCG at the time, Overstreet alleged his superiors discriminated against him by systematically hiring or promoting Caucasian applicants who were less qualified than Overstreet. He contended the alleged discrimination prevented him from earning a higher wage and receiving better benefits. Overstreet's complaint also raised claims of breach of contract (Count II), breach of covenant of good faith and fair dealing (Count III), and fraud, deceit, and misrepresentation (Count IV). The LFUCG filed an answer denying Overstreet's allegations on September 12, 1997.

Thereafter, Overstreet moved the court for class action certification, which the court denied on December 11, 1997. On August 13, 1998, on the LFUCG's motion, the court dismissed Counts II - IV of Overstreet's complaint on grounds of sovereign immunity.<sup>2</sup> The only remaining claim was Overstreet's allegation of race discrimination.

On November 12, 1998, the court granted Overstreet leave to file an amended complaint setting forth grounds for class action certification. Subsequently,

<sup>1</sup> Kentucky Revised Statutes (KRS) Chapter 344.

<sup>2</sup> These claims are not at issue in this appeal.

upon Overstreet's renewed motion for class certification, the court again denied class action status. However, the court issued an order on May 6, 1999, requiring the LFUCG to provide class-wide discovery so Overstreet had the opportunity to establish the viability of a class action.

On September 30, 2002, the LFUCG moved for summary judgment on the remaining race discrimination claim. On May 13, 2003, Overstreet made a third motion for class certification, which was denied by the trial court. After two years of inaction, Overstreet filed a motion objecting to the LFUCG's request for summary judgment. The court ultimately granted summary judgment on July 22, 2005, and denied Overstreet's subsequent motion to alter, amend or vacate the order.

Overstreet now contends the court erred by granting summary judgment in favor of the LFUCG because genuine issues of material fact exist regarding his race discrimination claim. He also claims the trial court incorrectly applied the law to the facts of his case, and the court erred by denying leave to amend his complaint. Finally, Overstreet argues it was reversible error to deny class action certification.

### **Standard of Review**

To prevail on a motion for summary judgment, the movant must “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.” Ky. R. Civ. P. (CR) 56.03; *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). “Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for

summary judgment be granted.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

## I.

Overstreet contends he was discriminated against because he was passed over for three different positions for which he applied within the LFUCG Department of Engineering. The LFUCG contends, however, that summary judgment was proper as to this claim because Overstreet was unable to establish a *prima facie* case of race discrimination.

Under the Kentucky Civil Rights Act, it is unlawful for an employer “[t]o fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race. . . .” KRS 344.040(1). First, to establish a *prima facie* case of race discrimination, the movant must show: “(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 Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). Second, if the

movant establishes discrimination by a preponderance of the evidence, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.” *Id.* Finally, if the employer articulates a legitimate race-neutral basis for the rejection, the movant must show that the employer's rationale is actually pretext for discrimination. *Id.* at 804, 93 S. Ct. at 1825.

In the case at bar, Overstreet applied for three positions within the Department of Engineering and each position was filled by a Caucasian male. We first note, as a minority applicant, Overstreet satisfied the first element of his *prima facie* case. The trial court, however, found that Overstreet could not prove he was objectively qualified for the positions.

On appeal, Overstreet contends there are genuine issues of material fact regarding the LFUCG's evaluation process. He also claims the trial court erred by failing to consider the LFUCG's analysis of an applicant's “training and experience.”<sup>3</sup> Overstreet specifically argues a question of fact exists as to whether his civil engineering experience outweighs the work experience and education of the successful applicants. We disagree.

In our view, the crux of this analysis is that each of the successful applicants held, at minimum, a bachelor's degree in a field related to engineering, while Overstreet obtained four months of training in the Army in addition to technical school classes. Of the job descriptions produced in evidence, each required at least a bachelor's degree and

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<sup>3</sup> The record on appeal refutes this assertion. During the hearing on Overstreet's motion to alter, amend or vacate, the court engaged in a lengthy discussion with Overstreet's attorney regarding the evaluation process utilized by the LFUCG.

supervisory management experience. It is apparent that Overstreet was objectively unqualified for the positions.

After considering all of Overstreet's arguments and reviewing the voluminous record on appeal in a light most favorable to Overstreet, we conclude he is unable to meet the burden of establishing a *prima facie* case of discrimination as a matter of law. As there are no genuine issues of fact relating to Overstreet's race discrimination claim, summary judgment was appropriate.

## **II.**

In Overstreet's second claim of error, he contends the trial court failed to consider all of the facts and properly apply the law to his claims. He again argues about the qualifications of the successful candidates and hiring policies of the LFUCG. Based upon our review of the record, Overstreet's assertions are merely subjective personal beliefs without evidentiary support. Accordingly, we find the court properly considered all of the evidence before granting summary judgment.

## **III.**

In his third assignment of error, Overstreet contends the trial court abused its discretion by denying him leave to file a second amended complaint. He argues that CR 15.01 mandates that leave to amend a complaint should be freely granted when justice so requires. However, Overstreet fails to cite the record on appeal as to when his motion to amend was made and the grounds warranting amendment. We note that in the order denying Overstreet's motion to alter, amend or vacate, the court stated, "Overstreet's

claim that he is entitled to amend his complaint to include subsequent discrimination and retaliation is a new cause of action and it is improper at this juncture to amend his complaint based on a hostile work environment.” Although our review is hampered by Overstreet's failure to cite the record, it appears the trial court did not abuse its discretion by denying leave to file a second amended complaint, especially considering the length of time this case had been pending in circuit court. *See Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 8 (Ky. 1972).

Overstreet also contends the court committed reversible error by summarily disposing of two pending claims without a formal ruling. We disagree.

Overstreet alleges the trial court neglected to address his claims of discrimination based on a racially hostile work environment and discrimination based on “failure to train.” Neither of these claims were raised in Overstreet's complaint or amended complaint. Likewise, Overstreet does not provide any citation to the record on appeal for this Court to review when and how these claims were actually presented to the trial court. As such, we decline to further address these issues.

#### IV.

In his final argument, Overstreet claims the court abused its discretion by denying class action certification. However, since there are no issues of material fact and summary judgment was proper, we find the court's denial of class certification moot. *See Long Run Baptist Ass'n, Inc. v. Louisville and Jefferson Co. Metro. Sewer Dist.*, 775 S.W.2d 520, 524 (Ky. App. 1989).

For the reasons stated herein, the order of Fayette Circuit Court is affirmed.

ALL CONCUR.

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