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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001231-MR

RORY SNOWDEN — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 07-CI-00333

KENTUCKY SMELTING TECHNOLOGY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER, ACTING CHIEF JUDGE; COMBS AND KELLER, JUDGES.

KELLER, JUDGE: Rory Snowden (Snowden) appeals from the trial court's summary judgment in favor of Kentucky Smelting Technology, Inc. (Kentucky Smelting). On appeal, Snowden argues two points: (1) that he put forth sufficient evidence to make a *prima facie* case of racial discrimination; and (2) that whether

Kentucky Smelting's reason for hiring a white man was simply a pretext was a question for the jury. Having reviewed the record, we affirm.

FACTS

Although we review a summary judgment in the light most favorable to the opponent, we note that knowledge of all of the evidence before the trial court is necessary to an understanding of its opinion and order. Therefore, following a brief overview, we have summarized all of the evidence presented to the trial court.

Kentucky Smelting is in the business of smelting aluminum. It supplies molten aluminum to Central Light Alloy (Central Light), its only customer, which is located in a facility next to Kentucky Smelting in Paris, Kentucky.

In April 2007, Snowden applied for a job at Kentucky Smelting. After completing an application and interview, Snowden, who is African-American, believes that he was offered and accepted a job. When he did not hear from Kentucky Smelting regarding a starting date and time, Snowden made several attempts to contact personnel at Kentucky Smelting. Eventually, Snowden was informed that someone else was hired. Snowden learned that the person who was hired was a white male, and Snowden believed that he was not hired because of his race.

On October 22, 2007, Snowden filed a complaint alleging that Kentucky Smelting had a policy of discriminating against African-Americans and that the policy had been applied to him. After conducting written discovery and

taking several depositions, Kentucky Smelting filed a motion for summary judgment. In its motion, Kentucky Smelting argued that Snowden could neither meet his burden of proving discrimination against him nor that Kentucky Smelting had a racially discriminatory hiring policy. Snowden argued, as he does before us, that he had made a *prima facie* case of discrimination. Snowden acknowledged that Kentucky Smelting had offered a nondiscriminatory reason for failing to hire him; however, he argued that the question of whether that reason is mere pretext is a question of fact for the jury, not one of law.

The trial court granted Kentucky Smelting's motion, finding that Snowden had failed to put forth any evidence that the reasons offered by Kentucky Smelting were mere pretext. In doing so, the trial court stated that, although Snowden argued he had a significant amount of experience operating a forklift, he did not list any such experience as part of his application. Additional facts are set forth below.

1. Deposition of Irene Zuniga-Farias (Zuniga-Farias)

Zuniga-Farias is the human resources coordinator for Kentucky Smelting. As such, she reviews applications, trains employees, and conducts orientations regarding benefits, safety, and personnel issues. Zuniga-Farias explained that new employees are initially placed at Kentucky Smelting through CBS, a temporary employment agency. Those who successfully complete a 90-day probationary period are then considered full-time employees of Kentucky Smelting.

Zuniga-Farias testified that she conducts an initial screening of applications but does not determine whom to hire. According to Zuniga-Farias, Dewayne Martin (Martin), the production manager, would review applications, interview applicants, and then tell her whom to hire.

Zuniga-Farias remembered Snowden and testified that she administered Kentucky Smelting's standard intake tests to him. Once Snowden completed the tests, Zuniga-Farias took his application and the results to Martin, who then interviewed Snowden. Zuniga-Farias did not know if Snowden was offered a job. However, she testified that, at or near the time Snowden applied for a job, Kentucky Smelting hired Brian Walton (Walton), a white man. According to Zuniga-Farias, Walton was familiar with Kentucky Smelting because he had previously worked for Central Light.

Finally, Zuniga-Farias testified that, when Snowden applied for a job, Kentucky Smelting did not employ any African-Americans.

2. Deposition of Dewayne Martin

According to Martin, the job Snowden applied for required operating a forklift and working with molten aluminum. However, the job consisted primarily of operating a forklift.

Martin testified that Zuniga-Farias would provide him with applications and test results and he would then conduct interviews. After interviewing prospective employees, Martin would conduct a tour of the Kentucky

Smelting and Central Light facilities. He conducted these tours because he wanted to be certain that a prospective employee knew what type of work he would be performing at Kentucky Smelting. After conducting the tour, Martin always asked if a prospective employee was still interested in a job. Once Martin received that commitment, he would convey the results of the interview to "human resources." Martin testified that he might make a recommendation to human resources, but he stated that he did not hire any employees.

Martin remembered interviewing Snowden and taking him for a tour of the Kentucky Smelting and Central Light facilities. During the interview, Snowden told Martin about his experience working as a cook and gas station attendant and that he had experience operating a forklift. After the tour, Martin asked Snowden if he was still interested in working at Kentucky Smelting and Snowden stated that he was. Martin testified that he then told Snowden that he would get his "paperwork" to human resources and, if hired, Snowden would need to wear steel-toed shoes to work. According to Martin, he did not tell Snowden that he had the job or that he was hired.

At some point thereafter, Zuniga-Farias told Martin that Snowden had called several times to check on his status. She asked Martin to call Snowden to tell him that someone with more experience had been hired, which Martin did.

Martin testified that he also interviewed Walton, who had experience and was familiar with the work performed at Kentucky Smelting, because he had

worked at Central Light. Martin also testified that he spoke with personnel at Central Light and confirmed that Walton had worked there.

3. Deposition of Snowden

Snowden testified that he served in the United States Army from 1981 to 1994, where he last worked as a supply sergeant. In civilian life, Snowden has owned and operated a bar/restaurant and a take-out restaurant; worked as a packer at Amazon.com; worked for the United States Postal Service; and worked for a pallet company. At the time of his deposition, Snowden had reopened the take-out restaurant and was operating that full-time.

In April 2007, Snowden applied for a job at Kentucky Smelting because he had heard that the company "paid well." Snowden testified that he picked up an application from the receptionist on April 11, 2007, took it home, completed it, and returned it the next day. The receptionist told Snowden that he should work through CBS if he wanted to "speed up the process." Snowden went to CBS that day, where he completed additional paperwork and watched videos about on-the-job safety and harassment. On or about April 23, 2007, Snowden went to Kentucky Smelting where he took two tests. He was scheduled to be interviewed that day but was told the interviewer was not available. Therefore, he returned the next day and was interviewed by Martin. According to Snowden, after the interview, Martin took him on a tour of the Kentucky Smelting and Central Light facilities. Snowden testified that, during the tour, Martin introduced him to at least one Kentucky Smelting employee as a "new employee." After the

interview, Martin told Snowden that he had the job; that he needed to purchase steel-toed shoes if he did not have any; and that someone would contact him in the near future to let him know when to start work.

Snowden testified that he did not hear anything from anyone at Kentucky Smelting so he contacted someone at CBS and asked about his status. The person from CBS advised Snowden that a person at Kentucky Smelting stated that the company was still working on the matter. Snowden made several calls to Kentucky Smelting and eventually went there to speak with Martin. However, he was told that Martin was not available. Eventually, Martin called Snowden and told Snowden that "they went over his head and they hired somebody else."

Snowden did not ask Martin or anyone at CBS if he was not hired because he is African-American. However, he believes that is the case because he has thirty years experience operating a forklift; Martin told him he had the job; and the job was given to a white man instead of to him. Furthermore, a former employee who is also African-American, William Scott (Scott), told Snowden that Kentucky Smelting did not want to hire African-Americans and Snowden believes that there were no African-Americans working for Kentucky Smelting.

4. Snowden's and Walton's Job Applications

Snowden relies in large part on what is on these job applications to support his argument. Therefore, we summarize below the pertinent parts of those documents.

On his application, Snowden listed three previous jobs: (1) owner/operator of the take-out restaurant; (2) packer for Amazon.com; and (3) supply sergeant in the United States Army. Snowden did not list operating a forklift as a job duty for any of these jobs; however, he listed "forklift" as a "mechanical skill." On what appears to be a separate form, Snowden stated that he had experience operating a forklift, but did not state how much. Snowden denied having any experience working with aluminum.

Walton completed his application on April 2, 2007, a week and a half before Snowden. On his application, Walton listed previous jobs as: (1) team leader for a crankshaft manufacturer; and (2) working with horses and as a groundskeeper at three different farms. He did not put on his application that he had any experience operating a forklift. Based on a notation on Walton's application, it appears that he was scheduled for an interview on April 23, 2007, the day before Snowden's interview. It is unclear from the record whether that interview took place on that date.

5. Affidavit of John Prezby

The only other evidence in the record is the affidavit of John Prezby (Prezby), plant manager at Kentucky Smelting. Prezby stated that both Snowden and Walton applied for jobs at Kentucky Smelting at or near the same time period in 2007. However, Prezby noted that Walton had previously applied for a job in 2005.

According to Prezby, Walton was familiar with the work conditions and environment at Kentucky Smelting because he had previously worked for Central Light. Kentucky Smelting hired Walton because of that familiarity and because he had experience as a forklift driver and with forging. In Prezby's estimation, "Walton was best suited for the position based on his qualifications, experience and familiarity with [Kentucky Smelting's] working environment and operations." Finally, Prezby noted the names of two African-Americans who had worked at Kentucky Smelting.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. Because Kentucky's Civil Rights Act mirrors the federal act, we use federal standards in evaluating Kentucky civil rights claims. *Kentucky Commission on Human Rights v. Commonwealth, Dept. of Justice, Bureau of State Police*, 586 S.W.2d 270, 271

(Ky. App. 1979); *see also Smith v. Leggett Wire Co.,* 220 F.3d 752 (6th Cir. 2000). With these standards in mind, we next analyze whether the trial court improvidently granted summary judgment.

ANALYSIS

> An employment discrimination action unfolds in three stages. First, the plaintiff must make a *prima facie* case of discrimination by offering proof 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. *McDonnell-Douglas Corporation v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973). Second, the employer must then articulate a "legitimate nondiscriminatory" reason for its action. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Third, once such a reason is given, it is incumbent on the employee to demonstrate that the stated reason is merely a pretext to cover the actual discrimination. *Id.* at 256, 101 S.Ct. at 1095.

Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 699 (Ky. App. 1991) (footnotes omitted).

Although the trial court did not address whether Snowden put forth sufficient evidence to make the *prima facie* case required to pass through the first stage of the *Handley* process, we are not convinced that he did. Viewing the facts most favorably to Snowden, he satisfied the first three steps in making a *prima facie* case. He is a member of a protected class, who is qualified for the job in question, and he did not receive the job. However, Snowden has not put forth any evidence that, once he was rejected, Kentucky Smelting "sought other applicants."

In fact, the evidence points to the opposite conclusion. Walton applied before Snowden and, based on the notation on his application, was interviewed before Snowden. There is no evidence that, faced with Snowden, a qualified African-American, Kentucky Smelting continued to seek white candidates to fill the position.

Snowden argues that he has met his burden with regard to the fourth requirement for presenting a *prima facie* case by simply showing that he is African-American and Walton is white. In support of this argument he cites *Handley*. In a footnote in *Handley,* this Court stated that the fourth "requirement is satisfied upon a showing that the position was awarded to a member of an unprotected class" and cited to *Hale v. Cuyahoga County Welfare Dept.*, 891 F.2d 604 (6th Cir. 1989). However, that footnote in *Handley* overstates the holding in *Hale.* In *Hale*, the United States Sixth Circuit Court of Appeals stated that this requirement is "generally" met by showing the job was awarded to a person outside the protected class. *Hale*, 891 F.2d at 606. We believe that to be true. However, in a case such as this, wherein Walton applied ten days before Snowden and was interviewed before Snowden, we believe that Snowden has some obligation to prove more than just that the job was awarded to Walton in order to satisfy the fourth prong of the *prima facie* test. This he has failed to do. Therefore, we question whether Snowden successfully made a *prima facie* case of discrimination.

Although we question whether Snowden met his burden of proving a *prima facie* case, we nonetheless address whether the trial court erred in finding that Snowden failed to satisfy the requirements of the third stage of the *Handley* process, proving pretext.

> A plaintiff may establish that an employer's stated reason for its employment action was pretextual by showing that the reason (1) had no basis in fact, (2) did not actually motivate the challenged conduct, or (3) is insufficient to explain the challenged conduct. *Manzer v. Diamond Shamrock Chems. Co.,* 29 F.3d 1078, 1084 (6th Cir. 1994). The plaintiff must produce "sufficient evidence from which the jury could reasonably reject [the defendants'] explanation and infer that the defendants intentionally discriminated against him." *Johnson v. Kroger Co.,* 319 F.3d 858, 866 (6th Cir. 2003).

Upshaw v. Ford Motor Co., 576 F.3d 576, 586 (6th Cir. 2009). If a plaintiff fails to present proof as outlined above, summary judgment is appropriate. *Id.* at 587.

Snowden relies on three arguments in attacking the legitimacy of the reasons offered by Prezby in his affidavit. First, Snowden argues that Prezby's statement that Walton had experience operating a forklift is not supported by the job applications. Snowden is correct. On his job application, Snowden indicates that he has experience operating a forklift. Walton did not specifically indicate on his application that he had experience operating a forklift. We agree with Snowden that, based solely on the job applications, Snowden appears to be better qualified to operate a forklift than Walton. However, Snowden has offered no evidence that Kentucky Smelting made its decision based solely on the job applications. In fact, as testified to by Martin and Zuniga-Farias, every qualified

applicant undergoes testing, is interviewed, and takes a tour of Kentucky Smelting's facility before being hired. During that interview process applicants divulge additional information such as the extent of their experience. Martin testified that he interviewed Walton and obtained additional information regarding Walton's experience. Furthermore, Martin testified that the job was not simply operating a forklift but also involved some smelting. Snowden has offered no evidence to the contrary. In light of Prezby's affidavit and Martin's testimony, Snowden's argument that Walton's application shows he lacked experience and that Snowden had more experience has no basis in fact. Therefore, this argument is not persuasive.

Snowden's second argument is that the differing testimony from Zuniga-Farias and Martin regarding who hired employees creates a genuine issue of material fact. "Material facts are only those facts that might affect the outcome of the action under governing law." *Talley v. Bravo Pitino Restaurant, Ltd.,* 61 F.3d 1241, 1245 (6th Cir. 1995). Snowden is correct that some of the testimony from Martin and Zuniga-Farias is at odds. However, he has not established how their differing testimony on the issue of who is responsible for hiring employees indicates that Prezby's explanation for why Kentucky Smelting hired Walton is mere pretext. Whether Martin or Zuniga-Farias or some unnamed third person made the determination to hire Walton does not negate or even denigrate Prezby's explanation. Therefore, we are not persuaded by this argument.

Finally, we note that Snowden also argues the absence of African-American employees at Kentucky Smelting establishes that Prezby's reasons are mere pretext. In support of this argument, Snowden points to Scott's statement that Kentucky Smelting did not like to hire and was hard on African-Americans. He also points to his personal observation that there were no African-Americans working at Kentucky Smelting when he toured the facility.

To successfully defeat a motion for summary judgment, the opponent must offer some facts of which he has personal knowledge and which would be admissible. CR 56.05. Snowden's argument regarding Scott's statement is based on inadmissible hearsay and is not sufficient to overcome Kentucky Smelting's motion for summary judgment.

Snowden appears to be arguing his observation of a lack of African-American employees is statistical evidence of discrimination sufficient to belie Prezby's reasons for hiring Walton. Statistical evidence can be used to prove that the reasons offered by an employer are pretextual. However, to be admissible, statistical evidence must establish, at a minimum, the number of qualified minorities available in a labor market. *See Smith v. Leggett Wire Co.,* 220 F.3d 752, 761-62 (6th Cir. 2000). Snowden has offered no such evidence; therefore, his observation would not be admissible for the purpose he apparently intends, and it is not sufficient to support his opposition to Kentucky Smelting's motion for summary judgment.

CONCLUSION

As set forth above, we question whether Snowden offered sufficient proof to make a *prima facie* case of discrimination. However, even if he did, he did not offer evidence sufficient to create a question of material fact regarding the legitimacy of Kentucky Smelting's reasons for hiring a white male instead of him. Therefore, we affirm.

ALL CONCUR.

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