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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001138-MR
AND
NO. 2010-CA-001236-MR

ROBERT C. OLIVER

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. BARRY WILLETT, JUDGE
ACTION NO. 02-CI-003685

J.J.B. HILLIARD, W.L. LYONS, INC.,
JAMES W. STUCKERT, AND
JAMES M. ROGERS (COLLECTIVELY
“HILLIARD LYONS”)

APPELLEES/CROSS-APPELLANTS

AND

NO. 2010-CA-001428-MR

ROBERT C. OLIVER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 02-CI-003685

J.J.B. HILLIARD, W.L. LYONS, INC.,
JAMES W. STUCKERT, AND
JAMES M. ROGERS (COLLECTIVELY
“HILLIARD LYONS”)

APPELLEES

AND

NO. 2010-CA-001479-MR

ROBERT C. OLIVER

CROSS-APPELLEE

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. BARRY WILLETT, JUDGE
ACTION NO. 02-CI-003685

PNC FINANCIAL SERVICES
GROUP, INC.

CROSS-APPELLANT

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: The Appellant/Cross-Appellee, Robert Oliver, appeals several rulings by the trial court and Appellee/Cross-Appellant J.J.B. Hilliard, W.L. Lyons, Inc. (Hilliard Lyons) also appeals the decision of the trial court.

Based upon the following, we affirm in part, reverse in part and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Oliver began working for Hilliard Lyons in 1991 as Vice President and Senior Investment Banker. Hilliard Lyons was purchased by PNC in 1998. During the transition period, Oliver entered into a “retention share pool agreement” with Hilliard Lyons and PNC whereby he would stay with the firm and he would

receive \$275,000 from the retention pool over a five-year time period. Based upon the terms of the agreement, the majority of the money would be paid during the fourth and fifth years.

Oliver reported to James M. Rogers, Executive Vice President and Chief Operating Officer of Hilliard Lyons, and indirectly to James W. Stuckert, then Chief Executive Officer. In 2001, Oliver's employment was terminated. Oliver asserts that his termination was without cause. He contends that in addition to refusing to pay him his share of the funds, Hilliard Lyons also refused to compensate him for expenses he incurred on his employer's behalf and for his accumulated, unused vacation time.

Hilliard Lyons contends that Oliver's termination was due to his mismanagement of employees in the Investment Banking Department, violating Hilliard Lyons's policies and procedures, and causing Hilliard Lyons to breach its contracts with others.

On May 17, 2002, Oliver brought an action in Jefferson Circuit Court asserting breach of contract, breach of fiduciary duties, fraud, intentional infliction of emotional distress and conversion. The action was stayed while an issue involving arbitration under the National Association of Securities Dealers (NASD) Code of Arbitration was heard. A panel of our Court held that Oliver was not subject to the Arbitration Clause of the NASD Code and the matter proceeded to trial. The jury awarded Oliver \$238,333.33 against Hilliard Lyons, Stuckert and

Rogers. Hilliard Lyons did not file a motion for judgment notwithstanding the verdict (“JNOV”).

Oliver then brought this appeal. The Appellees filed a cross-appeal.

DISCUSSION

I. OLIVER’S CLAIMS.

A. DENIAL OF PREJUDGMENT INTEREST.

Oliver’s first argument is that his damages were liquidated and, consequently, the trial court erred when it did not grant him prejudgment interest on the judgment entered in his favor. Oliver argues that his damages are “capable of ascertainment by mere computation.” The remaining three payments owed were for 2001 equal to 1/15 of the specified retention amount; 2002 equal to 6/15 of the amount; and for 2003 equal to 6/15 of the amount. The jury awarded him \$238,333.33. He asserts that there has never been a dispute as to the amount or due dates of the compensation that he should have received. Thus, he contends, Kentucky law requires prejudgment interest and the trial court erred in not granting it to him.

Hilliard Lyons argues that Oliver is wrong in his assertion that Kentucky law requires prejudgment interest when there are liquidated damages. Instead, Hilliard Lyons contends that interest is within the discretion of the trial court. It also argues that the money belonged to PNC as a line item in its budget and that the trial court properly concluded that the equities did not weigh in Oliver’s favor.

321, 325 (Ky. 1992), the Kentucky Supreme Court held that “[t]he determination as to whether or not to award prejudgment interest is based upon the foundation of equity and justice. It is a determination to be made by the trial court and to be disturbed by an appellate court only upon a showing of an abuse of discretion.” In *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 144 (Ky. 1991), the Court set forth that the determination of prejudgment interest was a decision the judge would make, not a jury. The Court went on to cite the Restatement (Second) of Contracts § 354 as follows:

The award of prejudgment interest, as it would apply to the contract theory in this case, is covered in the Restatement (Second) of Contracts § 354, “Interest as Damages,” as follows:

- (1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.
- (2) In any other case, such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.

Thus, where the subject matter of the breach of contract claim falls under subsection (1) above, interest is due as a matter of course, and where, as in this case, it falls under subsection (2) above, interest “may be allowed as justice requires.” Both subsections presuppose the trier of fact, judge or jury, has decided both the question of breach of contract and the amount due for the breach before reaching the question of interest as damages.

Id.

Subsection (1) is applicable in this situation. Oliver was terminated from his position of employment. His agreement with his employer was that he would continue on with his employment for the transition period for a specific sum of money. The jury found that Hilliard Lyons did not fire Oliver for cause and that he was entitled to the monies the parties had agreed to. Thus, we conclude that the trial court abused its discretion in failing to award prejudgment interest in this case.

B. DENIAL OF COSTS.

Oliver next contends that the trial court erred in denying him costs. Specifically, he asserts that he should have been awarded costs for:

Deposition Transcripts of James Douglas MacKinnon,

Robert C. Oliver and Marilyn Underwood Riley;

Travel Costs for Depositions in Columbus, Ohio;

Travel Costs for Deposition in Washington, DC;
Focus Group/Mock Jury Trial at Kentucky Justice
Association 12/7/09;

Court Charges for CDs of Hearings, Status Conferences,
Pretrial conference and trial transcript;

Presentation Boards for Mock Trial and Trial;

Cost of Court-Ordered Mediation Attempt; and
Petition, Order, Notice and Local Counsel's Fees for
Ohio Service of Foreign Subpoena.

Kentucky Rules of Civil Procedure (CR) 54.04(1) provides that “[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs[.]” CR 54.04(2) provides for specific costs such as

filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions (whether taken stenographically or by other than stenographic means), fees for extraordinary services ordered to be paid by the court, and such other costs as are ordinarily recoverable by the successful party.

The costs submitted by Oliver do not fall under CR 54.04 and the judge properly excluded them.

C. PRECLUSION OF EVIDENCE OF EMOTIONAL DISTRESS RELEVANT TO FRAUD AND PUNITIVE DAMAGES.

Oliver next contends that the trial court erred when it prohibited him from offering evidence that he suffered emotional distress as a result of the conduct of Hilliard Lyons, Stuckert and Rogers. Oliver sought to introduce the testimony of a psychiatrist, Dr. Randolph Schrodt. In denying Oliver's request, the trial court held that Oliver's intentional infliction of emotional distress claim had been dismissed. The court reasoned that since emotional distress damages were not recoverable under a common law fraud claim, Oliver could not recover emotional distress damages caused by the litigation process.

We agree with the trial court. The measure of damages for a claim based upon fraud is the pecuniary loss resulting from the misrepresentation. *Sanders, Inc. v. Chesmotel Lodge, Inc.*, 300 S.W.2d 239, 241 (Ky. 1957). While Oliver argues that fraud is an intentional tort, he agrees that Kentucky law does not provide precedent on the issue. He asserts that the case of *Craft v. Rice*, 671 S.W.

2d 247 (Ky. 1984), supports his case. However, the *Craft* case dealt with the claim for intentional infliction of emotional distress and has no bearing on damages recoverable under a fraud theory.

Oliver also contends that evidence of emotional distress should have been admitted as relevant to his claim for punitive damages. Oliver argues that Kentucky Revised Statutes (KRS) 411.186 and KRS 411.184 allow for such evidence. KRS 411.184(b) provides that fraud is “an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.” Hilliard Lyons, however, contends that when assessing evidence for a punitive damages claim, one must focus on the character of the wrongdoer and not the injury of the victim. We agree. In Kentucky Law of Damages § 4:1 (2012 ed.) (citing *Bisset v. Goss*, 481 S.W.2d 71, 74 (Ky. 1972) (quoting 25 C.J.S., Damages § 117(1) (2012))), it was explained as follows:

[S]uch damages are allowed not because of any special merit in the injured party’s case, but are awarded by way of punishment to the offender, and as a deterrent, warning, or example to defendant and others, or even, it has been said as an expression of the indignation of the jury.

The evidence of Oliver’s emotional state was not relevant to the issue of punitive damages and we, therefore, affirm the decision of the trial court on this issue.

D. DENIAL OF OBJECTIONS TO THE DEFENDANTS' TENDER OF AN INADEQUATE AMOUNT TO THE COURT.

Oliver next contends that on May 29, 2010, the trial court entered an order permitting the Appellees to deposit the jury award of \$238,333.33 to the Clerk of the Circuit Court. Oliver refused to accept this amount as it did not include prejudgment interest and costs. Hilliard Lyons deposited monies with the trial court into an interest bearing account from which Oliver could withdraw the funds at any time.

While Oliver contends that this was an "ineffective tender," we disagree. Oliver relies on the case of *Grange Mut. Cas. Co. v. Hollon*, 816 S.W.2d 663 (Ky. App. 1991), in support of his motion. Here, unlike *Grange*, Hilliard Lyons immediately paid into the court the amount of the jury verdict. While it did not pay in prejudgment interest or costs, it was not required to since there had been no determination that those sums were owed. Thus, we deny Oliver's appeal on this issue.

E. DISMISSAL OF THE VALID WAGE CLAIM AND DAMAGES.

Finally, Oliver contends that the trial court erred in refusing to allow his KRS 337.385 action to proceed. He states that, pursuant to this statute, he had a cause of action and the trial court erred in granting a directed verdict to the defendants.

KRS 337.010(2)(a)(2) exempts people “employed in a bona fide executive, administrative, supervisory, or professional capacity,” unless context requires otherwise. Oliver, however, contends his case is identical to the scenario in *Healthcare of Louisville v. Kiesel*, 715 S.W.2d 246, 248 (Ky. App. 1986). We disagree.

In *Kiesel*, a panel of our Court affirmed an award of damages pursuant to KRS 337.385 to *Kiesel* because he fell under the exception of *the context required otherwise*. *Id.* at 247-248. In making this determination, the Court held that an agreement whereby *Kiesel* would be paid severance pay, accrued vacation pay, and two personal days in exchange for his resignation warranted the exception. In this case, Oliver’s employment was terminated. He did not voluntarily resign and there was no agreement affecting such. Thus, we will uphold the trial court’s dismissal of this claim.

II. CROSS-APPEAL OF HILLIARD LYONS, PNC, STUCKERT AND ROGERS.

A. THE TRIAL COURT ERRED WHEN IT DENIED HILLIARD LYONS’S MOTION FOR DIRECTED VERDICT ON BREACH OF CONTRACT CLAIM.

Hilliard Lyons first contends that Oliver was an at-will employee and that it had every right to terminate his employment. It argues that Kentucky law provides that when, as argued by Oliver, an employment contract has a termination provision for cause, the employer cannot be held liable for breach of the contract

unless the decision to terminate the employee's employment is not justified. In *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 492 (Ky. 1983), the Kentucky Supreme Court held that:

Whether [an employee's] employment contract contained a "termination for cause only" covenant or whether he was fired in accordance with company policies and procedures for one or more of the many causes alleged by [the employer] cannot be resolved against him . . . [without] application of the good faith standard established in *Crest Coal Company, Inc. v. Bailey, Ky.*, 602 S.W.2d 425 (1980).

Pursuant to the holding in *Shah*, Hilliard Lyons argues that damages are not recoverable unless the employer's actions in evaluating the employee's performance were done in bad faith. Hilliard Lyons contends that there was evidence at trial that it conducted an extensive investigation into Oliver's actions and that it had a good faith belief that its actions in terminating him were justified. Specifically, it provides the following examples:

In August of 2001, Hilliard Lyons's HR Director initiated an investigation after complaints by current and former employees regarding Oliver's mismanagement of the Department;

The HR Director took statements from seven current and former employees regarding their dealings with Oliver;

The HR Director met with Oliver's supervisor, Rogers, to discuss her findings;

Rogers conducted his own follow-up investigation and spoke to nine current and former employees, including Oliver's prior supervisor, Stuckert, and confirmed many of the complaints;

Rogers and Stuckert met with Oliver in September, 2001, to discuss the complaints and to allow him an opportunity to rebut the allegations;

As part of his investigation, Rogers learned of instances where Oliver had wrongfully interfered with payouts owed to employees in Oliver's department pursuant to transactions on which they had worked;

Rogers and Stuckert met with Oliver in October, 2001 to discuss their findings and allow him an opportunity to resign.

Based upon the above evidence, Hilliard Lyons argues that it conducted a 2 ½ month investigation by its HR Department and Rogers and acted in good faith in terminating Oliver's employment.

Oliver, however, argues that the agreement was not a contract of employment. Instead, he contends that it was an agreement to pay set sums at set times for not leaving during the transition period. We agree. Pursuant to the agreement, Oliver agreed to stay with the company during the transition period for which he would receive sums of money based upon how long he stayed. While Oliver's employment with the company could be terminated at any time, he would still be entitled to the amount of the contract unless his termination was "for cause." The jury determined that, based upon the evidence, Oliver's employment was not terminated for cause and, consequently, awarded him the remainder of the contract amount as damages.

A claim for breach of contract requires that the claimant show the existence of a valid contract, the failure to comply with the terms of the contract and

damages resulting from the failure to comply. *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 903 n. 7 (Ky. 2008). In this case, Oliver set forth evidence of the existence of the contract executed by himself, Hilliard Lyons and PNC. He provided evidence that Hilliard Lyons and PNC terminated his employment without cause in violation of the terms of the contract and he provided the damages which were the monies owed under the contract. The trial court did not err in denying Hilliard Lyons's motion for a directed verdict on this issue.

**B. REFUSAL OF TRIAL COURT TO DISMISS OLIVER'S
FRAUDULENT MISREPRESENTATION CLAIM.**

Hilliard Lyons contends that the trial court erred when it refused to grant its, Stuckert's and Rogers' motion for summary judgment or motion for directed verdict on Oliver's fraudulent misrepresentation claim. As set forth above, Hilliard Lyons did not file a motion JNOV. It argues that Oliver presented no evidence to establish the essential elements of a fraudulent misrepresentation claim and this claim should never have been presented to the jury and the jury did not have sufficient evidence to find for Oliver on this claim. Hilliard Lyons asserts that, at trial, Oliver presented no evidence to support his claim that Stuckert and Rogers gave him false information about the retention bonus.

Hilliard Lyons argues that Stuckert truthfully told Oliver he was eligible for a retention bonus in the amount of \$275,000 payable over a five-year period so long as he remained employed with Hilliard Lyons on the anniversary dates. It also asserts that even if Oliver could show that the above representation was false,

he failed to offer any evidence that Stuckert knew that the representations were false, much less that he made these representations to Oliver in reckless disregard of their falsity.

The record reflects that no one ever made an issue at trial of Rogers talking with Oliver about his retention bonus. Roger's own attorney asks him whether, when he was informing Oliver of his eligibility for the bonus, if Oliver asked to see a copy of the retention bonus agreement. Rogers testifies that Oliver did not ask him for a copy of the agreement. This indicates that neither Rogers nor his attorney were disagreeing that Rogers had discussed the bonus with Oliver. This was not disputed at trial and Hilliard Lyons did not file a motion JNOV regarding it. The denial that Rogers even spoke to Oliver was first presented at oral arguments. It is not properly before us and the record does not support Hilliard Lyons's argument that a judgment should not have been entered against Rogers on the issue of false misrepresentation.

In asserting fraudulent misrepresentation, Oliver contended that the Appellees knew at the time some or all of the promises and representations and omissions were made or committed regarding the retention pool agreement that Defendants did not intend to carry through with the management retention pool agreement or provide Oliver with his share of the pool, thus committing a fraud upon him. Hilliard Lyons also contends that even if Oliver could prove the misrepresentation, he failed to present any evidence of his reliance upon it.

The jury found in favor of Oliver on this issue. The jury instruction provided that Oliver claimed that the defendants “defrauded him by stating that they would pay Mr. Oliver a retention pool bonus, with the understanding only that he would not leave his employment.” In *United Parcel Service, Co. v. Rickert*, 996 S.W.2d 464, 467-469 (Ky. 1999), the Kentucky Supreme Court allowed a claim by an employee where the employer stated that it would hire the individuals who attended a meeting even though there was evidence that the employer did not intend to do so. As stated in *Rickert*:

In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury.

Id. at 468 (citing *Wahba v. Don Corlett Motors, Inc.* 573 S.W.2d 357, 359, (Ky. App. 1978). Further, “[f]raud may be established by evidence which is wholly circumstantial.” *Rickert* at 468. “[P]roof may be developed by the character of the testimony, the coherency of the entire case as well as the documents, circumstances and facts presented.” *Id.* “Fraud may be committed either by intentionally asserting false information or by willfully failing to disclose the truth.” *Id.* at 469. “In Kentucky, a claimant may establish detrimental reliance in a fraud action when he acts or fails to act due to fraudulent misrepresentations.” *Id.*

In this case, the jury found that the Appellees committed fraud when they told Oliver he would be paid a bonus if he continued his employment. We find this

factually similar to *Rickert*. Here, the jury concluded that the appellees misrepresented and omitted facts to Oliver concerning payment under the retention pool when they intended not to follow through with that representation. Oliver argued that he relied upon these promises and refused other employment opportunities.

At trial, Oliver provided evidence that he never received a copy of the retention pool agreement and that it was read to him over the phone after the decision to terminate his employment had been made. Given the evidence presented by Oliver, it was not an error for the trial court to deny the motions for summary judgment and directed verdict tendered by the Appellees. Thus, we affirm the trial court's decision on this issue.

B. FAILURE TO DISMISS OLIVER'S CONVERSION CLAIM.

Hilliard Lyons next contends that the trial court erred when it did not dismiss Oliver's conversion claim and allowed it to be presented to the jury. It asserts that Oliver's claim that he was entitled to future, unpaid retention bonus payments after his termination of employment is not an appropriate conversion action because it is not a chattel in that it is not specific money. Instead, the retention pool fund was a line item in PNC's budget.

“Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” Restatement (Second) of Torts, § 222A (1965). Oliver argues that the conversion claim was

viable because the Retention Pool Fund was both a line item and comprised of specific sums of money controlled by Rogers and Stuckert. Since these funds were specifically identifiable, he contends they are appropriate for a conversion action.

We agree.

However the funds are characterized, they were a specific amount of money set aside to pay individual employees. Rogers and Stuckert controlled them in that they were capable of firing employees and denying the distribution of the funds to the employees, such as Oliver. Therefore, we agree with the trial court's denial to dismiss the conversion action against the Appellees.

C. TRIAL COURT'S REFUSAL TO DISMISS OLIVER'S PROMISSORY ESTOPPEL CLAIM.

Hilliard Lyons argues that the trial court erred in failing to dismiss Oliver's promissory estoppel claim. It asserts that his breach of contract claim nullified the promissory estoppel claim and that, even if it did not, Oliver failed to present any evidence of a promise or reliance upon a promise. The jury instruction tendered to the jury on this claim provided as follows:

1. Hilliard Lyons, James Stuckert, or James Rogers made a promise to Mr. Oliver that he would receive the entire retention pool bonus unless he voluntarily resigned, and that such promise was clear and unambiguous in its term.
2. Mr. Oliver reasonably relied on that promise by acting or forbearing to act.

3. Hilliard Lyons, James Stuckert, or James Rogers foresaw or expected that Mr. Oliver would rely upon that promise.
4. That enforcement of the promise is necessary to avoid injustice.

Hilliard Lyons contends that Oliver did not prove any of these elements. It argues that promissory estoppel “cannot be the basis for a claim if it represents the same performance contemplated under a written contract.” *Tractor and Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1198, 1205 (W.D. Ky. 1995) (citing *General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1042 (6th Cir. 1990)). It further contends that “[p]romissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract.” *General Aviation, Inc.*, 915 F.2d at 1042 (quoting *Walker v. KFC, Corp.* 728 F.2d 1215, 1220 (1984)).

Hilliard Lyons asserts that *Tractor & Farm Supply* is analogous to this action in that the promissory estoppel claim in that case was based upon oral statements made by a franchisor to a franchisee. In *Tractor & Farm Supply*, the Court held that “the performance demanded was the same performance that, in part, constituted consideration for the franchise agreement.” *Tractor & Farm Supply*, 898 F.Supp. at 1205. Even if allowed to claim both breach of contract and promissory estoppel, Hilliard Lyons argues that Oliver never presented any evidence that he relied to his detriment upon promises of future bonus payments regardless of his employment status.

Oliver contends that promissory estoppel claims are viable when the employer can reasonably foresee that continuation in employment and injustice may only be avoided by giving effect to the promise. He also contends that alternative theories may be presented to a jury. He argues that the elements of each cause of action were satisfied in his case.

On a motion for summary judgment, issues of fact must be resolved in favor of the non-moving party. *Bryant v. Pulaski County Det. Ctr.*, 330 S.W.3d 461, 466 (Ky. 2011); *Steelvest, Inc. v. Scansteel Serv. Ctr, Inc.*, 807 S.W.2d 476 (Ky. 1991).

[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor. We further declared that such a judgment is only proper

where the movant shows that the adverse party could not prevail under any circumstances.

Id. at 480.

Oliver presented evidence that he was informed by Stuckert that he would receive his bonus from the Retention Pool Fund if he did not voluntarily leave his employment. He also stated that he passed up employment opportunities based upon his reliance upon Stuckert's assertions. While he also went forward on a breach of contract theory, the trial court did not err in failing to dismiss the promissory estoppel action by summary judgment or directed verdict.

The trial court correctly concluded that Oliver had presented sufficient evidence upon which the jury could find that he had been promised the bonus

based upon his staying with the company rather than voluntarily resigning and that he relied upon this to his detriment. We, therefore, affirm the decision of the trial court on this issue.

E. INTRODUCTION OF EVIDENCE BY OLIVER OF DISPARATE TREATMENT AND THE TRIAL COURT'S ALLOWANCE OF SUCH EVIDENCE.

Hilliard Lyons's final argument is that the trial court abused its discretion and committed reversible error when it allowed Oliver to introduce hours of highly prejudicial and irrelevant testimony and thousands of pages of documents of disparate treatment during the trial. It argues that this tainted the jury. Hilliard Lyons asserts that the evidence should have been excluded for the following reasons:

1. Oliver never filed a disparate treatment claim and, therefore, any evidence comparing him to other Hilliard Lyons employees was completely irrelevant to his actual claims;
2. None of the other Hilliard Lyons employees that Oliver compared himself to was similarly situated to him; and
3. Oliver was not terminated for the use of Hilliard Lyons's email system for his personal business nor because he invested in a side piano business.

Hilliard Lyons relies on the case of *Harstad v. Whiteman*, 338 S.W. 3d 804 (Ky. App. 2011), in support of its position. In *Harstad*, a college professor sued his employer for breach of his employment contract after his employment was

terminated. At trial, *Harstad* introduced evidence that other faculty members were treated differently than he was under similar circumstances. The trial court found that such evidence was irrelevant and excluded it since *Harstad* had not brought an equal protection claim. The case was appealed and a panel of our Court held that the trial court had properly excluded the evidence. *Id.* at 816-817.

Hilliard Lyons asserts that the introduction of this evidence provided a “reasonable possibility that the error might have affected the jury’s decision.” *Crane v. Commonwealth*, 726 S.W.2d 302, 307 (Ky. 1987).

As agreed to by the parties, when reviewing a trial court’s evidentiary rulings, we do so under an abuse of discretion standard. *Hall v. Commonwealth*, 337 S.W.3d 595, 602 (Ky. 2011) (footnote omitted). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In deciding whether a reversal is necessary, the court must determine whether the error had a substantial influence upon the jury’s verdict. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009).

“Relevant evidence” is any evidence that has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Kentucky Rules of Evidence (KRE) 401. Oliver contends that the evidence complained of by Hilliard Lyons went directly to several of the matters at issue in the case including whether or not he was fired “for cause.” We agree.

In *Harstad*, the trial judge chose not to allow the admission of evidence which he deemed irrelevant because *Harstad* was a tenured employee with the college and was so under a contract of employment. In this situation as provided, supra, Oliver was not employed under a contract of employment with either Hilliard Lyons or PNC. Instead, he entered into a contract with them for the bonus he would receive under the Retention Pool Agreement. Pursuant to this agreement, Oliver would receive the bonus unless he was fired “for cause.” It was the position of Hilliard Lyons at trial that he was fired for cause. The evidence admitted at trial by Oliver was relevant to his activity and the activity tolerated with other employees. Thus, we affirm the decision of the trial court on this issue.

CONCLUSION

Based upon the above discussion, we affirm the decision of the trial court on all issues except its failure to award Oliver prejudgment interest. We reverse on the issue of prejudgment interest and remand this action to the trial court for an award of same.

Thus, we affirm in part, reverse in part, and remand for a judgment consistent with this opinion.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent as to the verdict of fraudulent misrepresentation as to Rogers.

BRIEFS FOR APPELLANT/CROSS-
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Jennifer L. McCarty
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ORAL ARGUMENT FOR
APPELLANT/CROSS-APPELEE
ROBERT C. OLIVER:

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ORAL ARGUMENT FOR
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