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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000443-MR

SHERRI SMITH (NOW WILSON) — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CI-00160

CABINET FOR HEALTH AND FAMILY SERVICES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,[1] SENIOR JUDGE.

WINE, JUDGE: Sherri L. Smith Wilson ("Wilson") appeals from an order of the Fayette Circuit Court dismissing her complaint alleging racial discrimination and granting a summary judgment on February 10, 2006, in favor of the Commonwealth of Kentucky, Cabinet for Health and Family Services ("CHFS"). After reviewing the parties' briefs, including the pleadings filed with the circuit court, and having considered the deposition of the appellant, we affirm the judgment below.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The underlying facts are not in dispute. Wilson graduated from the University of Louisville in August 1986 with a Bachelor of Science Degree in Correctional Administration. At the time of her deposition in March 2005, she had been accepted into a graduate program at Kentucky State University, seeking a Master's Degree in Public Administration. Although she attended some post-graduate courses while working for the Commonwealth of Kentucky ("Commonwealth"), she never received any additional degrees. Beginning in 1986, Wilson worked as a probation and parole officer with the Department of Corrections in the Justice Cabinet. She wrote pre-sentence investigation reports, worked with a program designed to help inmates transition back into the community and served as a juvenile counselor.

In June 2000, Wilson began work with CHFS as a Social Services Clinician I. She was a member of a foster care team where her responsibilities included interviewing foster parents and monitoring the status of children placed in foster care in Fayette County. In January 2001, she transferred back to the Department of Corrections, only to return to CHFS on April 15, 2001, where she was assigned to Franklin County.

In July 2002, Wilson applied for a position with CHFS's Central Intake, a department assigned the responsibility of receiving complaints concerning child abuse. When informed the position would result in a reduction in pay, Wilson withdrew her application. In December 2002, Wilson applied and interviewed for the position of Field Office Supervisor of a foster care team, also a position with CHFS. The minimum requirements for the position included: (1) a Master's Degree in Social Work, Sociology,

Psychology or related field; and (2) four years of social work experience. Although a Bachelor's Degree and two years of professional social work could be substituted for the Master's Degree, the position announcement stressed the clear preference for a Master's Degree in Social Work. Wilson was not hired and instead a Caucasian female with a Master's Degree in Social Work, whom Wilson insists was less qualified than she, was hired. In her deposition, Wilson admitted she was not familiar with the other applicant's work history except that she had not worked in foster care. Wilson also complained that the interviewing panel was entirely Caucasian and the individual hired actually helped conduct the interview. Wilson further alleges that a CHFS supervisor told her she would never be hired in a position within foster care because she had developed a reputation "for being confrontational."

Wilson also applied for a position on a Permanency Team with CHFS in December 2002. The vacancy was filled by an Arab-American whom Wilson claimed not only was not as qualified as herself but, contrary to CHFS policy, was hired from outside of the agency. Once again in her deposition, Wilson admitted she was not familiar with the other candidate's education or employment history.

Subsequently in June 2003, Wilson applied for a position in CHFS as a Field Office Supervisor of the Central Intake Team. The requirements for this position were the same as those for the foster care team supervisor position. Again, a Caucasian female, whom Wilson asserts was less qualified but who had more years of experience with CHFS and also had Master's Degree in Social Work, was hired instead of her.

In January 2005, Wilson filed her complaint in the Fayette Circuit Court alleging she had been a victim of intentional and illegal racial discrimination. On August 10, 2006, the trial court granted summary judgment, finding Wilson had failed to establish a *prima facie* case of race discrimination because she was not as qualified as the other applicants who were hired.

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. *Palmer v. International Ass'n of Machinists,* 882 S.W.2d 117, 120 (Ky. 1994); *Stewart v. University of Louisville,* 65 S.W.3d 536, 540 (Ky.App. 2001); CR 56.03. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 482 (Ky. 1991); *see also City of Florence, Kentucky v. Chipman,* 38 S.W.3d 387, 390 (Ky. 2001). The court must view the record in the light most favorable to the nonmovant and resolve all doubts in her favor. *Commonwealth v. Whitworth,* 74 S.W.3d 695, 698 (Ky. 2002); *Lipsteuer v. CSX Transportation, Inc.,* 37 S.W.3d 732, 736 (Ky. 2000). "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch*

v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999); *see also Murphy v. Second Street Corp.*, 48 S.W.3d 571, 573 (Ky.App. 2001). As an appellate court, we need not defer to the trial court's decision on summary judgment and will review the issue *de novo* as only legal questions are involved. *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 704-05 (Ky.App. 2004).

Discrimination in the terms, conditions, compensation, and privileges of employment on the basis of race is illegal pursuant to the Kentucky Civil Rights Act, KRS 344.010 *et seq.* Because Kentucky's Civil Rights Act was modeled after and mirrors the Federal Civil Rights Act of 1964, Kentucky state courts often rely on federal case law in deciding these cases. *Howard Baer, Inc. v. Schave,* 127 S.W.3d 589, 592 (Ky. 2003); *Jefferson County v. Zaring,* 91 S.W.3d 583, 590 (Ky. 2002).

The United States Supreme Court has established that an employee claiming racial discrimination in hiring or promotion must demonstrate, by a preponderance of the evidence, the following:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973).

In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 n. 44, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396 (1977), the Court explained that, under *McDonnell Douglas,* a plaintiff must show that his rejection is not attributable to "the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought."

The issues then are: (1) was Wilson qualified for the various positions she sought; and (2) if qualified was the failure to promote or hire the result of racial discrimination.

An employer does not illegally discriminate when it chooses, for nonracial reasons, one equally qualified candidate over another, much less when one lacks the necessary announced qualifications as did Wilson. As the Federal Court held in *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987):

> It may be worthwhile to note here that Title VII does not diminish lawful traditional management prerogatives in choosing among qualified candidates, *United Steelworkers of America v. Weber*, 443 U.S. 193, 207, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979). So long as its reasons are not discriminatory, an employer is free to choose among qualified candidates, *Burdine*, 450 U.S. at 259, 101 S.Ct. at 1096; *Canham*, 666 F.2d at 1061; *Leiberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980). An employer has even greater flexibility in choosing a management-level employee, as is the case here, because of the nature of such a position. *Ackerman v. Diamond Shamrock Corp*., 670 F.2d 66, 70 (6th Cir.1982). *See also Manson v. Continental Illinois National Bank*, 704 F.2d 361 (7th Cir. 1983); *Loeb v. Textron, Inc.,* 600 F.2d 1003 (1st Cir. 1979); *Frausto v. Legal Aid Society of San Diego, Inc.,* 563 F.2d 1324 (9th Cir. 1977).

Wilson concedes she did not have a Master's Degree in any field, including social work. However, she argues that because she has a Bachelor of Science Degree in Correctional Administration, she could substitute that with two years of social work experience for a Master's Degree. Even with her two years of experience, an additional four years would have been required. Although she was never hired as a social worker, Wilson argues her work experience qualified as social work. She points to her experience as director of Volunteers in Corrections ("VIC"), a program designed to help felons assimilate back into society. From her deposition, it appears this position lasted approximately one year. She also actively supervised felons on probation or parole for approximately three to four months. Wilson also worked as a counselor with juveniles at the Cisco Road Juvenile Detention Facility for three years. However, this was a part-time position usually only working on Saturdays. Wilson argues that all of her work as a probation and parole officer should satisfy the social work requirement. CHFS challenges this assertion. However, even assuming she qualified for the position utilizing the work experience as a substitution for the education component, the two applicants hired both had a Master's Degree in Social Work, the stated preference for both the Central Intake and Service Office Supervisor positions.

The trial court found Wilson was not qualified and stopped any further inquiry. However, even assuming Wilson was qualified for any of the positions she sought, the next question is whether CHFS discriminated against Wilson based on her race.

A plaintiff has two means of proving intentional racial discrimination, either by direct evidence of discrimination or by circumstantial evidence from which discrimination can be inferred. *Kline v. Tennessee Valley Authority,* 128 F.3d 337, 348 (6th Cir. 1997). Further, once a member of a protected class has made a *prima facie* showing of racial discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decisions. Then, the minority employee is given an opportunity to show that the employer's nondiscriminatory reason is only a pretext.

Wilson argues there is direct evidence of racial discrimination because her supervisor said she had a confrontational attitude, citing *Mohr v. Dustrol, Inc.*, 306 F.3d 636 (8th Cir. 2002). However, *Mohr* can be easily distinguished. In *Mohr*, the supervisor had direct involvement in the decision not to hire Mohr. Here, there is no proof that Wilson's supervisor was involved in the decision-making process. Wilson further argues concerns of other African-Americans—that minorities are treated unfairly,[2] hiring minorities inter-agency rather than intra-agency, and irregularities in one interview process—are all indirect evidence of racial discrimination. Thus, she argues that while she lacked the stated and preferred qualification of a Master's Degree in Social Work, circumstantial or indirect evidence of discrimination creates a question of "mixed motives"as to CHFS's refusal to promote or laterally transfer her. In *First Property*

[2] Based on a page from a 2003 Employee Satisfaction Survey included as exhibit 8 to CHFS's motion for summary judgment, which was provided by Wilson in discovery.

Management Corp. v. Zarebidaki, 867 S.W.2d 185, 188 (Ky. 1993), the Kentucky Supreme Court held:

> We recognize that in 1991 the Federal Civil Rights Act was amended to make it clear, if it wasn't already, that the plaintiff need only show that one of the grounds for discharge declared unlawful by the Federal Civil Rights Act was "a motivating factor," 42 U.S.C. § 2000e-2(m), which may (or may not) mean something different than the standard stated by the U.S. Supreme Court in *Price Waterhouse* and by our Court in *Meyers*. Thus, in cases under the Federal Civil Rights Act, if so-called "mixed motives" are involved, the plaintiff has only the burden of showing an "unlawful employment practice . . . was a motivating factor*,"* 42 U.S.C. § 2000e-2(m), whereupon the burden of proof shifts to the defendant to avoid liability by showing that the same employment decision would have been made "in the absence of the impermissible motivating factor."

An obvious disparity in qualifications which favored Wilson would be evidence that the nondiscriminatory reasons were pretextual. *Odom v. Frank,* 3 F.3d 839 (5th Cir. 1993). No such disparity is evident, and Wilson failed to offer any evidence that CHFS's reasons for promoting any of the other women instead of her were a pretext for racial discrimination. Wilson does not dispute that the other women had the necessary Master's Degree in Social Work. Rather she tries to substitute her Bachelor of Science Degree and work experience for the Master's Degree requirement. However she offered no evidence other than her own beliefs that her personal work experience could be substituted for the stated requirement of six years of social work. Absent four years of social work experience and a Bachelor's Degree, Wilson would not have had the prerequisite education equivalent for a Master's Degree.

While Wilson questioned the qualifications of the other women who were hired or promoted instead of her, she produced no evidence other than her own speculation that they did not possess the necessary qualifications. While she challenged the racial composition of the panel that interviewed her, again, she presented no evidence that such a panel must be racially diverse. Finally, while CHFS may have a stated policy of preferring to promote inter-agency as opposed to hiring from outside the Cabinet, Wilson cites no statute, regulation or case law that mandates such a practice. To defeat a motion for summary judgment, the nonmoving party must produce at least some affirmative evidence showing there is some material issue of fact for trial. *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky.App. 2001).

Accordingly, because Wilson offered no evidence of any unlawful or discriminatory employment practices and because she lacked the necessary qualifications, both preferred and mandatory for the positions she sought, the opinion and order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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