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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000066-MR

JOHN HENRY ADAMS; GEORGE A. ELLIS, JR.; ROBERT RELFORD; AND JAMES E. LYONS — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 97-CI-00542

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; ROBERT M. CLARK; AND JOHN TURNER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: John Henry Adams, George A. Ellis, Jr., Robert Relford, and James E. Lyons appeal from the Fayette Circuit Court's judgment pursuant to

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

a jury verdict dismissing Adams' claims for racial discrimination and retaliatory employment practices against Lexington-Fayette Urban County Government (LFUCG) and Robert Clark. For the reasons stated herein, we affirm.

In 1981, Adams was hired as an employee of LFUCG and assigned to the Division of Building Maintenance and Construction (BMC) as a painter. Sometime later, Adams began experiencing what he believed to be racially-motivated abusive treatment by his supervisor, BMC Director Robert Clark. After Adams brought his concerns about Clark's abusive conduct to Julius Berry, an administrative aide to the mayor, Berry initiated an investigation of the BMC.

On September 7, 1994, Julius Berry issued a report, the "Berry Report," to Sam Dunn, a LFUCG employee, which documented numerous allegations of discriminatory acts committed by Clark against BMC employees, including claims of racism, favoritism, and cronyism. At the conclusion of the report, Berry recommended that Clark's employment be terminated for official misconduct.

Subsequently, on May 24, 1995, Adams filed a complaint with the Lexington-Fayette County Human Rights Commission and the Equal Employment Opportunity Commission. Adams alleged that LFUCG had committed unlawful employment practices by discriminating against him in violation of Kentucky Revised Statutes (KRS) 344 and Chapter VII of the Civil Rights Act of 1964.

Following his complaint, Adams' attendance at supervisors' meetings was discontinued which he believed was retaliation for filing the complaint.

Additionally, according to Adams, during 1995, he was subjected to constant harassment and was denied advancement opportunities that were freely provided to lesser qualified Caucasian employees.

Responding to Adams' and other employees' numerous complaints, LFUCG hired Robert Roark, an attorney, to investigate the allegations of misconduct regarding Clark's leadership at the BMC. After his investigation, Roark drafted a letter to Clark which was signed by then Mayor Pam Miller on October 23, 1995. The letter listed Clark's alleged infractions and mentioned that several employees believed Clark had engaged in racially discriminatory employment practices.

In December 1995, Roark drafted a complaint to the Civil Service Commission in which LFUCG requested the termination of Clark's employment. The complaint was signed by Roark and Sam Dunn. Shortly after receiving the Mayor's letter and the filing of the Civil Service complaint, Clark resigned his position and ended his employment with LFUCG.

Subsequently, Clark filed a wrongful termination action against LFUCG and Sam Dunn. Roark drafted LFUCG and Dunn's answer to Clark's complaint and defended against the action in court. On November 4, 1996, LFUCG filed a motion for partial dismissal of Clark's action. Clark's action was dismissed on defendants' motion for summary judgment which was affirmed by this Court. *Clark v. LFUCG*, No. 1998-CA-000892-MR, (Ky.App. June 11, 1999).

On February 10, 1997, Adams filed a complaint against LFUCG and Robert Clark alleging that he was discriminated against in violation of KRS 344 on the basis of race, age, and/or disability. Additionally, citing KRS 344.280, Adams alleged that he was subjected to unlawful retaliation as a direct consequence of his decision to seek the vindication of his civil rights. George A. Ellis, Jr., Robert Relford, and James E. Lyons also filed racial discrimination actions against LFUCG and some of its employees.

Adams' and his three co-plaintiffs' cases were consolidated and the trial preparation for each case was conducted as if the cases would be jointly tried. After five years, on October 8, 2002, over the objection of the plaintiffs, the trial court issued an order severing each of the plaintiffs' cases from each other and set Adams' trial for June 23, 2003.

However, Adams' trial did not commence until February 27, 2006. During trial, Carolyn Smith, who worked with Adams at the BMC, testified that Clark was a "bad manager" and treated his employees poorly unless they were in his "inner-circle." She further testified that Adams had been excluded from the supervisors' meetings because of his disruptive behavior. Although Smith's trial testimony reflected that Adams had not been subjected to racial discrimination, her deposition testimony, conducted several years earlier, indicated that Adams had been subjected to racial discrimination by Clark. When asked to explain the differing positions, Smith testified that she could not remember giving the testimony contained in her deposition regarding Clark's racial motivations.

Regarding Adams' allegation that he was improperly forced to work in close proximity to James Hume, who had allegedly threatened to kill him, Smith testified that she was unaware of Hume's threat before she ordered Hume and Adams to work together. She further testified that she would have never knowingly ordered Adams to work under these conditions. When Hume testified, he stated that he had never threatened Adams' life or levied racial epithets against him.

Regarding Adams' allegation that he was transferred out of the BMC in a manner contrary to governmental policies, Wayne Wilson testified that Adams was transferred to the Division of Parks and Recreation because Adams had repeatedly indicated that he felt threatened at the BMC. Despite being transferred, Adams testified that he performed the same duties and received the same pay as he received at the BMC. At the conclusion of trial, the jury returned a verdict in favor of LFUCG and Dunn on every claim. This appeal followed.

Adams first contends that the trial court erred when it granted LFUCG's motion to sever Adams' and his co-plaintiffs' cases. Specifically, after having previously granted LFUCG's request to consolidate the plaintiffs' cases for a joint trial, the trial court severed the plaintiffs' cases into independent actions to be tried separately. Adams contends that the trial court's sudden reversal of its nine-year old consolidation order prejudiced his trial preparation because he had planned his strategy on the basis that the four cases would be tried simultaneously.

Accordingly, Adams contends that the trial court's decision to sever these cases was inappropriate, unfair, prejudicial, and warrants the granting of a new trial.

Kentucky Rules of Civil Procedure (CR) 42.02 provides that "[i]f the court determines that separate trials will be in furtherance of convenience or will avoid prejudice, or will be conducive to expedition and economy, it shall order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims or issues."

Furthermore, trial courts have broad discretion when ruling on severance motions pursuant to CR 42.02. *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339, 349 (Ky.App. 1982). A trial court abuses its discretion only when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

After reviewing the record, we conclude that the trial court did not abuse its discretion by ordering the severance of Adams' case from his three co-plaintiffs' cases. While Adams contends that the severance order was unfair and a surprise, the order was issued almost three years before his jury was impaneled. Thus, there was sufficient time for him to prepare his case for presentation to the jury. Accordingly, under the facts of this case, the trial court's severance order was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Adams, Ellis, Relford, and Lyons next contend that the trial court erred when it prevented further litigation by Ellis, Relford, and Lyons. However,

after reviewing the record, Ellis, Relford, and Lyons cannot seek relief through this appeal.

A party can only maintain an appeal from a judgment when he has been allegedly aggrieved or prejudiced by the judgment and can have his rights vindicated or grievances resolved in whole or in part by obtaining a reversal of the judgment. *Civil Serv. Comm'n v. Tankersley*, 330 S.W.2d 392, 393 (Ky. 1959). Moreover, even when a party is named in an action but not before the trial court, he cannot be a proper party to an appeal. *Moore v. Bates*, 332 S.W.2d 636, 638 (Ky. 1960).

Adams' co-plaintiffs' cases were severed and continued until Adams' case was adjudicated. While the severing of a trial is not a final order or judgment from which an appeal can be taken, Adams' co-plaintiffs were free to seek other appropriate relief from the trial court's ruling without prejudicing their right to have their cases tried on the merits. Therefore, as the parties stipulated during oral arguments, the appeals of Ellis, Relford, and Lyons, whose cases were not before the trial court for judgment, are dismissed because their litigation remains in the trial court for disposition.

Adams next contends that the trial court erred when it precluded the admission of several documents into evidence. First, he contends that the trial court erred by not admitting the entire Berry Report. The trial court ruled that any portion of the report that contained quotes, statements, or opinions of third parties would be excluded as inadmissible hearsay. Citing Kentucky Rules of Evidence

(KRE) 803(8) and *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), Adams contends that the report should have been admitted in its entirety under the public records exception to the hearsay rule.

KRE 803(8) provides the following:

> Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:
>
> (A) Investigative reports by police and other law enforcement personnel;
>
> (B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; and
>
> (C) Factual findings offered by the government in criminal cases.

The Berry Report clearly falls within the public records hearsay exception. It was created as a direct result of a fact-finding investigation properly authorized by law as provided in KRE 803(8). However, notwithstanding the public records exception to the hearsay rule, the individual entries of a public record do not become admissible simply because the document itself is admissible under the rule. *Prater v. Cabinet for Human Res.*, 954 S.W.2d 954, 958 (Ky. 1997).

"If a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a business or public record." *Id*. Therefore, when a report contains statements by out-of-court declarants, the statements of these individuals are excluded as hearsay within hearsay, i.e., "double hearsay," unless each statement conforms with an exception to the hearsay rule (e.g., in a report, a doctor's statements of a declarant's statements made for the purpose of medical treatment or diagnosis would be admissible pursuant to KRE 803(4)). *Id*. at 958-959.

Accordingly, the trial court properly excluded those portions of the Berry Report that contained third party statements because these statements constituted inadmissible "double hearsay." Adams did not offer any basis that the third party statements in question conformed to any of our recognized exceptions to the hearsay rule. Despite Adams' contention, the public records exception cannot be used as a license to obtain the carte blanche admission of every statement contained in a public record.

Adams next contends that the trial court erred by excluding LFUCG's answer and motion for partial dismissal filed in the Clark wrongful termination case. The trial court ruled that these two documents were inadmissible because they were merely repetitive, duplicative, and redundant to other documents previously admitted into evidence, namely Mayor Miller's letter and LFUCG's Civil Service complaint against Clark. Adams contends that LFUCG's answer and motion for partial dismissal constituted judicial admissions that one of its directors

had engaged in racial discrimination. Additionally, Adams contends that the documents were admissible as statements against party interest and were not cumulative.

A judicial admission has been defined as "'a formal act done in the course of judicial proceedings which waives or dispenses with the necessity of producing evidence by the opponent and bars the party himself from disputing it.'" *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 380 (Ky. 1992). Judicial admissions should be narrowly construed and must be deliberately and unequivocally made under circumstances that greatly minimize the probability that the admission was a mistake. *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 448 (Ky.App. 2006). Additionally, judicial admissions are not favored when the source of the alleged judicial admission is a separate lawsuit involving some, but not all, of the parties to the current litigation. *Goldsmith*, 833 S.W.2d at 380.

LFUCG's answer and motion for partial summary judgment were not judicial admissions of its discrimination against Adams. The unverified answer and motion were defenses to Clark's wrongful termination allegation in which LFUCG asserted every possible legal justification for his firing. Under the circumstances, its answer and motion for partial dismissal cannot be deemed a judicial admission that it, vicariously through Clark, engaged in discriminatory employment practices.

Adams further contends that the documents constituted statements against party interests, because they implicated a LFUCG director in racially discriminatory employment practices. We disagree.

KRE 804(b)(3) provides, in pertinent part, that "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil ... liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." While Adams contends that the two documents should have been admitted under KRE 804(b)(3), the statements contained in the documents were not so contrary to LFUCG's interests, at the time the statements contained in the documents were made, that they fall under the purview of the rule.

We likewise reject Adams' contention that these documents contained non-cumulative evidence. KRE 402 provides that all relevant evidence is admissible, except when constitutional, statutory, or court rule provides otherwise, and irrelevant evidence is inadmissible. "Nevertheless, evidence, although relevant, may be excluded if its probative value is substantially outweighed by considerations of waste of time or needless presentation of cumulative evidence, particularly in a setting calculated to be embarrassing to the witness." *Ford Motor Co. v. Zipper*, 502 S.W.2d 74, 78 (Ky. 1973).

When a trial court makes rulings on the admission of evidence, it is well established that these rulings will not be disturbed absent an abuse of

discretion. *Commonwealth v. King,* 950 S.W.2d 807, 809 (Ky. 1997). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English,* 993 S.W.2d at 945.

We conclude that the trial court did not abuse its discretion when it excluded the answer and motion for partial summary judgment. Similar to the answer and motion, the Mayor's letter and LFUCG's Civil Service complaint each indicated that Clark had engaged in disparate and unequal treatment of BMC employees. Thus, the contents of all of these documents were very consistent; and, thus, the exclusion of the answer and motion for partial summary judgment due to its cumulative nature was not an abuse of discretion.

Adams next contends that the trial court erred when it failed to admit LFUCG's answer to impeach Sam Dunn. Because the answer was filed on behalf of LFUCG and Dunn, Adams contends that he should have been allowed to impeach Dunn's trial testimony when he denied that the Civil Service complaint was filed partly due to Clark's racially discriminatory treatment of African-American employees.

KRE 801A(a)(1) permits the admission of a prior inconsistent statement of a witness if the witness' trial testimony is inconsistent with the prior out-of-court admission as long as a proper foundation is laid pursuant to KRE 613. *Gray v. Commonwealth*, 203 S.W.3d 679, 686-687 (Ky. 2006). When Adams attempted to introduce the answer against Dunn for impeachment, the trial court

ruled that the document was inadmissible to impeach Dunn because he did not prepare nor verify the answer.

We believe that the trial court did not abuse its discretion by excluding the answer for the purpose of impeaching Dunn. Although Dunn was a defendant in the Clark action with LFUCG, counsel solely prepared and signed the answer. Therefore, when Dunn denied that the Civil Service complaint was based partly on Clark's alleged racially discriminatory conduct, Dunn could not be impeached by the unverified answer.

Adams next contends that the trial court erred when it failed to direct a verdict in his favor. We disagree.

When ruling on a motion for directed verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the nonmoving party and must provide the nonmoving party every favorable and reasonable inference which can be drawn from the evidence. *Lovins v. Napier,* 814 S.W.2d 921, 922 (Ky. 1991). The trial court is precluded from granting a directed verdict unless there is a complete absence of proof on a material issue in the case or if no disputed issue of fact exists on which reasonable men could disagree. *Taylor v. Kennedy,* 700 S.W.2d 415, 416 (Ky.App. 1985).

When a plaintiff alleges that he has been subjected to illegal employment discrimination based on race, in the absence of direct evidence of discriminatory intent, a plaintiff must satisfy the burden shifting test of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Under this test, a plaintiff can establish a *prima facie* case of discrimination by showing that (1) he is a member of a protected class; (2) he was subjected to an adverse employment decision; (3) he was qualified for the position; and (4) that "similarly situated non-protected employees were treated more favorably." *Peltier v. United States,* 388 F.3d 984, 987 (6th Cir. 2004); *Kirkwood v. Courier-Journal*, 858 S.W.2d 194, 198 (Ky.App. 1993).

If the plaintiff succeeds in establishing a *prima facie* case of racial discrimination, "the burden then shifts to the employer to articulate a 'legitimate nondiscriminatory' reason for its action." *Turner v. Pendennis Club*, 19 S.W.3d 117, 120 (Ky.App. 2000), citing *Texas Dept. of Cmty. Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). "Finally, should the employer be able to provide a 'legitimate nondiscriminatory' reason for not hiring the plaintiff, the plaintiff bears the burden of showing by a preponderance of the evidence that the 'legitimate reason' propounded by the employer is merely a pretext to camouflage the true discriminatory reason underlying its actions." *Id*.

We conclude that the trial court did not err when it denied Adams' motion for a directed verdict. Taken in the light most favorable to LFUCG, both Carolyn Smith and David Wallace testified that Clark was simply a bad supervisor who poorly treated most of his employees regardless of race. They further testified that Clark showed special favor to some employees, including African-Americans.

Adams further contends that Jim Hume repeatedly antagonized him with racial epithets, yet his supervisors failed to prevent such abusive treatment.

However, Hume denied making derogatory remarks against Adams, and Adams testified that he never heard Hume make such remarks. Specifically, with regard to being called a "boy," which Adams viewed to be racially demeaning, Hume testified that he made a statement to a group of men, including Caucasians and African-Americans, in which he said, "Boys, get to work."

Further, there was testimony that Adams was not transferred from BMC for racial reasons but because he had expressed safety concerns. With respect to Adams' contention that he was prevented from attending the supervisors' meeting, Smith testified that he was prohibited from attending because of his disruptive conduct. Thus, it was not unreasonable for the jury to find that Clark engaged in unequal employment practices but that the motivating factor was not the race of his employees and that Adams was not subjected to retaliation.

Accordingly, after reviewing the evidence before the jury in a light most favorable to LFUCG, the trial court did not err by denying Adams' motion for a directed verdict because LFUCG articulated "legitimate nondiscriminatory" reasons for the actions regarding Adams. The evidence was also sufficient to support the jury's finding that Adams was not subjected to unlawful retaliation.

Adams next contends that the trial court erred by providing the jury with inadequate and defective instructions. He contends that Instruction No. 1 required the jury to find that he had suffered a materially adverse change on the level of a demotion or job termination. Adams argues that this evidentiary standard is higher than what is required under Kentucky law for demonstrating a

materially adverse change. He further argues that Instruction No. 1 improperly required that he prove that his race was the basis for the adverse action taken against him rather than a motivating factor in Clark's decision to engage in discriminatory acts against him. He further contends that Verdict Form No. 1A should not have included a fill-in-the-blank line for the jury to state the materially adverse changes that Adams was subjected to if they found discrimination.

In Instruction No. 1, the jury was informed the following:

> ...only if you are satisfied from the evidence that Adams suffered a materially adverse change(s) in the terms or conditions of his employment based upon his race during the period from May 20, 1990 through September 1, 2002, and Adams' race was a motivating and determining factor in LFUCG's adverse action taken against him....A materially adverse change(s) would be indicated by termination of employment, a demotion evidence by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Pursuant to the instruction, Adams was not required to establish that he was demoted or terminated. The instruction listed several other examples of impermissible material changes, including a decrease in wage or salary, a less distinguished title, or a material loss of benefits. Moreover, the language of Instruction No. 1 was approved as permissible in *Hollins v. Atlantic Co.,* 188 F.3d 652, 662 (6th Cir. 1999).

Next, Instruction No. 1 did not require that Adams prove that his race was the sole factor for any materially adverse change. Adams had to prove only

that his race was a motivating and determining factor for why LFUCG engaged in adverse actions against him. In "mixed motive" cases, which involve factors beyond those prohibited by law, a jury can be instructed that the plaintiff must prove that "but for" her protected classification (i.e., race, gender, age, etc.) she would not have been subjected to the materially adverse action. *Meyers v. Chapman Printing Co.,* 840 S.W.2d 814, 823 (Ky. 1992). Therefore, because the instruction essentially required that the jury find that Adams' race was a "but for" cause for LFUCG's adverse actions, Instruction No. 1 properly conformed to Kentucky law.

Regarding Adams' contention that Verdict Form No. 1A and other forms contained an impermissible fill-in-the-blank section, we note that Kentucky law mandates that juries be provided "bare bones" instructions in all civil cases. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). Instead of instructing juries on detailed statements of law, Kentucky jury instructions should provide only the essential legal elements and permit counsel to flesh them out during their closing arguments. *Bayless v. Boyer*, 180 S.W.3d 439, 450 (Ky. 2005).

Although we encourage trial courts to give simplistic jury instructions whenever possible, the fill-in-the-blank instruction forms, requiring the jury to state what materially adverse actions were taken against Adams, were not impermissible. By the use of interrogatories, Kentucky juries on occasion are requested to make specific findings of fact as required by jury instructions. *Hilsmeier v. Chapman*, 192 S.W.3d 340, 345 (Ky. 2006).

Adams next contends that Instruction No. 2 should have contained a vicarious liability instruction because the instruction as it was written left the jury with the misunderstanding that Clark's and his fellow employees' actions were not the responsibility of LFUCG. Adams contends that the failure to include a vicarious liability instruction created ambiguity as to whether LFUCG could be held responsible for its employees' discriminatory actions.

Further, Adams contends that the trial court's use of heavily defense oriented instructions regarding his claim of a hostile workplace did not comport with the hostile workplace instructions approved by our Supreme Court in *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky. 2005). Adams also contends that the inclusion of an instruction stating the legal effect of off-duty conduct confused the jury as to where acts of discrimination took place.

After reviewing the record, Instruction No. 2 did not imply that LFUCG could not be held responsible for the conduct of its employees for their alleged discriminatory conduct. The instruction permitted the jury to find that Adams worked in a hostile and abusive work environment if Adams was subjected to racial harassment. There was nothing in the instruction that would imply that LFUCG had to give an order or, in any other way, actively participate in discriminatory acts at the upper levels of government. In conformity with our "bare bones" instruction rule, Adams was free to flesh this contention out during his closing argument.

The language of Instruction No. 2 does slightly deviate from the instruction that was approved in *Lumpkins*. *Id*. at 604-605. After providing that the jury should find for Adams if he worked in a hostile and abusive environment, Instruction No. 2 provides, in pertinent part, the following:

> In determining whether the work environment was hostile or abusive based on race, you may consider any of the following factors:
>
> a. the frequency of the conduct or behavior based on race;
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> b. the severity of the conduct or behavior based on race;
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> c. whether the conduct or behavior based on race was physically threatening or humiliating; or
>
> d. whether the conduct or behavior based on race unreasonably interfered with Adams' work performance.

Beyond the substitution of names, Instruction No. 2 inserted the phrase "based on race" throughout the instruction, which was not included in the *Lumpkins* instruction.

While Instruction No. 2 did state "based on race" several times unlike the *Lumpkins* instruction, Instruction No. 2 was not deficient or erroneous due to the additional phrase. Although jury instructions should not give undue prominence to certain facts or issues as stated in *Kavanaugh v. Daniels*, 549 S.W.2d 526, 528 (Ky.App. 1977), Instruction No. 2 simply restated the central issue of Adams' case rather than over emphasize a marginal or immaterial issue.

Adams further contends that the word "only" was improperly used in Instruction No. 2 when it was not used in the instruction in *Lumpkins*. However, although it was not in *Lumpkins*, we conclude that the word "only" found in Instruction No. 2 was permissible. Instruction No. 2 provides that Adams succeeds "only if you [the jury] are satisfied . . . that . . . Adams was subjected to racial harassment . . . ." The addition of the word "only," instead of the sentence merely stating "if you are satisfied," did not materially change the standard of what the jury was required to find. Regardless of the addition or omission of the word "only," the jury was instructed that they had to find for Adams if he was subjected to a hostile and abusive work environment.

Adams next contends that the trial court erred by including extraneous language in Instruction No. 2. At the end of Instruction No. 2, the paragraph provides that "[c]onduct outside of the workplace cannot create a hostile work environment unless such conduct is especially severe and pervasive and the plaintiff is required to continue working in close proximity to the person who has harassed him outside the workplace." Adams contends that this inclusion was improper because it tended to confuse the jury regarding the legal standards necessary to find discrimination.

The last paragraph in Instruction No. 2 echoes the statement of law provided in *Dowd v. United Steelworkers of America, Local No. 286*, 253 F.3d 1093, 1101-1102 (8th Cir. 2001). Although *Dowd* is not mandatory, Kentucky courts look to federal law for guidance in implementing the Kentucky Civil Rights

Act. *Tiller v. Univ. of Kentucky*, 55 S.W.3d 846, 849 (Ky.App. 2001). Further, the locations of the alleged acts of discrimination were clear from the evidence, and there is no indication that this instruction misled the jury.

Adams next contends that Instruction No. 4 improperly required him to prove that he suffered a "materially adverse change" in his employment in order to recover for retaliation and, thus, precluded his recovery for "severe and pervasive" retaliatory harassment. Consequently, he contends that the instruction was prejudicial because it improperly constricted what was illegal conduct.

In *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 132 S.W.3d 790 (Ky. 2004), the court held that a *prima facie* case of retaliation requires the plaintiff to establish: (1) he engaged in an activity protected under statutory law; (2) that the exercising of his civil rights was known by the defendant; (3) that, thereafter, an adverse employment action was taken against plaintiff by defendant; and (4) that the protected activity and the adverse employment action were causally connected. *Id*. at 803.

The Supreme Court stated that "[a] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id*. at 802.

Despite this definition, in *Brooks*, the court ruled that the plaintiff was subjected to objectively and subjectively humiliating treatment. *Id*. at 804. Further, the court held that the changes in the plaintiff's duties "subjected her to greater supervisory scrutiny, carried an imputed diminished level of trust, and marked an objective decrease in prestige. It was more than a *de minimis* employment action." *Id*. at 804. From the *Brooks* decision, it is clear that Instruction No. 4, which was identical to the definition and rule of law adopted in *Brooks*, permitted relief for severe and pervasive humiliating retaliation which injures an employee's status.

Adams next contends that the trial court erred by failing to give the jury a "missing evidence" instruction. Specifically, Adams contends that LFUCG destroyed, lost, or fabricated documentation which could have determined whether its conduct was based on racially discriminatory motives. Adams further contends that LFUCG failed to produce the "Roark Report" file and tampered with the "Sam Dunn File." Accordingly, Adams contends that the trial court was required to give a "missing evidence instruction."

When deciding an issue regarding destroyed or missing evidence, trial courts can remedy the matter through evidentiary rules and "missing evidence" instructions. *Monsanto Co. v. Reed,* 950 S.W.2d 811, 815 (Ky. 1997). In making the determination of whether to give these instructions, trial courts should decide if the failure to produce the evidence "will substantially prejudice appellant's right to a fair trial." *Tinsley v. Jackson,* 771 S.W.2d 331, 332 (Ky. 1989). However, before

a "missing evidence" instruction can be given, there must be some intentional conduct to hinder discovery on the part of the party who is unable to produce the requested evidence. *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002).

Having viewed the videotaped trial testimony cited by Adams, we conclude that there was no evidence that LFUCG intentionally destroyed evidence favorable to Adams to prevent its use in his case. Adams has cited the testimony of four witnesses to establish that beneficial evidence had been destroyed: (1) Sue Boorman, a database administrator for LFUCG; (2) Timothy Bailey, a computer analyst for LFUCG; (3) Darrylyn Combs, an employment manager for LFUCG; and (4) Diane Wills, an employee of LFUCG Division of Human Resources.

These witnesses testified that a supervisor had suggested in the 1990's that LFUCG employees should shred records whenever possible to prevent their use against LFUCG in any potential future lawsuit. However, all employees did not comply with his request. Additionally, and most importantly, each of these witnesses testified that they had no personal knowledge of the destruction of documents regarding Adams' employment or his lawsuit against LFUCG.

Despite Adams' contention, there is no evidence that a "Roark Report" file exists. While he did create several documents, there is no evidence that a comprehensive report exists containing documents supporting Roark's findings. Further, Adams has not identified what evidence is missing from the "Sam Dunn File" and how he was substantially prejudiced by the missing

evidence. Accordingly, we conclude that the trial court did not err by denying Adams' request for a "missing evidence" instruction.

Adams next contends that the trial court failed to instruct that "disparate treatment" is legally equivalent to "discrimination." Specifically, because LFUCG created documents indicating that Clark had engaged in "disparate treatment," Adams contends that the trial court was required to instruct the jury that "disparate treatment" means "discrimination." Despite Adams' contention, the trial court's decision not to instruct the jury that "disparate treatment" equates to "discrimination" was proper.

"Discrimination" in the context of this case constituted illegal employment practices. "Disparate treatment" as defined by LFUCG constituted Clark's differing treatment of employees based on cronyism while Adams defined the term as illegal discrimination. With this in mind, it was proper for the trial court to exclude Adams' requested instruction and allow Adams to "flesh out" whether LFUCG's "disparate treatment" of employees constituted illegal discrimination.

The final issues we address concern Roark's representation of LFUCG. The trial court denied Adams' request that LFUCG produce a report purportedly authored by Roark following his investigation of the allegations of discrimination regarding Clark, denied his request to call Roark as a witness, and refused to disqualify him as counsel.

Both Adams and LFUCG cite two separate prior opinions of this Court as binding on the present appeal. Adams contends that our unpublished decision in *Clark v. LFUCG*, 46 K.L.S. 9, 14 (1999), wherein we stated that "Roark was subject to being deposed on the basis of his investigation" precludes the present Court from affirming the trial court. LFUCG asserts that our denial of Adams' motion for CR 76.36 relief following the trial court's denial of his motion to disqualify Roark and the production of his investigative report precludes further review of the issues.

The arguments of both are advanced pursuant to the doctrine of *res adjudicata* which bars relitigation of causes of action and of facts or issues previously litigated as to the parties and their privies in all other actions in the same or other judicial tribunal of concurrent jurisdiction. *Yeoman v. Com. Health Policy Bd.,* 983 S.W.2d 459, 464 (Ky. 1998). Neither Adams nor LFUCG present the requisites necessary for the application of *res adjudicata* or its counterpart, issue preclusion. *Id*.

The Clark litigation was a wrongful termination action to which Adams was not a party; thus, there is no identity of the parties. LFUCG cannot rely on this Court's denial of Adams' *writ of mandamus* because it was not a decision on the merits. Our decision was premised on the nature of the relief requested and our conclusion that Adams had an adequate remedy by appeal and, thus, could not establish the need for the extraordinary relief requested. Consequently, we reject both contentions and consider the issues presented.

LFUCG denies that Roark retained a file regarding his investigation or that he authored a document containing the details of his investigation and the conclusion reached. Adams' contrary contention is based on his assumption that Roark has possession of the documents sought rather than any proof that the documents exist. However, even if we accept Adams' assumption as correct, we conclude that the documents sought are not discoverable.

The attorney-client privilege is a long-standing common law concept that provides absolute protection from the disclosure of confidential communications made by or to a person advising with an attorney for the purpose of obtaining legal advice. *St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 775 (Ky. 2005). Thus, if the communications shared are not made in confidence to a lawyer for the purpose of obtaining legal advice, the communications are not shielded under the attorney-client privilege. *Sanborn v. Commonwealth*, 892 S.W.2d 542, 550 (Ky. 1994).

Documents and materials prepared in anticipation of trial are likewise shielded from discovery. CR 26.02(3); *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 805 (Ky. 2000). However, work product material is discoverable when a "party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CR 26.02(3).

Roark was hired by LFUCG to investigate the allegations of discrimination by Clark. Although in 1995, when Roark was hired to perform the

investigation, there was no pending litigation. The nature of the allegations caused LFUCG to reasonably believe that the aggrieved employees would file civil actions and, therefore, hired counsel to investigate. Under the circumstances, we conclude that any records or reports compiled as a result of Roark's investigation constitute work product. Any possible hardship caused to Adams was rectified by the trial court's order that required LFUCG to provide a list of the individuals interviewed during Roark's investigation permitting Adams to obtain the substantial equivalent of the information sought by deposing the individuals interviewed during the investigation.

The final issue we address is whether Roark should have been disqualified from representing LFUCG. For the reasons that follow, we affirm the trial court's refusal to disqualify Roark.

Adams contends that Roark was a necessary witness and, thus, was precluded from representing LFUCG at trial. The genesis of his contention is Rule 3.7 of the Kentucky Rules of Professional Conduct (Supreme Court Rule 3.130), which provides in part:

> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony related to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) Disqualification of the lawyer would work a substantial hardship on the client.

If, as Adams asserts, because of Roark's investigation of the claims of discrimination made by the LFUCG employees against Clark he was a necessary witness, his representation of LFUCG at trial would pose an ethical problem. However, our Supreme Court has expressly declined to equate ethical rules with evidentiary matters that are left within the discretion of the trial court. *Zurich Insurance Company v. Knotts,* 52 S.W.3d 555 (Ky. 2001). Further analysis is required.

The issue of attorney disqualification because of his or her potential as a necessary witness at trial arises in two contexts: When called as a witness by the client or when called by the opposing party. In the first situation, there is the question of prejudice to the opposing party while in the latter the focus is that incurred by the litigant represented by the attorney.

When opposing counsel is subpoenaed as a witness, courts have been cautious to scrutinize the reason for the subpoena so that ethical rules are not used as a weapon to disqualify opposing counsel. *See Taylor v. Grogan*, 900 P.2d 60 (Colo. 1995). Thus, courts are required to balance the right of a litigant to counsel of his choice against that of the opposing litigant's right to present his case. When counsel serves the duel function of witness and attorney, the commentary to Rule 3.7 suggests the following:

> [A] balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance of the lawyer's

> testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client.

SCR 3.130-3.7, Comment (4).

When considering the question of attorney disqualification, the court must anticipate the evidentiary issues that might arise as well as what impact the attorney's involvement with the case will have on the jury. The rule is designed to avoid public perception that the lawyer is distorting the truth or enhancing his or her own credibility and the confusion created by the role of advocate and that of a witness. *Zurich*, 52 S.W.3d at 558.

Although in *Zurich*, the Court expressly rejected the argument that the trial court is an enforcer of the Professional Code of Conduct, it vested the court with discretion to disqualify counsel. Yet, it added the caveat that because of the possible prejudice to the client, disqualification should be imposed only when absolutely necessary. *Id*. at 560. We now turn our attention to the present case.

The trial court refused to disqualify Roark as counsel. Adams contends that Roark's involvement in the underlying investigation was crucial to its case and, as a consequence, he was a necessary witness. With reservation, we affirm.

It is undeniable that Adams had access to the individuals interviewed during the investigation and the opportunity to depose those interviewed. Although Adams contends that Roark was a necessary witness to discern the scope

and substance of his investigation, he fails to allege what additional information could have been gained by Roark's testimony. There is no evidence that Roark had any specialized or personal knowledge that could not be gained from other sources.

Adams also makes the broad assertion that Roark's participation in Clark's dismissal from LFUCG cast him as a "liar" when, at Adams' trial, he asserted the defense that Adams was not discriminated against and, in closing argument, that the mayor's letter did not indicate racial discrimination. Under the circumstances where the attorney has actively participated in an investigation such as preceded the present action, opposing counsel and the trial court must be particularly astute and preclude counsel from "testifying" before the jury during opening and closing argument. If the attorney has misstated the testimony of the witnesses or goes outside of the record to corroborate his argument, upon proper objection by opposing counsel, the trial court should inform the jury of the correct testimony. *See Smith v. Wright*, 512 S.W.2d 943 (Ky. 1974).

However, having reviewed the record, we find no reason to believe that Roark was dishonest with the court concerning his participation in the investigation. He was a zealous advocate for his client. Again, we emphasize that disqualification is a drastic action taken only when absolutely necessary. *Id*. Accordingly, we can see no prejudice caused by the trial court's refusal to permit Adams to call Roark as a witness and its denial of Adams' motion to disqualify Roark.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed. The appeals of Ellis, Relford, and Lyons are dismissed because their litigations were not concluded or a part of the trial court's judgment in this appeal.

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