[Cite as *Austin v. Ohio Dept. of Adm. Servs.*, 2008-Ohio-7051.]

Court of Claims of Ohio
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DENNIS AUSTIN

Plaintiff

v.

OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES

Defendant
Case No. 2007-05202

Judge J. Craig Wright
Magistrate Lee Hogan

MAGISTRATE DECISION

Plaintiff brought this action alleging disparate treatment on the basis of race. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

Plaintiff, an African-American, was employed by defendant from May 1991 until March 2006. During his employment, plaintiff and a Caucasian co-worker, Adrian Fitch, had a stressful relationship that was well-known to other employees. Plaintiff asserted among other things that Fitch raised his voice to him, inappropriately gave him orders that should have come from management, used profanity and, on one occasion, called plaintiff a "black nigger." Plaintiff maintains that he frequently sought management's help in dealing with his relationship with Fitch but that management failed to address his concerns, and that Fitch was never disciplined. For example, on February 19, 2002, plaintiff reported that Fitch had used foul language in commanding him to do a certain job and that Fitch had belittled him in front of other employees on various occasions.

Although the manager discussed the reported conduct with Fitch, he was not disciplined. (Plaintiff's Exhibit 5.)

By contrast, on June 24, 2005, plaintiff was issued a written reprimand as a result of an incident in which Fitch entered a room and overheard plaintiff, in a conversation with the union steward, refer to Fitch as an "asshole." (Plaintiff's Exhibit 8, Page 1.) On July 6, 2005, plaintiff filed a grievance concerning the reprimand wherein he asserted that the discipline was not commensurate with the conduct and that management had failed to investigate plaintiff's concerns that Fitch might become violent toward him. The grievance was denied at all three steps of the hearing process. (Plaintiff's Exhibit 8, Pages 2-6.)

Plaintiff alleges that in January 2006, he and several others were watching television during their lunch break when a report was aired concerning a shooting incident between two co-workers. Plaintiff maintains that he commented to the effect that he could understand how such a thing could happen because the person who did the shooting was probably getting treated as poorly as he was. Subsequently, co-workers to whom plaintiff made other comments referencing both Fitch and shooting, reported plaintiff's comments to management. Plaintiff was placed on administrative leave, an investigation was conducted, and plaintiff's employment was ultimately terminated. Plaintiff contends that his comments were made in jest, that no one took them seriously, and that his termination was unduly harsh in comparison to treatment Fitch received for his conduct toward plaintiff.

Former R.C. 4112.02(A) states: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

Disparate treatment discrimination has been described as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters v. United States* (1977), 431 U.S. 324, 335-336, fn. 15. In a disparate treatment case, liability depends upon whether the protected trait actually motivated the employer's decision. *Hazen Paper Co. v. Biggins* (1993), 507 U.S. 604, 610. For example, the "employer may have relied upon a formal, facially discriminatory policy that required adverse treatment" of protected employees, or the "employer may have been motivated by the protected trait on an ad hoc, informal basis." Id. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Id. In order to establish discrimination in a disparate treatment case, the plaintiff initially has the burden of proving a prima facie case of discrimination. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 252-253. Inasmuch as there was no direct evidence of racial discrimination in this case, plaintiff was required to show: 1) that he was a member of a protected class; 2) that he suffered an adverse employment action; 3) that he was qualified for the position he lost; and 4) that a comparable non-protected person was treated more favorably for the same or similar conduct. See, e.g., *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792.

At the close of plaintiff's case, defendant moved the court for dismissal pursuant to Civ.R. 41(B)(2) on the ground that plaintiff had failed to establish a prima facie case. The court overruled that motion based upon the finding that plaintiff had satisfied the first three requirements and that, despite defendant's arguments to the contrary, there was some evidence that Fitch, a comparable, non-protected employee, was treated more favorably than plaintiff for similar conduct.

Thus, the burden of production shifted to defendant to articulate some legitimate, nondiscriminatory reason for its action. *Burdine*, supra, at 253.

Defendant produced evidence to demonstrate that there was no racial bias involved in the decision to terminate plaintiff's employment, to document that he had been progressively disciplined, and to substantiate its contentions that plaintiff made serious, threatening remarks in violation of defendant's established Workplace Violence Prevention Policy. Although the court initially doubted whether plaintiff made the statements that were attributed to him or, if made, that they were perceived as threatening by anyone who heard them, the overwhelming weight of defendant's evidence establishes that plaintiff made comments that were much more deliberate and disturbing than were described in his case in chief. Specifically, the court is convinced that plaintiff made comments on separate occasions to co-workers Larry Davenport, Clara Taylor, and Kenny Keirns, to the effect that he should get a gun and "blow [Fitch's] fucking brains out."

Moreover, defendant's witnesses established that in the six to twelve months prior to the termination, plaintiff's work performance had deteriorated and that plaintiff had intimated that he was experiencing personal problems. There was also testimony that some co-workers observed signs that plaintiff was abusing alcohol. In addition to the previously discussed June 24, 2005 written reprimand, plaintiff had been verbally reprimanded on March 4, 2005, regarding an unauthorized absence, and on August 9, 2005, he was issued a five-day suspension for neglect of duty, failure of good behavior, and dishonesty. (Defendant's Exhibit B.) All of these factors, in light of the longstanding animosity between plaintiff and Fitch, and plaintiff's frustration over losing his grievance at every step of the process, created a classic scenario for potential violence that no employer could ignore. In short, defendant clearly established a legitimate, nondiscriminatory basis for termination of plaintiff's employment.

Having so found, the court must next determine whether plaintiff demonstrated by a preponderance of the evidence that the reasons offered by defendant were not its true reasons, but were a pretext for discrimination. *McDonnell Douglas,* supra, at 804.

The court must find either: "'(1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the discharge, or (3) that the proffered reason was insufficient to motivate the discharge.'" *Owens v. Boulevard Motel Corp*. (Nov. 5, 1998), Franklin App. No. 97APE12-1728, quoting *Frantz v. Beechmont Pet Hosp.* (1996), 117 Ohio App.3d 351.

Upon review, the court finds that the totality of the evidence demonstrates that defendant's proffered reasons were based in fact, that they were not a pretext, and that they were sufficient to justify plaintiff's termination. Plaintiff simply did not establish that he was treated differently than Fitch or any other comparable co-worker who was not African-American. Other than plaintiff's own testimony, there was no evidence to corroborate that Fitch made derogatory racial comments to him. With regard to the incident in which Fitch allegedly used profanity in reference to plaintiff, defendant's witnesses testified credibly that, unlike the incident for which plaintiff received a written reprimand, no one overheard the comment attributed to Fitch, rather, it was "one person's word against the other." Both parties were interviewed separately about the incident and, after Fitch acknowledged that profanity could not be tolerated in the workplace, it was determined that the matter need not progress any further. In addition, plaintiff's testimony that he had repeatedly asked for management's help was not corroborated by other evidence. To the contrary, defendant's witnesses testified that Fitch complained to management frequently but that plaintiff did not and that, if plaintiff was asked if there was anything that management could help him with, he would typically reply that he could handle the situation, whether it was conflict with Fitch or with his personal problems and declining work performance. In the final analysis, plaintiff failed to prove by a preponderance of the evidence that he was discriminated against on the basis of his race, that he was treated less favorably as a result of his race, or that the decision to terminate his employment was racially motivated. Therefore, it is recommended that judgment be granted in favor of defendant.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(I). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law
under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

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LEE HOGAN
Magistrate

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LH/cmd
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