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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000447-MR

RUSSELL LEWIS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 03-CI-00643

INTEC JANITORIAL CONTRACTOR
AND SUPPLIER, D/B/A INTEC BUILDING
SERVICES, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Russell Lewis appeals from the Hardin Circuit Court's order granting summary judgment in favor of Intec Janitorial Contractor and Supplier (Intec). For the following reasons, we reverse and remand.

Lewis, an African-American, was initially employed in 1983 as a supervisor of the night cleaning crew at Fort Knox, where he worked for a series of various government contractors. He became employed by appellee Intec after it was awarded the

cleaning contract in February 2000. On January 21, 2003, Lewis was informed that his position of night supervisor had been eliminated and replaced by a nonsupervisory union position in order to reduce costs for renegotiation of the government contract. Since Lewis lacked union seniority, his employment was terminated.

Lewis subsequently filed a complaint alleging that he was improperly discharged, because of his race, pursuant to KRS 344.040 and KRS 344.450. Upon the completion of discovery, Intec moved the court for summary judgment in its favor. The court held that Lewis could prove his discriminatory discharge claim either through direct evidence, or through circumstantial evidence which satisfied the *McDonnell Douglas Corp. v. Green*[1] burden-shifting analysis. Finding that Lewis could meet neither standard, the court ultimately granted summary judgment in Intec's favor. This appeal followed.

As an initial matter, Lewis contends that the circuit court erred in holding that the only way he could prove discriminatory discharge through circumstantial evidence was pursuant to the *McDonnell Douglas* burden-shifting paradigm. We disagree.

A discriminatory discharge plaintiff "may establish discrimination either by introducing direct evidence of

[1] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

discrimination or by proving inferential and circumstantial evidence which would support an inference of discrimination."[2] As Lewis did not offer direct evidence of discrimination, the circuit court did not err in holding that Lewis must prove his circumstantial evidence case pursuant to the *McDonnell Douglas* burden-shifting paradigm.[3] The *McDonnell Douglas* paradigm "assures the plaintiff his day in court despite the unavailability of direct evidence"[4] as "a *procedural* device [that establishes] an order of proof and production."[5]

In ruling upon a summary judgment motion, a trial court must "determine whether there is a genuine issue as to any material fact, and whether the moving party is entitled to a judgment as a matter of law."[6] Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[7] The trial court must view the record "in a light most favorable to the party opposing the motion for

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[2] *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 348 (6th Cir. 1997).

[3] *See Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003) ("where there is no direct evidence of retaliation, . . . the burden of production and persuasion follows the familiar *McDonnell Douglas* framework").

[4] *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979).

[5] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 521, 113 S.Ct. 2742, 2755, 125 L.Ed.2d 407 (1993).

[6] *Bell v. Louisville Motors, Inc.*, 573 S.W.2d 351, 352 (Ky.App. 1978); CR 56.03.

[7] *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

summary judgment and all doubts are to be resolved in his favor."[8] In reviewing the trial court's order granting summary judgment, we "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."[9]

The burden-shifting analysis applicable to discriminatory discharge cases is summarized in *Johnson v. University of Cincinnati*[10] as follows:

> Under the circumstantial evidence approach, the familiar *McDonnell Douglas-Burdine* tripartite test is employed. This paradigm requires the plaintiff to establish a *prima facie* case of discrimination. To establish a *prima facie* case of discrimination, a plaintiff must show that 1) he is a member of a protected class; 2) he was qualified for his job and performed it satisfactorily; 3) despite his qualifications and performance, he suffered an adverse employment action; and 4) that he was replaced by a person outside the protected class or was treated less favorably than a similarly situated individual outside his protected class. If the plaintiff is able to do so, a mandatory presumption of discrimination is created and the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." If the defendant carries this burden, then the plaintiff must prove that the proffered reason was actually a pretext to hide unlawful discrimination.

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[8] *Id.* at 480 (citing *Dossett v. New York Mining & Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)).

[9] *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

[10] 215 F.3d 561, 572-73 (6th Cir. 2000) (internal citations omitted).

As the *Johnson* court further explained, a

> plaintiff may establish that the [employer's] proffered reason was a mere pretext by showing that 1) the stated reasons had no basis in fact; 2) the stated reasons were not the actual reasons; and 3) that the stated reasons were insufficient to explain the defendant's action.[11]

Here, the circuit court found in its order granting summary judgment that Lewis established a *prima facie* case of discrimination and that Intec's stated desire to cut costs constituted a legitimate, nondiscriminatory reason for his discharge. As Lewis does not dispute these conclusions on appeal, we turn to his contention that the circuit court erred in finding that he did not prove Intec's proffered reason was a pretext.

To support his theory that "cutting costs" was a pretextual reason for his discharge, Lewis contends that Intec did not save much money by replacing his night supervisor position with a group leader position. Indeed, Intec's brief admits that at the time of Lewis's discharge he was paid only thirteen cents more per hour than the replacement group leader was paid. Further, Intec hired another laborer "off the street" the month after Lewis was discharged. Intec counters, however, that Lewis incorrectly assumes that Intec would not have hired any additional employees if he had remained with the company.

[11] *Id.* at 573.

Moreover, Intec argues that if Lewis had remained with the company, there would be 35 rather than 34 employees, including a night supervisor making slightly more than the night group leader makes per hour. Of course, any savings Intec may or may not have gained are relevant to the extent that they reveal Intec's motive for discharging Lewis. The fact-finder in a discriminatory discharge case must focus on the employer's motivation,[12] not on the soundness of its business judgment.[13]

In further support of his position that "cutting costs" was a pretextual reason for his discharge, Lewis stresses the fact that Intec refused his request to continue working with the company in a laborer's position. Intec asserts that it could not honor Lewis's request because he was nonunion and its collective bargaining union agreement required it to fill the new position by seniority. Lewis disagrees, contending that although the collective bargaining agreement required Intec to recognize seniority, it ultimately allowed a "clearly better qualified" outsider such as Lewis to be hired over an existing union employee. Again, this is relevant to the extent that it reveals Intec's motive for discharging Lewis.

Further, Lewis contends that the juxtaposition of his and fellow supervisor Bettina Crum's relationships with Intec's

[12] *Loeb*, 600 F.2d at 1012, n.6.

[13] *Wilkins v. Eaton Corp.*, 790 F.2d 515, 520 (6th Cir. 1986).

owner, Cesar Vanegas, supports his argument of discriminatory discharge. Lewis stated in his deposition that Crum and Vanegas often went to lunch together,[14] hugged each other, and were overall very friendly. On the other hand, Lewis further stated that Vanegas would never talk to him and that Vanegas once turned his back and walked away from Lewis's attempt at a conversation.

Lewis also relies on the following additional facts as evidence of discriminatory discharge. Crum told Lewis on one occasion that she hated him, and on another occasion she introduced Lewis to Vanegas as a man whose wife is a German.[15] Lewis also introduced evidence that no African-Americans worked on Crum's day shift until he complained about the situation in 2000, and that in the month he was fired, only three of the twenty-one day laborers and four of the nine night laborers were African-American.[16]

Reviewing this evidence in the light most favorable to Lewis,[17] we do not believe that Intec has shown that he cannot

[14] Lewis testified that he was invited to lunch on several occasions after he complained about never being invited; however, he was unable to attend because he was given such short notice.

[15] Intec claims that Crum, who also is German, was merely recognizing their common national origin. Lewis proffers instead that Crum made the comment because she resented the fact that Lewis was married to a German native.

[16] The person hired for the nonsupervisory union position after Lewis's position was eliminated was also an African-American.

[17] *Steelvest*, 807 S.W.2d at 480 (citing *Dossett v. New York Mining & Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)).

prevail under any circumstances.[18] Rather, the United States Supreme Court has explained that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[19] We believe that Lewis has presented sufficient evidence for a jury to find that Intec's proffered reason of "cutting costs" is pretextual. Therefore, the evidence could support a jury's conclusion that Intec unlawfully discriminated.

We note, however, that "rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff."[20] In order for Lewis to prevail on remand, he ultimately must persuade the fact-finder not only that Intec's proffered reason for discharging him was false but also that the reason Intec discharged him was discriminatory. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[21]

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[18] *Id.* at 480 (citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

[19] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000).

[20] *Id.* at 146, 120 S.Ct. at 2108 (citing *St. Mary's Honor Center*, 509 U.S. at 511, 113 S.Ct. 2742).

[21] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

For the foregoing reasons, we reverse the court's order and remand this matter to the Hardin Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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