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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001464-MR

FREDERICK CLARKE; JACQUELINE K. SCHROERING; AND HARRY L. GREGORY, III — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 05-CI-010735

RIVERSIDE PAVING AND CONTRACTING, INC. — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE, ACREE AND VANMETER, JUDGES.

TAYLOR, CHIEF JUDGE: Frederick Clarke, Jacqueline K. Schroering, and Harry L. Gregory, III (collectively referred to appellants) bring this appeal from a February 4, 2010, judgment and a July 9, 2010, order of the Jefferson Circuit Court

awarding Clarke $6,000 in damages upon his civil rights claim under Kentucky Revised Statutes (KRS) 344.040 and awarding attorney's fees of $3,360 under KRS 344.450. We affirm in part, vacate in part, and remand.

Clarke was hired by Riverside Paving and Contracting, Inc. (Riverside Paving) on March 12, 2004. At Riverside Paving, Clarke worked mainly as a laborer and occasionally as an equipment operator. Riverside Paving was owned and operated by Carroll Swartz and his wife, Marilyn Swartz. Carroll terminated Clarke's employment with Riverside Paving on July 27, 2004.

Consequently, Clarke filed a complaint in the Jefferson Circuit Court against Riverside Paving alleging hostile work environment, wrongful discharge due to racial discrimination, and retaliation under the Kentucky Civil Rights Act (KRS Chapter 344). Clarke, an African-American, claimed his employment was terminated because of his race; Riverside Paving denied same.

The matter was tried by the circuit court without a jury under Kentucky Rules of Civil Procedure (CR) 52.01. Following a bench trial, the circuit court dismissed Clarke's claims for wrongful discharge and retaliation but found in Clarke's favor upon the hostile work environment claim. The court awarded Clarke $6,000 in damages upon the hostile work environment claim and awarded $3,360 in attorney's fees. This appeal follows.

As this case was tried by a court without a jury, our review proceeds under CR 52.01. Thereunder, the circuit court's findings of fact will not be disturbed on appeal unless clearly erroneous. A finding of fact is clearly erroneous

if not supported by substantial evidence of a probative value. *See Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). And, we review issues of law *de novo*. *See Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005).

Clarke contends that the circuit court erred by dismissing his claim for wrongful termination due to racial discrimination under KRS 344.040. Specifically, Clarke maintains that Riverside Paving improperly terminated his employment because he was African-American. He argues that the circuit court erroneously found that his termination was not due to racial motivation but due to an altercation that occurred between Clarke and Marilyn. Clarke argues that this proffered nondiscriminatory reason for his termination was merely pretextual and that the real reason for his termination was truly racial.

In its judgment, the circuit court observed that conflicting evidence existed concerning the altercation and reasons for Clarke's termination:

> Mr. Clarke also testified his next paycheck, on July 23, was incorrect. According to Mr. Clarke, he noticed on his way out of the office that he had been paid as a laborer for part of a day instead of as an operator for the entire day, and, therefore, he should have been paid a higher wage. Mr. Clark[e] testified that he told Charles Thomas "Tom" Smith, a white male employed by Riverside for 33 years who worked on Mr. Clarke's crew, and that Tom told him he should return to the office and inform [Marilyn]. Mr. Clarke testified that he told [Marilyn], "Miss Swartz, something's wrong with my check." He testified that she responded, "Boy, you been paid the way you're supposed to get paid because it's the way Carroll said to pay you." Mr. Clarke further testified that Joe "Papa Joe" Billups, an African-American male employed by Riverside for 35 years and who worked on Mr. Clarke's crew, was

standing nearby and confirmed to [Marilyn] that Mr. Clarke worked as an operator all day. According to Mr. Clarke, [Marilyn] responded, "Boy, I told you, you were paid half and half because that's the way Carroll told me to pay you." Mr. Clarke testified that he then became aggravated and raised his voice to [Marilyn] and said, "I work for you, you don't own me." He also told [Marilyn] that he felt it was bad enough that the workweek had ended on Wednesday that week and that the workers did not get paid until Friday. Mr. Clarke testified that [Marilyn] then said to him, "Boy, you are stupid. Get out of my office before I call the police." Mr. Clarke testified that he became upset and refused to be polite to [Marilyn] after she called him "stupid." He testified that he responded, "Go ahead, I will call the police, too," and, on his way out of the office, said, "I will call wage and hour and get my money." Mr. Clarke testified that he accidentally ripped his check on the door on the way out and [Marilyn] told him to stay away and not come back or she would call the police. Mr. Clarke testified that it was his belief that [Marilyn] had fired him and that he thought he would have to call the Wage and Hour Division to receive his paycheck.

[Marilyn] recounted the altercation differently and testified that Mr. Clarke entered the office and said to her, "My fucking check is wrong." She testified that she then told Mr. Clarke that she broke down his time between laborer and operator because Mr. Swartz told her to do so and that she would talk to Mr. Swartz about it and make any necessary changes on the next week's paycheck. She further testified that Mr. Clarke said he did not want that check and ripped it up and dropped it onto her desk. According to [Marilyn], she told Mr. Clarke to tape the check because she would not write him another one. She testified that Mr. Clarke responded, "I said, get your fucking ass back there and make me another check," to which [Marilyn] responded, "Boy, if you don't get out of here, I am going to call the police on you." [Marilyn] admitted that she called Mr. Clarke "boy" at this time, but testified that her intent was not to be disrespectful

toward him. She further testified that she could hear him "ranting and raving" outside her office when he left. [Marilyn] stated that she did not fire Mr. Clarke because only Mr. Swartz has the authority to fire employees.

Mr. Billups testified that after [Marilyn] told Mr. Clarke she would make any necessary corrections on Mr. Clarke's next paycheck, Mr. Clarke left the office then returned and told [Marilyn] to give him his "damn money" and said he did not want that check. Mr. Billups confirmed that [Marilyn] said to Mr. Clarke, "Boy, if you don't get out of here, I'm going to call the police." Mr. Billups further testified that he and Mr. Clarke then left the office and he heard Mr. Clarke cursing and yelling.

Doug Carlisle, who works in an office adjoining Riverside's office, testified that he heard yelling coming from Riverside's office and he went into the parking lot to see what was going on. He testified that he saw Mr. Clarke yelling and cursing. Mr. Carlisle testified that, as he went to check on [Marilyn], he saw Mr. Clarke spinning around, throwing his arms up in the air, and saw other workers trying to calm him down as he continued to make a commotion at his car.

Mr. Clarke testified that he did not return to Riverside the following Monday, as he believed [Marilyn] had fired him. He further testified that Mr. Swartz called him and asked why he had been absent, then Mr. Swartz asked him to return to work the next day, Tuesday. Mr. Clarke agreed to return on Tuesday. On Tuesday, Mr. Clarke talked to Mr. Swartz about his check being short because he was not paid operator's pay. Mr. Clarke testified that Mr. Swartz told him that he saw Mr. Clarke raking [sic] and that if the paycheck was wrong, he would speak with [Marilyn] and get it fixed.

Mr. Clarke testified that at the end of the workday on Tuesday, July 27, 2004, Mr. Swartz

motioned for him. Mr. Swartz then told Mr. Clarke that he had received by facsimile a police report from Riverside's insurance company and that he must terminate Mr. Clarke's employment because of his felony conviction. Mr. Clarke testified that the document had a gold seal on it, giving him the impression that it was not faxed. Mr. Smith testified that he was nearby when Mr. Swartz fired Mr. Clarke and that he heard Mr. Swartz tell Mr. Clarke that his employment had to be terminated because Mr. Clarke lied on his application, he had a police report showing a felony conviction, and Riverside's insurance company would not cover him. Mr. Smith also recalled seeing a gold seal on the document. Mr. Swartz testified that he fired Mr. Clarke because he had learned from [Marilyn] of the inappropriate conduct Mr. Clarke exhibited toward her the previous Friday, which he had corroborated with other workers.

A copy of the first page of the document was introduced as Clarke's Trial Exhibit 3 and is date-stamped July 27, 2004, by the Louisville Metro Police Records Center. [Marilyn] testified that she would not have received the police report from the insurance company, but from the police records. She testified that she received the police report on the day Mr. Clarke was fired. She testified that she obtained the record check because she believed Mr. Swartz had a right and obligation to her, his business, and others to know about Mr. Clarke's criminal history in order to protect them. [Marilyn] testified that Mr. Clarke's job application had an area for the applicant to disclose felony convictions, but the area was not checked to signify that completing that portion of the application was required. According to Mr. Smith's testimony, it was common knowledge among the workers that the majority of them had criminal histories. Mr. Smith testified that "90% of the workers at Riverside have a record." He further testified that it was his opinion that Mr. Swartz already knew Mr. Clarke had a criminal history because Mr. Clarke had disclosed it to Mr. Swartz and because everyone knew who had a record and who did not. He further testified that Mr. Swartz

> had previously joked that, "I got a bunch of crooks" working at Riverside.
>
> [Marilyn] testified that Mr. Clarke had become irate with her on another occasion predating the July 17 and 23 altercations. She testified that Mr. Clarke came into her office once to complain that he came to work, but his crew was laid off after working for three hours. According to [Marilyn], Mr. Clarke demanded to be paid for working eight hours and she told him to take the matter up with his foreman. She further testified that Mr. Clarke left and yelled at her.

Ultimately, the circuit court found the testimony of the Swartzes and Billups more credible and specifically found that "Clarke's termination was a result of [the] altercation . . . and his behavior" on that day. It is well within the circuit court's province to weigh the credibility of witnesses. *See Humphrey v. Humphrey*, 326 S.W.3d 460 (Ky. App. 2010). And, there is more than substantial evidence to support the circuit court's finding that Clarke's termination was not the result of racial discrimination, but rather the result of Clarke's own behavior toward Marilyn that led to the altercation.

However, Clarke contends that the circuit court erred as a matter of law and that he was entitled to judgment in his favor upon the wrongful termination claim:

> [T]he Circuit Court made an error of law in ignoring the conflict between Riverside's stated reason for firing Clarke at the time of his discharge and its stated reason for firing him offered at trial. Since the former reason was patently insufficient as a matter of law, the Circuit Court should have ruled for Clarke on his wrongful discharge claims instead of accepting as true Riverside's obviously contrived reason that it presented at the trial of this case.

Clarke's Reply Brief at 1. Clarke is incorrect in his analysis of the law for two reasons. First, Clarke failed to persuade the trier of fact that Riverside Paving's nondiscriminatory reason for his termination was pretextual. *See Woods v. Western Kentucky University*, 303 S.W.3d 484 (Ky. App. 2009). And, second, even if Clarke had succeeded in proving that Riverside Paving's proffered reason was pretextual, Clarke was still not entitled to judgment as a matter of law.

In *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, (Ky. 2005), the Kentucky Supreme Court explained that courts were generally split as to the impact of a plaintiff's showing that an employer's stated reason for termination was pretextual. After reviewing three possible approaches, the Supreme Court adopted the "permissive pretext only" standard:

> The moderate approach to pretext analysis is dubbed the "permissive pretext only" standard. Under this method, if the plaintiff establishes that the defendant's reasons are pretextual the trier of fact is permitted, but not required, to enter judgment for the plaintiff. The technique allows a permissive rather than a mandatory determination favoring the plaintiff.

Williams v. Wal-Mart Stores, Inc., 184 S.W.3d at 498. The Court elucidated further upon the permissive pretext only standard:

> The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason ... is correct." In other words, "[i]t is not enough ... to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."

Id. at 498-499. Thus, even if plaintiff succeeds in establishing pretext, the trier of fact is not required to find that the employer engaged in intentional discrimination. Hence, we conclude that the circuit court did not commit error by failing to find in favor of Clarke upon his claim of wrongful discharge due to racial discrimination in violation of KRS 344.040.

Clarke next contends that the circuit court erred by dismissing his retaliation claim. KRS 344.280. Based upon our disposition of the above issue, we view this contention to be, likewise, without merit. As previously stated, the circuit court found that Clarke was terminated due to the altercation with Marilyn and his behavior that day and not due to discrimination or retaliation. The circuit court weighed the evidence and chose not to believe Clarke's version of events. The circuit court's finding that Clarke's termination was the result of an altercation and of Clarke's own behavior is supported by substantial evidence of a probative value. Thus, we reject Clarke's allegation that the circuit court erred by dismissing his retaliation claim.

Lastly, it is argued that the circuit court erred in its award of attorney's fees in the amount of $3,360.[1] We agree.

KRS 344.450 provides that a successful plaintiff is entitled to a "reasonable fee" for his attorney. The determination of a reasonable fee is generally left within the discretion of the circuit court; nonetheless, on appellate review, the attorney's

[1] Riverside Paving and Contracting, Inc., argues that Frederick Clarke's attorneys, Jacqueline K. Schroering and Harry L. Gregory, should have filed a separate appellant's brief on the issue of attorney's fees. We reject this contention as the brief filed by Clarke adequately addressed the issue.

fees will be reversed only if the circuit court abused its discretion. *Dingus v. FADA Service Co., Inc.*, 856 S.W.2d 45 (Ky. App. 1993).

To determine a reasonable fee under KRS 344.450, the circuit court must initially calculate the "lodestar" figure. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). The lodestar figure is reached by multiplying counsel's reasonable expended hours by a reasonable hourly rate. After obtaining the lodestar figure, the circuit court may then enhance or reduce same based upon a number of factors. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); *Axton v. Vance*, 207 Ky. 580, 269 S.W. 534 (1925). These factors include:

> (a) Amount and character of services rendered.
>
> (b) Labor, time, and trouble involved.
>
> (c) Nature and importance of the litigation or business in which the services were rendered.
>
> (d) Responsibility imposed.
>
> (e) The amount of money or the value of property affected by the controversy, or involved in the employment.
>
> (f) Skill and experience called for in the performance of the services.
>
> (g) The professional character and standing of the attorneys.
>
> (h) The results secured.

Axton, 269 S.W. at 536-537.

In this case, the circuit court set forth its method to determine the award of attorney's fees:

> According to the affidavit Mr. Clarke's attorneys have tendered to the Court, Mr. Clarke's attorneys contracted to receive 40% of Mr. Clarke's award, billed at a $250.00 hourly rate. The Court finds that this hourly rate is reasonable. His attorneys also stated that they have billed Mr. Clarke for 100.08 hours on this matter. The Court finds that the number of hours expended by Mr. Clarke's attorneys is not reasonable in relation to the actual relief obtained, as Mr. Clarke recovered on only one of his three claims. In accordance with *Meyers*, [*Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992)] the Court will reduce the amount requested ($25,200.00) by 1/3, totaling $8,400.00. Having contracted to receive 40% of Mr. Clarke's recovery, the Court will award 40% of $8,400.00 in attorneys' fees. (Citations omitted.)

In its award of attorney's fees, we believe the circuit court abused its discretion in two respects. First, it erred by automatically reducing the lodestar figure by one-third because Clarke only recovered upon one of his three claims. Our Supreme Court has specifically rejected an automatic reduction of attorney's fees directly in proportion to the number of plaintiff's successful civil rights claims.

In *Hill v. Kentucky Lottery Corporation*, 327 S.W.3d 417, 429 (Ky. 2010), the Supreme Court held:

> Because the jury at the second trial found against the Hills on the defamation claims and awarded damages only for the civil rights retaliation claims, the trial court reasoned that it should award attorney fees of one-half of the requested amount . . . .

. . . .

> We understand the difficult challenge trial judges face in balancing the myriad of complex factors involved in awarding attorney fees in a civil rights case. There is no mathematically precise answer, but that is exactly what the trial judge tried to find when he divided the requested fee in half, to allocate one-half to the attorneys' efforts in the defamation claims and the other half to the civil rights claims. However, that was done with no consideration of the actual time and effort expended on the different claims, or consideration of the time and effort common to all the claims. It is inconceivable that proper representation of the Hills for one cause of action required only one-half of the time, talent, and effort expended to represent them on both the civil rights claims *and* the defamation claims.
>
> The fact that all the claims were, as the trial judge stated, "somewhat interrelated" militates against his award because it suggests that much of what was done in support of the defamation claims had to be done anyway if only the civil rights claims were involved. Splitting the fee equally between the two causes of action ignores that reality, and does not represent a true effort to place a value on the services rendered by the attorneys to vindicate the civil rights violations. It undervalues the financial burden of pursuing a civil rights violation by allocating a part of that burden to other claims that may be joined with the civil rights violation in a common law suit.

Instead of automatically reducing the attorney's fees based upon the number of successful claims, we think the circuit court must take into account the "actual time and effort expended on the different claims" and "the effort common to all claims." *Id.* at 429. The circuit court must engage in a "true effort to place value on the services rendered." *Id.*

Second, we think the circuit court erred by further reducing the lodestar amount by 40 percent. The circuit court curiously believed it proper to additionally reduce the lodestar amount by 40 percent because Clarke and his attorneys previously executed a contingency fee contract for such amount. Under the contract, the attorneys were to recover 40 percent of Clarke's ultimate award. Here, the attorney's fees were not awarded based upon Clarke's contract but rather upon KRS 344.450. And, the lodestar figure does not represent Clarke's award but is calculated by multiplying the attorney's reasonable hours by a reasonable hourly rate. As such, the circuit court erred by further reducing the lodestar figure by 40 percent.

In sum, we vacate the award of attorney's fees. Upon remand, the circuit court shall reconsider its award of attorney's fees. It shall not automatically reduce the lodestar amount by either one-third (representing the successful number of claims) or by 40 percent (based upon the contingency fee contract). In reconsidering the award of attorney's fees, the circuit court should do so in view of *Hill*, 327 S.W.3d 412 and *Hansley*, 461 U.S. 424. We affirm on all other issues.

For the foregoing reasons, the judgment and order of the Jefferson Circuit Court are affirmed in part, and vacated in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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