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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001393-MR

PAULA APONTE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 02-CI-001279

STOCK YARDS BANK & TRUST COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

ROSENBLUM, SENIOR JUDGE: Paula Aponte appeals from an opinion and order of the Jefferson Circuit Court awarding summary judgment to Stock Yards Bank and Trust Company (the Bank) in an action brought by Aponte pursuant to KRS[2] Chapter 344, the Kentucky Civil Rights Act. Aponte contends that she was

[1] Senior Judge Paul Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

[2] Kentucky Revised Statutes.

subjected to discriminatory conduct by the Bank based upon her national origin. Because Aponte has failed to establish a prima facie case of national origin discrimination, and because the circuit court did not abuse its discretion in denying Aponte's motion to compel the Bank to provide supplementary employee compensation information, we affirm.

Aponte, who is Hispanic, was hired by the Bank in October 1998 to fill its newly created position as Vice President of Corporate Training. Her duties included, among other things, organizing training classes and preparing training materials for Bank employees. Greg Hoeck originally hired Aponte and was her immediate supervisor during her tenure at the bank. David Heintzman is president of the Bank.

There were no events prior to August 2000 which gave Aponte reason to be concerned about her status with the Bank. However, in August 2000 Hoeck communicated to Aponte that Heintzman was concerned about her commitment to the bank, with her job performance, and with her attendance record. Approximately one week later Aponte requested a meeting with Hoeck to further discuss the matter. At this meeting Aponte defended her commitment to the Bank, her job performance, and her attendance record. According to Aponte, she questioned Hoeck regarding whether the Bank's concerns had anything to do

with her gender, race or color, and Hoeck responded "That's typical of you people, always playing the race card."[3]

In January 2001 Aponte received the results of her 2000 year-end performance evaluation. Her evaluation was "partially-unfavorable," and raised issues concerning Aponte's timeliness and responsiveness. Aponte was also informed at this time that she would not be receiving a year-end bonus. As a component of her disparate treatment allegation Aponte notes that Graphic Design Department Head Dave Jordan did receive a 2000 year-end bonus even though he, too, had received a partially unfavorable year-end evaluation.

In June 2001 Aponte had her mid-year performance evaluation. The evaluation again contained negative appraisals of her performance. Approximately three weeks later Aponte met with Hoeck and Heintzman regarding her mid-year review. Shortly thereafter, Aponte was informed that she was being terminated.

On February 18, 2002, Aponte filed a Complaint in Jefferson Circuit Court alleging that, in violation of KRS 344, she had "been subjected to conduct of a discriminatory nature based on her national origin," and that the Bank "through its agents or supervisors, engaged in a pattern and practice of

[3] According to Hoeck, in response to Aponte's question concerning whether her treatment was based upon race he responded "this discussion is about your performance. It's not a race issue, don't play the race card. Let's talk about your performance." As summary judgment was awarded against Aponte, we accept her version of the incident. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

unlawful discrimination based on national origin and singling [Aponte] out and treating [her] less favorably on the basis of [her] national origin[.]" In its answer, the Bank asserted that it lawfully discharged Aponte because, in the Bank's judgment, her performance and conduct warranted it; the Bank's decision to fire Aponte was lawful, reasonable and in good faith because it is entitled by law to make that business decision; and because Aponte's injuries, if any, resulted from her own conduct because that conduct resulted in her discharge.

Following the completion of discovery, on March 3, 2004, the Bank filed a motion for summary judgment. On June 15, 2004, the circuit court entered an order granting the Bank's motion for summary judgment. Aponte filed a motion to alter, amend, or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59, which was denied. This appeal followed.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances." 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)). The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, 807 S.W.2d at 480 (citing Dossett v. New York Mining & Manufacturing Co., 451

S.W.2d 843 (Ky. 1970)). However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992)(citing Steelvest, supra at 480). This Court has previously stated that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue" [citations omitted]. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

Aponte contends that the trial court erroneously granted summary judgment to the Bank because there remain genuine issues of material fact; because she established a prima facie discrimination case by showing that similarly situated employees were treated more favorably than she; because Hoeck's racial comment created a genuine issue of material fact as to whether the reason for Aponte's termination was motivated by racial animus; and because her claim of disparate treatment demonstrated the discriminatory motives of the Bank.

Aponte contends that the Bank discriminated against her in violation of KRS Chapter 344. Because KRS Chapter 344 is modeled upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., Kentucky courts generally follow federal law in interpreting Chapter 344. Stewart v. University of Louisville, 65 S.W.3d 536, 539 (Ky. App. 2001). Chapter 344 and Title VII prohibit two forms of discrimination - disparate impact and disparate treatment. A plaintiff may establish a prima facie case of discrimination through either direct evidence of intentional discrimination, Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 114-15 (6th Cir. 1987), or circumstantial evidence giving rise to an inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Direct evidence and the McDonnell Douglas formula comprise "two different evidentiary paths by which to resolve the ultimate issue of defendant's discriminatory intent." Blalock v. Metals Trades, Inc., 775 F.2d 703, 707 (6th Cir. 1985). Where a plaintiff presents direct, credible evidence of discrimination, the McDonnell Douglas formula is inapplicable because the "plaintiff no longer needs the inference of discrimination that arises from the prima facie case." Terbovitz, 825 F.2d at 115.

Aponte has not presented direct evidence of national origin discrimination.[4] The "race card" comment by Hoeck is not direct evidence of discrimination, but, rather, circumstantial evidence, as there are varying inferences which may be drawn from the statement.

Because Aponte has not presented direct evidence of discrimination, we must apply the familiar three-part formula from McDonnell Douglas. Under this formula the plaintiff carries the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. The burden then shifts to the defendant to rebut the presumption by offering a legitimate, non-discriminatory reason for the adverse employment action. McDonnell Douglas, 411 U.S. at 802. The defendant need not persuade the court that it was "actually motivated by the proffered reasons" but the "explanation provided must be legally sufficient to justify a judgment for the defendant." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-255, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). To meet its burden, the defendant must clearly articulate, through introduction of admissible evidence, the non-discriminatory reasons for its employment decision. Id. The plaintiff must then respond by demonstrating, by a preponderance of the evidence, that the defendant's proffered reason for the

[4] Aponte herself relies upon the McDonnell Douglas formula rather than allege direct evidence of discrimination.

employment action is a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-04. A plaintiff can show that the defendant's decision was pretextual by presenting sufficient evidence that the proffered reasons (1) had no basis in fact, (2) did not actually motivate the decision, or (3) were insufficient to motivate the decision. Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994). If the plaintiff has made her prima facie case and presented sufficient evidence for a reasonable jury to reject the defendant's asserted justification for its actions, then the case should be submitted to the factfinder "to determine whether intentional discrimination has occurred." Manzer, 29 F.3d at 1083.

Turning to the first prong of the McDonnell Douglas formula, in order to meet her burden of establishing a prima facie case of discrimination the plaintiff must demonstrate (1) that she is a member of a protected class; (2) that she suffered an adverse employment action; (3) that she was qualified for the relevant position; and (4) that she was replaced by someone outside her protected class or was treated differently than similarly situated individuals outside her protected class. Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 538-39 (6th Cir. 2002). The plaintiff's burden of establishing a prima facie case is "not onerous" and is a "burden easily met." Cline

v. Catholic Diocese of Toledo, 206 F.3d 651, 660 (6th Cir. 2000). Once the plaintiff establishes a prima facie case by a preponderance of the evidence, an inference of discrimination arises. Warfield v. Lebanon Corr. Inst., 181 F.3d 723, 728-29 (6th Cir. 1999).

As an Hispanic, Aponte is a member of a protected class, and meets the first element of the McDonnel Douglas prima facie case test. KRS 344.040.

"An adverse employment action is a materially adverse change in the terms or conditions of employment because of the employer's conduct." Policastro, 297 F.3d at 539. "To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration in job responsibilities." Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). Examples of a materially adverse employment decision include "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Id. "Reassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions." Policastro, 297 F.3d at 539. Because Aponte was terminated from her position with the Bank,

she suffered an adverse employment action and fulfills the second element of the McDonnel Douglas prima facie case test.

The third element of the prima facie case test requires that the plaintiff demonstrate that she was qualified for the relevant position. The Bank does not challenge Aponte's qualifications for the position of Vice President of Corporate Training, only certain aspects of her job performance and her reaction to criticism of her performance. The record reflects that prior to her employment at the Bank Aponte was, among other things, a training manager at Manufacturers Hanover Trust Bank from 1982 to 1989; a training analyst at PNC Bank from 1991 to 1995; and Manager of Corporate Training at the Bank of Louisville from 1995 to October 1998, when she was hired by the Stock Yards Bank. The record also demonstrates high praise by Bank personnel for her performance during classroom training sessions. Aponte satisfies the qualification element of the test.

To satisfy element four of the McDonnell Douglas prima facie case test, Aponte must demonstrate that she was either replaced by someone outside her protected class or was treated differently than similarly situated individuals outside her protected class. It is undisputed that Aponte's position was not filled after her termination, and so she must rely on the second alternative for satisfying this element, i.e., that she

was treated differently than similarly situated individuals outside her protected class.

In support of her position that she was treated differently than similarly situated individuals outside of her protected class Aponte cites to the situation involving David Jordan, Vice President of the Bank's Graphic Design Department.[5] In approximately May of 2000 Jordan was disciplined for misuse of the Bank's e-mail system. Jordan was using the system for personal e-mail, and was directed to refrain from using the system for that purpose. In the process of informing his e-mail correspondents not to e-mail him at the bank, he sent an e-mail to his wife. He included an end-note to the message which stated to the effect, "if you're a SYB employee and are reading this message, f*** you." Jordan was disciplined with a one-day suspension from work and was made to apologize to the Bank employee who had read the message. Aponte alleges she was treated differently from Jordan because Jordan was not terminated and received a bonus for the year 2000, whereas she did not receive a bonus and was terminated for her conduct.

To be considered similarly situated, a plaintiff "need not demonstrate an exact correlation with the employee receiving

[5] Aponte also claims that employees of the Bank did not socialize with her by inviting her to lunch and to their homes. However, Aponte has not related this lack of socializing to her national origin and, further, she has not alleged hostile work-environment discrimination. We accordingly conclude that this allegation is not relevant to the claims asserted in her complaint.

more favorable treatment in order for the two to be considered 'similarly-situated'" but rather must show that the plaintiff and the comparable person are similar "in all of the relevant aspects." Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998).

Both Aponte and Jordan are Vice Presidents and both report to Hoeck; however, other than that, there situations are not similar. First, their respective job duties, job descriptions, and job responsibilities are fundamentally dissimilar. Aponte is a corporate trainer and Jordan is a graphic designer. Secondly, and more importantly, Aponte was disciplined for conduct relating directly to her job performance, including failure to meet deadlines; failure to follow-up on phone calls and e-mails; failure to attend meetings; failure to communicate with management; and failure to fill training classes. In addition, according to the Bank, Aponte's termination was also related to her reluctance to accept criticism of her job performance and her deteriorating work relationships.

On the other hand, Jordan's conduct did not relate directly to his job performance, but, rather, related to inappropriate use of the Bank's e-mail system and a crass addendum to an e-mail which he knew may be read by a Bank employee. There is no evidence contained in the record that

Jordan did not competently perform his graphic design duties.[6] Hence, we conclude that the Bank's failure to terminate Jordan or its award of a year 2000 bonus to him does not demonstrate that she was treated differently than a similarly situated individual. Because of the dissimilarities in the relevant conduct, the two were not similarly situated, and Aponte's contention that Jordan was similarly situated and/or received more favorable treatment is not supported by the record.

There are no genuine issues of material fact concerning whether Aponte has established a prima facie case of discrimination under the McDonnel Douglas formula.[7] As a matter of law, she has not. Aponte has failed to demonstrate that any similarly situated employee at the Bank who had engaged in similar conduct was disciplined less severely than she was. As such, the circuit court properly granted summary judgment to the

[6] While in her brief Aponte states that Jordan, too, was evaluated as having failed to meet deadlines, she does not cite us to supporting evidence in the record. Further, this issue was not raised in Jordan's deposition, and we are unable to find any evidence in the record corroborating Aponte's assertion. In any event, Aponte was evaluated for various other deficiencies in her performance aside from failing to meet deadlines. So, even if Jordan was evaluated negatively for failing to meet deadlines, he still would not be similarly situated with Aponte.

[7] We recognize that there are alternative approaches to establishing a prima facie case of discrimination, see, e.g. Shah v. General Electric Company, 816 F.2d 264, 269 (1987)(A discharged plaintiff who was not replaced can nonetheless establish a prima facie case by showing that the defendant engaged in a pattern of discrimination which supports an inference that any particular employment decision, during the period the discriminatory policy was in force, was made pursuant to that policy). However, Aponte does not allege that the Bank engaged in a pattern of discrimination, nor has Aponte relied upon any approach other than the McDonnel Douglas prima facie case test to establish her claim of disparate treatment.

Bank. Further, as Aponte has failed to satisfy the first element of the McDonnel Douglas formula, we need not discuss the remaining two elements, i.e., the evidence supporting (1) the Bank's nondiscriminatory justification for the discharge and (2) whether the Bank's nondiscriminatory justification was pretextual.[8]

Aponte also contends that the circuit court erred in denying her motion to compel the Bank to respond to an interrogatory concerning wage information relating to the Bank's various department heads. Interrogatory No. 15 of Aponte's June 12, 2003, discovery request stated as follows:[9]

> Please identify and disclose all persons that were department heads of SYB during Plaintiff's employment at SYB, including, but not limited to: Judy Wells, Sam Winkler, James Hillebrand, Lynn Hillebrand, June Meredit, Judy Sprowls, Karen Buler, Ann Burt, Cathy Thompson and John Jenkins. For those identified in [the] foregoing question, provide the following information for each of the years of their employment with Defendant from 1998 – 2001:
>
> 1. Job title and location of assignment

[8] We note that if, arguendo, we had accepted that Aponte had established a prima facie case, the Bank offered a nondiscriminatory reason for Aponte's discharge (i.e. poor job performance) and Aponte has failed to present evidence sufficient to demonstrate that the Bank's proffered reason for her discharge was pretextual.

[9] The discovery request is not located in proper sequence in the trial record and we have been unable to locate the actual June 12 discovery request. Neither party cites us to its location in the record (assuming it was even filed therein). However, Aponte's motion to compel and the Bank's response thereto are contained in the record, and there is no dispute that Interrogatory No. 15 as set forth in Aponte's brief correctly reflects the interrogatory at issue.

(bank or branch);

2. All compensation for each year of their employment;

3. Job description; and

4. Experience and qualifications for each position each such employee held.

Aponte alleges that the information contained in the interrogatory is relevant to the issues of disparate treatment and disparate pay.

CR 26.02, Scope of discovery, provides, in relevant part, as follows:

> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is well-settled that discovery rules are to be liberally construed so as to provide both parties with relevant information fundamental to proper litigation. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Generally, control of discovery is a matter of judicial discretion. Primm v. Isaac, 127 S.W.3d 630 (Ky. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." The Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

Aponte's Application for Employment with the Bank reflects that she listed $51,000.00 as her required salary. In her deposition, Aponte testified as follows:

> Q. What - - what was your salary? What were your benefits? What were you getting from them?
>
> A. My salary was [$]50,000 a year, Insurance benefits. That was it.
>
> Q. Was there any discussion about raises and how that would be handled?
>
> A. No.
>
> Q. Was there any discussion about bonuses?
>
> A. No.
>
> Q. Was there any discussion about leave time?
>
> A. No.
>
> Q. Was there any discussion about performance appraisal?
>
> A. No.
>
> Q. Was there anything about the setting of or determining a salary that you deemed inappropriate?

A. I don’t understand the question.

Q. Were you happy with the salary?

A. Yes.

Q. Did you have any complaints about either the salary itself or the process of arriving at the salary?

A. No.

In summary, based upon the foregoing, the record discloses that Aponte, at the time of her hiring, received substantially the salary that she requested. In her deposition she stated that she was happy with the salary she was offered by the Bank. Since the Bank paid her the salary Aponte requested on her job application, it follows that any disparity in her salary in comparison with the compensation paid to other department heads (who may not in any event be similarly situated) cannot rationally be linked to national origin discrimination. Aponte received the compensation she requested.

Aponte received substantially the salary she requested and she had no objections as to how that salary was arrived at. As such, the evidence sought by Aponte was not relevant to the subject matter involved in the action, i.e., whether she received disparate pay based upon her national origin.

Nor is the information relevant to her disparate treatment claim in regard to her failure to receive a bonus for

the year 2000. While this interrogatory would disclose whether an individual employee received a bonus, the information requested would not shed light on whether the bonus had been awarded to other employees despite conduct similar to that engaged in by Aponte. We moreover note that the recent salary levels and years of experience for each vice president level employee were provided in a separate interrogatory, and Aponte does not suggest that this information provides any indication of disparate pay in comparison with other personnel at the vice presidential level.

Aponte also attempts to connect this information as relevant to Hoeck's "race card" comment and her associated claim of disparate treatment. However, again, we discern no relevance to this aspect of her claim.

In light of the foregoing, the circuit court did not abuse its discretion by denying her motion to compel the Bank to respond to the interrogatory.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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