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# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001578-MR (DIRECT)  
NO. 1999-CA-001655-MR (CROSS)

THE LEXINGTON-FAYETTE URBAN  
COUNTY HOUSING AUTHORITY;  
AUSTIN J. SIMMS;  
MARGARET BURCH; JIM DESPAIN;

APPELLANTS/CROSS-APPELLEES

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS G. PAISLEY, JUDGE  
ACTION NO. 92-CI-02843

SANDRA C. BROOKS AND  
WILLIAM C. JACOBS, HER ATTORNEY

APPELLEES/CROSS-APPELLANTS

OPINION  
REVERSING DIRECT APPEAL NO. 1999-CA-001578-MR

AFFIRMING IN PART - REVERSING IN PART AND REMANDING  
CROSS-APPEAL NO. 1999-CA-001655-MR

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BEFORE: GUIDUGLI, KNOFF AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. This appeal and cross-appeal stem from various orders and judgments entered by the Fayette Circuit Court in regard to Sandra C. Brooks' (Brooks) claims of racial discrimination and retaliation under Kentucky's Civil Rights Act (KRS Chapter 344, et seq.) against the Lexington-Fayette Urban County Housing Authority (the Housing Authority). In regard to the direct appeal of the Housing Authority, we reverse the trial

court's denial of the Housing Authority's motion for directed verdict and award of attorney fees, court costs, and out-of-pocket expenses to Brooks. In regard to Brooks' cross-appeal, we affirm all of the orders of the trial court from which Brooks appeals with the exception of the order pertaining to the award of attorney fees, which is reversed.

#### PROCEDURAL HISTORY<sup>1</sup>

In July 1992, Brooks, an African-American female, filed a complaint against the Housing Authority, Austin Simms, the Housing Authority's Executive Director, and Margaret Burch and Jim DeSpain, two of the Housing Authority's managerial employees (the individual defendants). In the complaint, Brooks alleged that the Housing Authority and the individual defendants discriminated against her on the basis of race in regard to several hiring and promotion decisions, retaliated against her when she filed a sworn charge of discrimination with the Lexington-Fayette Urban County Human Rights Commission, and engaged in a pattern of behavior which led to her constructive discharge.

The Housing Authority filed a motion for summary judgment on Brooks' claims for discrimination and constructive discharge. In support of its argument, the Housing Authority claimed that Brooks made misrepresentations concerning her educational background and work experience which came to light during the discovery process. Based on these misrepresentations,

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<sup>1</sup>We will further develop facts regarding Brooks' claims for discrimination and retaliation where appropriate in relation to the arguments raised on appeal.

the Housing Authority argued that the after-acquired evidence doctrine precluded Brooks' claims.<sup>2</sup> In support of its argument, the Housing Authority attached an affidavit from Simms stating:

If I had known that Brooks had submitted false information in her 1987 application, or known of any of her other application falsifications, the Housing Authority would not have hired or promoted Brooks to any of the positions she sought.

Brooks filed a motion for partial summary judgment on her claim that she was initially discriminated against when she applied for a position as an assistant housing manager and was hired as a work order clerk. Brooks argued that she had established a case of discrimination in regard to this incident and that the Housing Authority had failed to articulate a legitimate, nondiscriminatory reason for its failure to hire her as assistant housing manager.

In an order entered August 10, 1995, the trial court addressed both parties' summary judgment motions. In denying the Housing Authority's motion, the trial court agreed that Brooks misrepresented her educational background and work experience, but held:

The public policy behind anti-discriminatory legislation such as that enacted in Kentucky is two-fold involving both deterrence and compensation for injuries suffered as a result of discrimination. In discussing the Age Discrimination in Employment Act of 1967 [citation omitted], the Supreme Court stated:

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<sup>2</sup>Under that doctrine, an employer's discovery of employee wrongdoing during litigation of an employer's claim for discrimination which is of such a nature that the employer would have discharged the employee had it known of the misconduct at the time it occurred acts as a bar to an employee's charges of discrimination.

"[i]t would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act." McKennon v. Nashville Banner Publishing Co., 130 L.Ed. 2d 852, 861 (1995). [Footnote omitted.] The purpose of such legislation in exposing and deterring discrimination is met even if the Plaintiff comes to the Court with unclean hands. Yet, the public policy of encouraging applicants to be truthful should be afforded weight as well. The Court finds that it is not in the position of having to choose between the two. The goals of both can be furthered, not by using the after-acquired evidence as a bar to the discrimination charge in the present case, but by considering it in limiting and fashioning an appropriate remedy in this case should the Plaintiff prevail on the merits.

The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged in wrongdoing must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case. We do not conclude that either, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.

McKennon, 130 L.Ed.2d at 863.

Therefore, this Court concludes that should the Plaintiff prevail on the merits of her discrimination case, the remedies of front pay and reinstatement are foreclosed to her.

In denying Brooks' motion for summary judgment, the trial court stated:

The Plaintiff is a member of a protected class. She is an African American. She was at least minimally qualified for the manager position even though she did not possess the preferred degree. It is a reasonable assumption that had she not been qualified, she would not have been the first choice of the supervisor for that position. She did not receive the manager position. As the above-referenced memorandum of [Simms] indicates, the position not only remained open, but was readvertised. The position eventually was filled [sic] by a caucasian woman possessing the preferred bachelor's degree. Clearly the Plaintiff has established a prima facie case of discrimination.

The burden then shifts to the Defendants [to articulate a legitimate nondiscriminatory reason for its decision]. [citation omitted] It is this burden that the Plaintiff argues that the Defendants have failed to meet. It is important to remember the posture of this case as it stands before the Court now. It is the Court's role at this stage to determine if the Plaintiff is entitle [sic] to summary judgment on this claim. The Court is not sitting as trier of fact.

When the Court determines the appropriateness of summary judgment, it must view the record in the light most favorable to the opposing party resolving all doubts in favor of the opposing party. Ky. R. Civ. Pro. 56 permits summary judgment only where there is no genuine issue of material fact and the moving party is entitle [sic] to judgment as a matter of law. Kentucky case law has held that summary judgment may only be granted where the opposing party could not prevail under any circumstances. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W. 2d 476 (1991). Yet the opposing party cannot sit idly by and survive a summary judgment motion. Therefore, the narrow issue before the Court on the Plaintiff's motion is whether the Defendants have sufficiently articulated a nondiscriminatory reason for the hiring decision in question.

Reason is defined by Webster's as "the motive or basis of action, decision, feeling or belief. [sic] Webster's New Riverside

Dictionary (2d ed. 1984). The Director has testified that he cannot recall the reason for the decision. Often the genuine inability to recall is more truthful than the self-serving response. However, the genuineness of the response is for the trier of fact to determine. Likewise, the cause of the employment action is for the trier of fact to determine. The Defendant has set forth a sufficiently neutral statement to survive summary judgment.

On September 2, 1997, the trial court entered an order clarifying its ruling on the after-acquired evidence doctrine, stating:

The Court will clarify that its ruling on August 10, 1995 was and still is that the Plaintiff does not have the remedies of reinstatement or front pay available to her due to her misrepresentations. Front pay is that award which could be given from the time of judgment for a specified time forward. Furthermore, under [McKennon], the Plaintiff's right to back pay will be limited to the time period beginning with her leaving the employment of the Defendants and ending with the time when the Defendants discovered Plaintiff's misrepresentations in gaining employment.

In June 1996, the individual defendants sought dismissal of the complaint against them on the ground that KRS Chapter 344 does not allow individuals to be held liable for civil rights violations. In a separate motion, the Housing Authority and the individual defendants asked that Brooks' claims for punitive damages be stricken on the ground that KRS Chapter 344 does not allow for the recovery of punitive damages. On October 4, 1996, the trial court entered an order dismissing the individual defendants and striking Brooks' claim for punitive damages, stating:

The act is clear. In all but limited circumstances, liability extends solely to employers. KRS Sec. 344.030(2) defines an

employer as one with eight or more employees and agents of the employer. The argument that individuals can be proceeded against as agents of the employer has been specifically addressed and rejected by Lowry v. Clark, 843 F.Supp. 228 (E.D. Ky. 1994). Despite the Plaintiff's protestations to the contrary, the Court finds Lowry to be a well reasoned opinion.

. . . .

Also pending at this time is the Defendants' Motion to Strike the Plaintiff's punitive damages claim. A discrimination claim is a creature of statute. The remedies available upon successful prosecution of such a claim are controlled by statute. Gryzb v. Evans, Ky., 700 S.W.2d 399, 401 (1995). The plain language of KRS § 344.450 does not include punitive damages as an available remedy.

Brooks' claims were finally tried before a jury in September 1997. The jury was not instructed in regard to Brooks' claim of constructive discharge. On September 26, 1997, the jury rendered a verdict in favor of the Housing Authority on Brooks' claim of discrimination and a verdict in favor of Brooks on her claims of retaliation. The jury awarded Brooks \$40,000 for "embarrassment, humiliation and mental distress . . . [Brooks] suffered as a direct result of [the Housing Authority's] conduct[.]" On October 17, 1997, an interlocutory judgment in accordance with the jury's findings and award was entered in which the court awarded Brooks attorney fees "in such amount as the Court shall determine upon application by [Brooks]," and dismissed Brooks' claims of discrimination. On July 30, 1999, the trial court entered a final judgment awarding a Brooks a total of \$56,810.37 for attorney fees, court costs, and out-of-pocket expenses.

As we have noted, both the Housing Authority and Brooks have appealed from the various orders and judgments of the trial court. We will address the issues raised by Brooks on her cross-appeal first followed by the issues raised by the Housing Authority on its direct appeal, with the exception that issues raised by both parties with regard to the award of attorney fees will be addressed last.

BROOKS' CROSS-APPEAL

- I. DID THE TRIAL COURT ERR IN REFUSING TO GRANT BROOKS' MOTIONS FOR DIRECTED VERDICT AND/OR NEW TRIAL AS TO THE HOUSING AUTHORITY'S LIABILITY FOR DISCRIMINATION?

Brooks contends that she was entitled to either a directed verdict in her favor or a new trial on the issue of the Housing Authority's liability for discrimination based on the fact that it did not initially hire her as assistant housing manager in 1987 and failed to promote her to that position in 1990 and 1991. When a motion for directed verdict is made, "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). The trial court cannot grant a motion for directed verdict "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Taylor v. Kennedy, Ky.App., 700 S.W.2d 415, 416 (1985). "On appeal, the



appellate court considers the evidence in the same light.”

Lovins, 814 S.W.2d at 922.

In order to maintain a claim for racial discrimination, a plaintiff must first establish a prima facie case of discrimination by showing that:

- 1) she is a member of a protected class, 2) she is qualified for and applied for an available position, 3) she did not receive the job, and 4) the position remained open and the employer sought other applicants.

Kentucky Center for the Arts v. Handley, Ky. App., 827 S.W.2d 697, 699 (1991). This burden of proof mirrors the federal standard adopted by the United States Supreme Court in McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The fourth element of the prima facie case can be established by showing that a member of an unprotected class was ultimately hired to fill the position. Handley, 827 S.W.2d at 699, fn 1. Once the plaintiff has established a prima facie case, the burden of proof shifts to the defendant, who must then “articulate a “legitimate nondiscriminatory” reason for its action.” Id. at 699, citing Texas Department of Community Affairs v. Burdine, 450 U.S. 428, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Once the defendant has established a nondiscriminatory reason for its decision, the burden shifts back to the plaintiff “to demonstrate that the stated reason is merely a pretext to cover the actual discrimination.” Handley, 827 S.W.2d at 699. If the plaintiff’s establishment of a prima facie case is unrefuted, judgment is to be entered in favor of the plaintiff. Id. at 700.

Turning to the facts presented at trial in light of the standard of review set forth in Lovins and Taylor, we note the following. In July 1987, the Housing Authority advertised an opening for an assistant housing manager position in a Lexington newspaper. Brooks applied for the job and was interviewed. During the interview process, Brooks was told that the Housing Authority also had an opening for a work order clerk. Brooks was told that if she accepted the work order clerk position she would be in line for a better position within the Housing Authority in the future. Although Brooks gave the Housing Authority permission to consider her for the work order clerk position, she emphasized her preference for the assistant housing manager position.

On August 26, 1997, Simms prepared the following memo regarding the work order clerk position which was distributed to various Housing Authority employees, including DeSpain, Burch, and Shirley Cook (Cook):

Because of the apparent delay in filling the position of Assistant Manager and Work Order Clerk, I have taken the liberty to do the following:

Since Earl's and Jackie's number one preference was the same person for both positions, I have given Earl the authority to hire the subject individual, Sandra Brooks.

Further, by this memo, I direct Sandra Baldrige to readvertise the position of Assistant Manager and to ask all of you named above to serve on the committee. I would further request from Sandy that the committee be furnished with evaluation sheets and that they be used as we interview each applicant.

You are to evaluate those who submit applications and the top three are to be

submitted to my office for a final determination.

Hopefully, this will delineate (sic) any further delay.

At trial, Simms testified that it was his decision to hire Brooks as a work order clerk. He further testified, and Brooks agreed, that the Housing Authority could not have hired her for both positions.

The Housing Authority offered the work order clerk position to Brooks and she accepted it. At the time she accepted the offer, Brooks was unaware that she had been the top candidate for both the work order clerk and assistant housing manager position. When Brooks learned that she had been the top candidate for the assistant housing manager position, she asked who had been hired to fill the spot. Upon learning that the position was going to be re-advertised, Brooks sought to re-apply but was told that Housing Authority policy prohibited her from applying for another position within the Housing Authority during her one-year probationary period. A white female was ultimately hired as assistant housing manager. At the end of her probationary period, Brooks was promoted to an accounting position.

A new assistant housing manager position was created in 1990 and Brooks applied for that position. As part of the selection process, the Housing Authority used a panel of three employees to conduct initial candidate interviews. Brooks was interviewed by the panel and designated as one of the top three candidates. Brooks next underwent a second interview with Cook,

who was the designated supervisor for the position. Cook testified that after interviewing the top three candidates, including Brooks, she was not satisfied with any of them and sought to re-advertise the position. At trial, Cook testified that she did not want to hire Brooks for the position because (1) she had concerns that Brooks did not always provided needed assistance; (2) she was concerned that Brooks was abrupt and abrasive with people and this could be problematic when dealing with frustrated leaseholders; and (3) she needed someone who could work well with the staff. When she told Simms how she felt, he told her it would be nice if Brooks got the position because it would be good for other employees to see people being promoted from within. Simms asked Cook to take Brooks to lunch and talk with her further to see if she could change her mind.

At Simms' request, Cook took Brooks to lunch. Cook testified that the lunch was good from a conversation standpoint, but that she was still not convinced that Brooks was the right person for the job.

Brooks testified that at the end of lunch Cook told her that she had the job as assistant manager. Brooks stated that Cook told her that Simms, who was out of town, would have to finalize the paperwork before she could be promoted. Cook's version of this event is much different. Cook testified that Brooks asked when she would hear something about the position or when a decision would be made. She told Brooks that Simms was out of town and nothing would be done until he returned. Cook

denied telling Brooks that she had the job or that she offered the job to Brooks because only Simms could hire someone.

According to Brooks, Simms returned to the office but never contacted her about the promotion. When she called Cook and asked why she had not heard anything, Cook appeared to be surprised that Simms had not contacted her. Brooks testified that Cook came to her desk later the same day and asked her to come to the break room. While on their way to the break room, Burch stopped them and asked Cook to come to her office. Burch and Cook were later joined by Simms. Brooks stated that after meeting with Burch and Simms for approximately an hour and a half, an upset-looking Cook told her that she was not going to be promoted and that the position was going to be re-advertised. Again, Cook's version of the event is much different. She testified that she did meet with Burch and Simms on one occasion when she was at the central office, and at some point during this meeting she told Simms that she still wanted to re-advertise the position. According to Cook, she wanted to re-advertise the opening because she wanted someone with a current strong housing/property management background. When she met with Brooks, Cook stated that she did not tell Brooks about her concerns about her job performance or abrasiveness. Cook denied being upset or near tears during this meeting.

Upon re-advertisement of the assistant housing manager position, Brooks once again applied. Brooks testified that she was called into a meeting with DeSpain and Suzanne Feng, her supervisor, and offered a lateral transfer to a new position

which did not contain a pay raise. Brooks refused the position because had she accepted she would have been back on a probationary period which would have made her ineligible to apply for the assistant housing manager position.

Brooks completed another interview with the three-employee panel, but was not selected as one of the top three candidates for the assistant housing manager position. Again, a white female was ultimately hired to fill the position. Cook testified that the person hired to fill the assistant housing manager position had three years of property management experience before applying which Brooks did not have, and four years of management experience immediately prior to that. Cook stated that while Brooks had some management and housing experience, none of it was recent and she did not believe that Brooks had the experience necessary for the job.

Brooks contends that the trial court should have entered a directed verdict in her favor on her claims of discrimination because the Housing Authority failed to rebut her prima facie case by offering a legitimate nondiscriminatory reason as to why it did not initially hire her to fill the assistant housing manager position and twice failed to promote her to that position. Based on the above-referenced facts, we disagree.

In regard to why Brooks was not initially hired to fill the assistant housing manager position, Simms testified that having decided to hire her to fill the work order clerk position he could not also hire her to fill the assistant housing manager

position. We believe that this explanation suffices to satisfy the Housing Authority's burden of establishing a legitimate, nondiscriminatory reason as to why Brooks was not hired as assistant housing manager in 1989.

[T]he burden of refuting the prima facie case need not be met by persuasion; the employer need only articulate with clarity and reasonable specificity, a reason unrelated to a discriminatory motive, and is not required to persuade the trier of fact that the action was lawful.

Handley, 827 S.W.2d at 700. As explained by the United States Supreme Court in Burdine:

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. [citations omitted] The McDonnell Douglas division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.

The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. [footnote omitted] The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejections. [citations omitted]. As the Court explained in Furnco Construction Corp, v, Walters, 436 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise explained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the

employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. [footnote omitted]

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reason. [citation omitted] It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. [footnote omitted] To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. [footnote omitted] The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly



by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. 248, 253-256, 101 S.Ct. 1089, 1093-1095, 67 L.Ed.2d 207, 215-217 (1981). The United States Supreme Court has also recognized that "the determination that a defendant has met its burden of production . . . can involve no credibility assessment." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509, 113 S.Ct. 2742, 2748, 125 L.Ed.2d 407, 417 (1993). Based on the foregoing authority, we believe that the reason offered by Simms as to why Brooks was not hired to fill the assistant housing manager position in 1987 meets the above-referenced criteria. Simms' explanation gives a nondiscriminatory reason as to why Brooks was not originally hired as assistant housing manager. This is all that Handley requires. To accept Brooks' argument that Simms' explanation was insufficient would be vocative of the third Handley prong which requires Brooks to show that the reason offered for the hiring decision is pretextual in nature.

Brooks' contention that the Housing Authority failed to offer a nondiscriminatory reason for failing to promote her to assistant housing manager in 1990 and 1991 is without merit. As we noted in the recitation of facts relevant to this argument, Cook articulate numerous reasons as to why she did not want to promote Brooks, and these explanations satisfy the Housing Authority's burden of proof under Handley.

II. DID THE TRIAL COURT ERR IN ITS APPLICATION OF THE AFTER-ACQUIRED EVIDENCE DOCTRINE?

While preparing for trial, the Housing Authority discovered several discrepancies in the résumé Brooks used when she initially applied with the Housing Authority in 1987 and on her subsequent applications for the assistant housing manager position in 1990 and 1991. Although the Housing Authority cited numerous examples of Brooks' misrepresentations in its July 1993 motion for summary judgment, we will use the ones the Housing Authority relies on in its brief on appeal as illustrations of the type of discrepancies which appear.

On her 1987 résumé, Brooks indicated that she had a 3.0 GPA at the University of Kentucky. In her 1990 application, Brooks indicated that her GPA was 2.8. When questioned at her deposition regarding this discrepancy, Brooks stated that the 2.8 GPA was correct, and that she had rounded it up to 3.0 on her 1987 résumé.

On her 1990 application for the assistant housing manager position, Brooks indicated that she had completed 3.5 years at the University of Kentucky as a business major with a 2.8 GPA. Under the column headed "Degree/Diploma," Brooks typed "Bachelor." On her résumé under the title "Educational History," Brooks typed "University of Kentucky, Bachelor's Degree, Business Administration 1983, completed 132 credit hours." The Housing Authority questioned Brooks regarding whether she had a Bachelor's degree in her requests for admission filed in Brooks' federal court action.<sup>3</sup> Brooks admitted that she did not have the

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<sup>3</sup>Brooks originally filed her claims in the U.S. District Court for the Eastern District of Kentucky. This claim was later

(continued...)

Bachelor's degree, but referred to her 1987 application and résumé "which reflect [that] Plaintiff had 132 hours of the 150 hours needed for a Bachelor's degree."

On her 1991 application for the assistant housing manager position, Brooks indicated that she had completed four years at the University of Kentucky as a business major. Under the column headed "Degree/Diploma," Brooks typed "BS." When questioned about this discrepancy during her deposition, Brooks maintained that her résumé and application only showed that she had "four years towards a B.S." as opposed to a Bachelor's degree.

Based on these misrepresentations and others, the Housing Authority moved for summary judgment on Brooks' discrimination claims on the ground that the aforementioned after-acquired evidence doctrine precluded Brooks' claims for discrimination. Simms testified both by affidavit in support of the motion for summary judgment and in court during trial that had he known of the misrepresentations at the time Brooks initially applied he would not have hired her, and that if he would have discovered the misrepresentations during the course of her employment he would have discharged her. As we have noted, the trial court denied the Housing Authority's motion for summary judgment, but did rule that Brooks' misrepresentations precluded her from seeking front pay and reinstatement in line with

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<sup>3</sup>(...continued)  
voluntarily dismissed without prejudice.

McKennon. Because of this ruling, Brooks' claim for damages for constructive discharge was not submitted to the jury.

Brooks contends that under McKennon, the Housing Authority bore the burden of proving that she made the misrepresentations of which it complained and that the trial court relieved the Housing Authority from meeting its burden by the following language contained in a footnote to its order of August 10, 1995:

The Court refuses to embroil itself in the semantics of determining exactly what misrepresentations were made, the extent of such misrepresentations, and the defendant's prior knowledge of the misrepresentations. It suffices to say, misrepresentations were made.

We disagree.

In McKennon, the United States Supreme Court described the employer's burden of proof under the after-acquired evidence doctrine as follows:

Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.

McKennon, 513 U.S. at 362-363, 115 S.Ct. at 886-887, 130 L.Ed.2d at 864. The Housing Authority presented evidence of misrepresentations and that it would have terminated Brooks had it learned of the misrepresentations during the course of her employment. The fact that the trial court agreed that misrepresentations were made was not improper, given the evidence contained in the résumé and applications, Brooks' response to the

requests for admissions, and Brooks' deposition testimony. Therefore, the trial court's application of the after-acquired evidence doctrine was not erroneous.

III. DID THE TRIAL COURT ERR IN REFUSING TO USE BROOKS' TENDERED JURY INSTRUCTION IN REGARD TO HER DISCRIMINATION CLAIM?

Brooks maintains that in cases where the plaintiff seeks to prove discrimination by circumstantial evidence, the plaintiff is entitled to a jury instruction "in accordance with the 3-stage format of . . . Handley." Specifically, Brooks argues that the jury should have been instructed to find in her favor if it was satisfied that the Housing Authority did not give a legitimate, nondiscriminatory explanation for its employment decisions and if she has shown that she was a member of a protected class, that she was qualified to fill the position, that she did not receive the position, and that the position remained open and was ultimately filled by a member of an unprotected class. We disagree.

As the Housing Authority points out in its brief on appeal, the provisions in Handley on which Brooks relies are burden-shifting presumptions. "In Kentucky, jury instructions do not include evidentiary presumptions." Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 824 (1992).

Such presumptions alter the burden of going forward with the evidence, and this may result in a directed verdict in the absence of countervailing evidence, but the jury instructions should be framed only to state what the jury must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.

Meyers, 840 S.W.2d at 824.

IV. WAS IT ERRONEOUS FOR THE TRIAL COURT TO DISMISS BROOKS' CLAIMS OF RETALIATION AGAINST THE INDIVIDUAL DEFENDANTS?

Brooks alleges that:

Because KRS 344.280 proscribes retaliatory conduct by a "person," and because "person" is defined by KRS 344.010 as, inter alia, "one (1) or more individuals," and because Simms, Burch, and DeSpain are "individuals" and therefore "persons" within the meaning of KRS 344.280, the trial court should not have dismissed Brooks' retaliation claim against them.

We find that this argument is not properly preserved for our review because it was not presented to the trial court.

When the individual defendants moved for summary judgment on Brooks' claims against them, they argued that KRS Chapter 344 does not allow individuals to be held liable for civil rights violations. In responding to the argument of the individual defendants, Brooks only referred to Kentucky's general discrimination provisions and raised no argument pertaining to KRS 344.280. Because an argument not raised before the trial court cannot be considered on appeal, we will not address this argument. Lawrence v. Risen, Ky.App., 598 S.W.2d 474, 476 (1980).

V. DID THE TRIAL COURT ERR IN REFUSING TO SUBMIT BROOKS' CLAIM FOR PUNITIVE DAMAGES TO THE JURY?

Brooks argues that the trial court improperly refused to submit her claim for punitive damages to the jury. Because we have held that the trial court erred in refusing to grant the Housing Authority's motion for directed verdict on Brooks' retaliation claim, we need not address this argument.

Having considered all of the arguments raised by Brooks in her cross-appeal with the exception of her arguments pertaining to attorney fees, the decisions of the trial court from which Brooks complains are affirmed.

THE HOUSING AUTHORITY'S DIRECT APPEAL

Aside from an argument pertaining to attorney fees which we will address at the end of this opinion, the only argument the Housing Authority raises on direct appeal is that the trial court erred in refusing to grant a directed verdict in its favor in regard to Brooks' claim of retaliation. We will first address Brooks' contention that this issue was not properly preserved for our review.

Brooks maintains that when the Housing Authority moved for a directed verdict at the close of her case, it did not assert that Brooks failed to show that its reason for treating Brooks as it did following her filing of the sworn claim of discrimination with the Commission was pretextual in nature. Based on this fact, Brooks contends that the Housing Authority's mere renewal of its motion for directed verdict "in general" at the close of all evidence was not sufficient to preserve this alleged error for our review. If this is truly what happened, then we may have been persuaded to agree with Brooks. However, a review of the Housing Authority's motions on the videotape of the trial shows that there is more to this story which Brooks fails to take into consideration.

When the Housing Authority made its motion for directed verdict at the conclusion of Brooks' case in chief, the trial

court indicated that it would take the motion under advisement. At the close of all evidence, counsel for the parties retired to the judge's chambers to discuss the jury instructions. At the outset, the trial court asked if there were any motions to be made at the conclusion of the evidence. Counsel for the Housing Authority then reminded the trial court that it had not yet ruled on its initial motion for directed verdict. In response to this observation, the trial court indicated that one of the issues to be decided was whether the actions Brooks alleged to have occurred after her filing of the sworn charge with the Commission were sufficient to rise to the level of retaliation. The trial court stated that in its opinion, the actions Brooks complained of were sufficient under Handley to support a claim for retaliation and overruled the motion for directed verdict. After making this ruling, the trial court asked counsel for the Housing Authority if it wished to renew its motion for directed verdict in general. When counsel for the Housing Authority responded in the affirmative, the trial court denied its motion.

We agree with the Housing Authority that based on the foregoing, its renewal "in general" of its motion for directed verdict preserved this issue for our review. The trial court clearly stated that it believed Brooks showed evidence of conduct on the Housing Authority's behalf which would warrant submission of Brooks' claims for retaliation to the jury. Faced with this finding on behalf of the trial court before counsel for the Housing Authority had an opportunity to make its second motion for directed verdict, we believe that the Housing Authority's



renewal of its motion in general was sufficient to preserve this issue for our review.

The Housing Authority claims that the trial court erred in failing to grant its motion for directed verdict because: (1) Brooks presented no evidence of any act constituting adverse employment action on behalf of the Housing Authority or severe or pervasive harassment on behalf of a supervisor; (2) that Brooks failed to establish a causal connection between Brooks' protected activity and any alleged adverse employment action on behalf of the Housing Authority; and (3) even if Brooks established a prima facie case of retaliation, she did not prove that the Housing Authority's articulation of a non-retaliatory reason for its action was pretextual in nature.

We will begin our discussion of the Housing Authority's argument by analyzing the evidence in light of the standards we have previously discussed under Lovins and Napier. As we previously indicated, Brooks filed her sworn charge of discrimination with the Commission on July 2, 1991. Brooks alleged that shortly after filing her sworn complaint, she was periodically sent to work in the maintenance area of the Housing Authority's warehouse in July, August, September, and October of 1991.

In late October 1991, Brooks wrote a note to Feng advising her that an investigator from the Commission would be coming to interview her and asking Feng to be truthful when she spoke with the investigator. On November 8, 1991, approximately one week after Brooks informed Feng of the pending investigation,

Brooks was called to a meeting in the board room by DeSpain. Feng and Alan Sisk from personnel were also in attendance. Both parties dispute what occurred at this meeting, however, in light of the standard of review for directed verdict, we will accept Brooks' statement of what occurred.

According to Brooks, the meeting was very adversarial in nature. When Brooks asked if everything was "OK," DeSpain stated that he was in charge of the meeting and that if she said anything he did not like he would write her up for insubordination and fire her.

DeSpain proceeded to tell Brooks that on November 7, 1991, he observed her reading a newspaper at the receptionist's desk for 25-30 minutes immediately prior to her lunch break. According to DeSpain, after Brooks finished reading the paper she proceeded to take her entire lunch break. DeSpain also told Brooks that on the same day he observed her talking with a man outside the building for an extended period of time during work hours. DeSpain then accused Brooks of making an accounting error on a HUD report which could have cost the Housing Authority thousands of dollars. When Brooks told DeSpain that in reality she had found the error on a form which he had principally prepared and brought the error to his attention, DeSpain became angry and "slapped" his hand back and forth at her. Although DeSpain did not physically touch Brooks, she testified that his hand was so close that she could feel the hairs on the back of his fingers. At that point, Brooks began to cry and asked to leave the room.

When Brooks returned to the meeting, Simms was present. When Simms asked Brooks what had occurred, she told him that DeSpain was making false accusations. After discussing DeSpain's concerns, Simms allegedly told Brooks that she should get permission from her supervisor to leave her desk for any reason. When Brooks asked Simms if other employees were required to obtain permission to leave their desks, Simms told her not to worry about anyone else. Although Simms denied telling Brooks to obtain permission to leave her desk, there was no dispute that following the meeting Brooks did not leave her desk for any reason without asking Feng's permission to do so. As a result of the meeting of November 8, 1991, Brooks filed a sworn charge of retaliation with the Commission on November 14, 1991.

Brooks testified that one day when she was preparing to leave her desk to go on break, she saw the Sheriff come into the Housing Authority to serve Simms with her federal complaint. Before Brooks' break was over, Feng came into the break room and told her that her break was over. Brooks accompanied Feng to her office, where Feng told her that Sisk had just shortened her break time from fifteen minutes to ten.

Under KRS 344.280, it is an unlawful practice:

To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

KRS 344.280(1). In addressing the burden of proof necessary to establish a claim for retaliation, Handley states:

The McDonnell-Douglas scheme [for discrimination] is, in a modified version, applicable to retaliation claims. The plaintiff, in making out a prima facie case, must show that 1) she engaged in a protected activity, 2) she was disadvantaged by an act of her employer, and 3) there was a causal connection between the activity engaged in and the employer's act. Again, if the employer articulates a legitimate, non-retaliatory reason for the decision, the employee must show that "but for" the protected activity, the adverse action would not have occurred.

Handley, 827 S.W.2d at 701, citing DeAnda v. St. Joseph Hospital, 671 F.2d 850 (5<sup>th</sup> Cir. 1982). The Housing Authority contends that Brooks did not establish a prima facie case of retaliation because Brooks failed to "present evidence of any act constituting adverse employment action or pervasive retaliatory harassment by a supervisor on the part of the Housing Authority." Brooks argues that the fact that (1) she was required to do intermittent work at the warehouse immediately after the filing of her sworn charge with the Commission; (2) she was required to obtain permission to leave her desk for any reason from her supervisor; and (3) her breaks were shortened from fifteen minutes to ten minutes were sufficient to prove that she was "disadvantaged by an act of her employer" as required by Handley.

Aside from stating that a plaintiff must show that she was "disadvantaged by an act of her employer" in order to set forth a prima facie case of retaliation, Handley is silent as to what constitutes a disadvantageous act. Because of the similarities between KRS Chapter 344 and Title VII of the federal civil rights act, it is permissible to seek guidance from federal

case law in rendering decisions on claims brought under KRS Chapter 344. Handley, 827 S.W.2d at 699.

The Sixth Circuit has recently ruled that a Title VII plaintiff must show that the defendant "took adverse employment action against the plaintiff or that the plaintiff was subject to severe or pervasive retaliatory harassment by a supervisor" in order to establish a prima facie case of retaliation. Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6<sup>th</sup> Cir. 2000). The Fifth Circuit has recognized that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." Dollis v. Rubin, 77 F.3d 777, 781-782 (5<sup>th</sup> Cir. 1995.) In so ruling, the Fifth Circuit noted that ultimate employment decisions are those concerned with hiring and discharging, promoting, compensating, and granting leave. Dollis, 77 F.3d at 782. See also Matteen v. Eastman Kodak Company, 104 F.3d 702 (5<sup>th</sup> Cir. 1997); and Messer v. Meno, 130 F.3d 130 (5<sup>th</sup> Cir. 1997). The Eighth Circuit reached a similar decision, stating that "while the action complained of may have . . . a tangential effect on [a plaintiff's] employment, [it must] rise to the level of an ultimate employment decision intended to be actionable under Title VII." Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8<sup>th</sup> Cir. 1997).

While we realize that other federal circuit and district courts have adopted a lesser standard in evaluating whether an employer's allegedly retaliatory conduct constitutes

adverse employment action, we believe that we should apply the "ultimate employment decision" standard in determining whether a plaintiff has been "disadvantaged by an act of her employer." As support for our decision, we adopt the reasoning set forth by the Third Circuit in Robinson v. City of Pittsburg, 120 F.3d 1286 (3<sup>rd</sup> Cir. 1997).

Retaliatory conduct other than discharge or refusal to rehire is . . . proscribed by Title VII only if it alter the employee's "compensation, terms, conditions, or privileges of employment," deprives him or her of "employment opportunities," or "adversely affects his [or her] status as an employee." It follows that "not everything that makes an employee unhappy" qualifies as retaliation, for "[o]therwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee' did not like would form the basis of a discrimination suit." Smart v. Ball State University, 89 F.3d 437, 441 (7<sup>th</sup> Cir. 1996), (quoting Williams v. Bristol-Myers-Squibb Co., 85 F.3d 270, 274 (7<sup>th</sup> Cir. 1996)).

Courts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment into the doctrinal requirement that the alleged retaliation constitute "adverse employment action." [citations omitted] Accordingly, just as we concluded that a quid pro quo plaintiff must show a "quo" that is serious enough to alter his or her "compensation, terms, conditions, or privileges" of employment, we hold that the "adverse employment action" element of a retaliation plaintiff's prima facie case incorporates the same requirement that the retaliatory conduct rise to the level of a violation of 42 U.S.C. § 200e-2(a)(1) or (2). [footnote omitted].

Robinson, 120 F.3d at 1300-1301.

Applying the foregoing standard to the case at hand, even if we accept Brooks' allegations as to what occurred after she filed her sworn charge with the Commission, she has failed to prove that she was disadvantaged by the Housing Authority. At best, Brooks has shown that she was required to occasionally work in the warehouse, that she was required to get permission from her supervisor to leave her desk for any reason, that she was subjected to one meeting where DeSpain "slapped" at her without making physical contact and falsely accused her of making accounting errors and being away from her desk for long periods of time for reasons unrelated to her job, and that her breaks were shortened from fifteen minutes to ten. Brooks made no allegation that she was terminated, demoted, subjected to a decrease in compensation or benefits, denied leave, or subjected to any other adverse employment action as a result of the filing of her sworn charge with the Commission. Because the activities of which Brooks complains do not rise to the level of adverse employment action as detailed above, Brooks has failed to make a prima facie showing of retaliation and the trial court erred in refusing to direct a verdict in favor of the Housing Authority.

ATTORNEY FEES

As we have previously noted, the trial court awarded Brooks a total of \$56,810.37 in attorney fees, court costs, and out-of-pocket expenses as a result of her success in regard to her claim for retaliation. On appeal, both parties raise several arguments in regard to the amount of attorney fees awarded. Because we have found that the trial court erred in failing to grant a directed verdict in favor of the Housing Authority in regard to Brooks' claims of retaliation, it necessarily follows that she is not entitled to an award of attorney fees.

All orders challenged by Brooks in her cross-appeal are affirmed with the exception of the trial court's award of attorney fees. In regard to the Housing Authority's direct appeal, the trial court's denial of the Housing Authority's motion for directed verdict is reversed, as is the trial court's award of attorney fees, and this matter is remanded to the trial court with instructions to enter a directed verdict in favor of the Housing Authority.

ALL CONCUR.

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