RENDERED: MAY 12, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003137-MR
AND
NO. 1997-CA-003189-MR

COMMONWEALTH ALUMINUM CORPORATION — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 93-CI-00095

JAMES F. MOORE AND ZACK N. WOMACK — APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING
** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Commonwealth Aluminum Corporation (Commonwealth) appeals from a judgment of the Hancock Circuit Court awarding James F. Moore (Moore) $443,883.00 in damages after the jury found that Moore was terminated from his employment with Commonwealth because of his race, in violation of Kentucky Revised Statute (KRS) 344.040. Moore cross-appealed the circuit court's denial of his request for an instruction on punitive damages. This opinion was originally issued on November 24, 1999, but was withdrawn by subsequent order on a petition for rehearing filed by Moore. Oral arguments were held on April 11, 2000. For the reasons set forth below, we reverse the judgment

of the circuit court. Therefore, the issue of punitive damages is rendered moot.

Moore, who is black, was hired by Commonwealth in 1973 and by 1989 had attained the position of temporary supervisor over "D crew" in Commonwealth's production section. Mike Miller (Miller), the production superintendent, was Moore's supervisor. Also in 1989, Scott Davis (Davis) was hired as a manager at the Commonwealth facility, making him Miller's supervisor. Shortly after Davis's arrival, he made Moore the permanent production supervisor. Moore occupied this position in 1991, the year in which the events took place giving rise to the underlying lawsuit.

On May 9, 1991, Davis received word from a production employee that Moore and others in production were playing cards in the break room for extended periods of time. After receiving a second report from the same employee of continued card playing, Davis and Miller went to the plant that night in an attempt to observe Moore and others playing cards. Mack Fowlkes (Fowlkes), a maintenance superintendent, also went along. Moore was not observed playing cards on that visit. However, the following day Fowlkes reported to Davis that Charlie Pate, a maintenance supervisor, had confirmed Moore's involvement in excessive card playing. In addition, Miller called Davis to report that yet another employee had called Miller, reporting the occurrence of card playing while on duty by Moore and others.

Davis then spoke with the Human Resources Department to apprise them of the situation and discuss options for disciplining Moore. Termination was offered as one option.

On May 21, 1991, Davis confronted Moore with the reports he had of Moore's excessive card playing. Moore denied the allegations, and Davis then terminated Moore's employment. Moore's employment at that point was irrevocably terminated, but Davis gave Moore the option to formally resign, which Moore declined. Moore filed suit in Hancock Circuit Court on December 8, 1993. The above-referenced judgment was entered on September 5, 1997.

Commonwealth raises two issues on appeal: (1) whether it was error for the circuit court to deny its motion for directed verdict[1] and motion for judgment notwithstanding the verdict (NOV) and (2) whether it was reversible error to allow Fowlkes's deposition transcript into the jury room during deliberations.[2]

Commonwealth contends that it established a legitimate nondiscriminatory reason for terminating Moore, Moore failed to present evidence showing that the reason was pretextual, and that Moore failed to establish that unlawful race discrimination was determinative in terminating his employment.

---

[1]Commonwealth made a motion for directed verdict following the close of plaintiff's case and following the close of Commonwealth's case. Commonwealth in its brief has not mentioned the second motion for directed verdict, presumably subsuming the issue into that of the judgment NOV motion.

[2]At the time of trial, Fowlkes was not within the jurisdiction of the circuit court. His deposition was taken by Commonwealth, and a redacted version was read into evidence.

For the purpose of determining whether judgment NOV should have been granted, we recognize that "the considerations governing a proper decision on a motion for a judgment notwithstanding the verdict are exactly the same as those first presented on a motion for directed verdict at the close of all the evidence." Cassinelli v. Begley, Ky., 433 S.W.2d 651, 652 (1968) (citations omitted). The trial court must view the evidence "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. On appeal, the appellate court considers the evidence in the same light." Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991) (citations omitted). The court is at liberty to grant judgment notwithstanding the verdict only if "the plaintiff's evidence, whether taken alone or in light of all the evidence is not of sufficient probative value to induce conviction in the minds of reasonable men. . . ." Burnett v. Ahlers, Ky., 483 S.W.2d 153, 157 (1972), (quoting Wadkins' Adm'x v. Chesapeake & Ohio Railway Co., Ky., 298 S.W.2d 7, 9 (1956)).

McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) established a three-part process of burdens and proofs in Title VII Civil Rights Act cases. Kentucky's Civil Rights Act, KRS 344.010, et seq., was modeled after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., and thus federal law guides review of discrimination cases. Kentucky Center for the Arts v. Handley, Ky. App., 827 S.W.2d 697, 699 (1991) (citations omitted). A

complainant must first prove a prima facie case of discrimination "by showing (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, 411 U.S. at 802. Commonwealth has conceded that Moore has established a prima facie case for discrimination in that (i) he is black, (ii) he was qualified for the position of production supervisor, (iii) he was terminated from that position, and (iv) the position was thereafter filled by a member of a nonprotected class.[3]

After the plaintiff establishes a prima facie case, McDonnell-Douglas, next requires the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell-Douglas, 411 U.S. at 801. Commonwealth has done this. Commonwealth maintains that Moore was discharged for excessive card playing and lying about such when confronted by Davis, and at least three witnesses testified that Moore and other D crew employees played cards excessively.

The final stage in the three-part McDonnell-Douglas process follows the rebuttal of the prima facie case by the

[3] Aware of the fact that the elements of Moore's prima facie case do not exactly match those outlined in McDonnell-Douglas, we note that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." McDonnell-Douglas, 411 U.S. 792 at footnote 13.

employer's articulation of a legitimate nondiscriminatory reason for the adverse employment action. Plaintiff must then "produce sufficient evidence from which the jury may reasonably reject the employer's explanation." Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1083 (6th Cir. 1994) (citations omitted). In order to accomplish this and allow the case to reach a jury, plaintiff must show by a preponderance of evidence either "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge." Manzer, 29 F.3d at 1804, (quoting McNabola v. Chicago Transit Authority, 10 F.3d 501, 513 (7th Cir. 1993)). At the meeting with Davis and Miller that resulted in his firing, Moore denied playing cards. However, in his meeting with Commonwealth's Human Resources Department the next day, Moore stated that he had been fired for playing cards, and a major point of contention at trial was whether Moore denied playing cards altogether or denied playing longer than on breaks and lunch periods. Thus, Moore has not shown that the proffered reason had no basis in fact, i.e., that card playing never occurred. The third showing, that the reasons were insufficient to motivate discharge, can be made by adducing "evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct. . . ." Id. Moore was the only employee disciplined for playing cards. However, testimony revealed that Moore was the only supervisor engaged in card playing and that among the hourly employees who played cards and

were not disciplined, several were black. Furthermore, all witnesses who testified on the subject (including Moore) agreed that a supervisor has a higher duty of responsibility and leadership and should rightfully be held to a higher standard of conduct. Because other black employees were not disciplined and Moore was the only supervisor playing cards, we conclude that Moore has not shown that card playing was an insufficient reason to motivate discharge.

In order to submit the case to the jury on the second showing, that the proffered reasons did not actually motivate his discharge, the plaintiff must show that a discriminatory motive was more likely than not the reason for the employment decision, thus exposing the proffered reasons as pretext. Manzer, 29 F.3d 1078. This requires "cold hard facts presented from which the inference can be drawn that race or sex was a determining factor." Kentucky Center for the Arts v. Handley, Ky. App., 827 S.W.2d 697, 700 (1991) (citations omitted).

Moore relies on several pieces of evidence in showing pretext/discriminatory motive. While examining each independently, and the several together, we stress that in this analysis it is necessary that the evidence, taken as true, establish more than brusque treatment or summary employment actions; we must ask whether the character of the evidence permits the inference that the employment decision was discriminatorily motivated. Moore cites the fact that Davis did not shake Moore's hand at their first meeting. While Davis does not appear to dispute this, the record does contain testimony

from black employees Fowlkes and Dale Outerbridge that Davis never failed to shake their hands.

Moore stresses repeatedly as proof of pretext the fact that there was no written policy at Commonwealth forbidding card playing, while other offenses (e.g., fighting, stealing) were publicized. We find this to be without merit. Beyond the common sense notion that any activity of an employee which keeps him from work for long periods should result in discipline, which notion Moore and others roundly agreed with, it should be remembered that Commonwealth has in place an at-will employment policy whereby an employee may be fired for any or no reason. We cannot accept the premise that an employer who fires an employee for an articulated reason not actually written down in company materials is acting on a pretext.

Fowlkes, the maintenance superintendent, was taken along by Davis and Miller in the plant walk-through in an attempt to observe card playing. Moore cites this as direct evidence of racial bias on Davis's part. Fowlkes, in his deposition, did say that he felt he was brought along because he was black, yet he also said that he did not feel that Moore's termination was racially motivated. Commonwealth testified that Fowlkes was brought along because he was one of the top three management employees at the time. Regardless of whether it could be inferred that Fowlkes was along because of his race, we feel it would be unreasonable and specious to allow the fact of Fowlkes's race to create the separate inference that Davis's *employment decision* with respect to Moore was motivated by discrimination.

This is especially so because Miller testified that *he* told Davis to call Fowlkes about going to the plant.

Moore finds the fact that Davis did not confront or attempt to counsel Moore about the card playing at an earlier time indicative of pretext/discrimination. We reject this. A person in Davis's position is obviously invested with a degree of discretion in employee relations matters, and the Court is not in the position to second-guess an employer's methods and employment decisions. Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 231 (1984). We stress that by calling into question an employer's actions, a plaintiff does not necessarily by the same stroke implicate discrimination.

Lastly, Moore points to two racial incidents at Commonwealth to show pretext/discrimination. The first, in which a fellow employee drew a watermelon on a box, was reported by Moore to Miller. Miller could not say whether he got back to Moore about the incident, but aside from that question, there is no evidence that Davis was aware of the incident. The second incident was one in which an employee reportedly used a white sock in order to signify the Ku Klux Klan. Miller testified that it was not in fact Moore who reported this to him and that no particular individual was named as the perpetrator. Again, the record does not reveal that Davis had any knowledge of this incident. These vague and remote incidents do not create an inference that Davis acted with discriminatory motive in terminating Moore. Without some indication that Davis knew about these activities and encouraged them or failed to act on them, we

will not allow the specter of racism to impugn Davis's employment decision.

In summary, we adjudge that Moore failed to present any evidence from which a reasonable juror could fairly infer that Commonwealth's reason for terminating Moore was a pretext and that the employment decision was more likely than not motivated by discrimination. It was, therefore, error to deny Commonwealth's motion for judgment NOV. Because we reverse on this issue, it is not necessary to reach the question of whether the presence of Fowlkes's deposition transcript in the jury room during deliberations constituted reversible error. Likewise, the question on cross-appeal of whether punitive damages are available in an employment discrimination action is rendered moot.

The judgment of the Hancock Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

John A. West
Luann Devine
Covington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLANT/CROSS APPELLEE:

Philip C. Eschels
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES/CROSS-APPELLANTS:

Zack N. Womack
Henderson, Kentucky