RENDERED: JUNE 6, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001320-MR

ROBERT DYE — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 97-CI-01379

WESTERN KENTUCKY UNIVERSITY — APPELLEE

AND

NO. 2001-CA-001389-MR

WESTERN KENTUCKY UNIVERSITY — CROSS-APPELLANT

v.

CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 97-CI-01379

ROBERT DYE — CROSS-APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This appeal and protective cross-appeal involve an allegation of wrongful termination based on race and disability. A jury verdict found the termination was not based

on either race or disability and the employee's claim was dismissed. On appeal, the appellant haphazardly presents numerous allegations of error, none of which contain any merit. Hence we affirm the judgment of dismissal. The protective cross-appeal now becomes moot and is also dismissed.

Appellant, Robert Dye (Dye), who is African-American, was employed by appellee, Western Kentucky University (WKU), from October 1988 until he was terminated on October 2, 1997. Dye's position at WKU was that of Building Services Attendant (BSA). Building Services Attendants perform various janitorial functions in campus buildings.

WKU's version of events is as follows. In 1996, Dye was assigned to the Pearce Ford Tower, a residence hall on WKU's campus. On January 21, 1997, Dye approached a residence assistant (RA), Dave Baskett, in the lobby of Pearce Ford Tower where Baskett lived. Dye was angry with Baskett because Baskett had reported to Facilities Management that the showers on his floor had not been cleaned in some time, and Dye told Baskett that his (Dye's) supervisor had "come down" on him (Dye) because of Baskett's complaint. Dye told Baskett in a threatening way that if Baskett complained in the future, that Dye would "come down" on Baskett. Baskett reported the threat, after which Dye was reassigned to work in Keen Hall, another residence hall at WKU.

In March, 1997, WKU received another complaint concerning Dye by another RA, Aaron High, who resided in Keen Hall. High alleged that, after complaining to Dye about a dirty bathroom on his (High's) floor, Dye got in the elevator with High and was breathing loudly and glaring at High in a threatening manner.

Following the complaint by High, the matter was investigated by Mark Struss, WKU's Director of Facilities Management. Based on his investigation, Struss recommended that Dye be terminated, which was approved by Tony Glisson, the Human Resources Director, as well as WKU's General Counsel, Deborah Wilkins. Struss and Glisson subsequently met with Dye regarding the matter, and agreed to give him one last chance. Dye was told that any further incidents would result in immediate termination.

On September 25, 1997, Dye engaged in a confrontation with another Building Services Attendant, Debra Logan. Dye's supervisor, Vinny Vincent, separated the two and told them to report to their work stations. Following this incident, Vincent's supervisor, Terry Hovey, recommended to Struss that Dye be fired because he presented a threat to students and other employees. Struss agreed, and this recommendation was reviewed and approved by Glisson and Wilkins. Dye was terminated by Struss on October 2, 1997.

Dye testified to a different version of events. Dye testified that in July of 1996, he presented to his supervisor, Vinny Vincent, statements from his doctors showing that he had high blood pressure and an irregular heartbeat, and asked to be on light duty. Dye also took the doctor's statements to Vincent's supervisor, Tom Maachi (who was the assistant superintendent of housing), and also talked to Maachi's boss, Mark Struss. Dye contends that, after showing Vincent the doctor's statements, Vincent stated that a person in Dye's condition "don't need to be working up there."

Dye testified that Vincent sometimes made disrespectful statements to him when Vincent came to him with work instructions. However, on cross-examination Dye testified that Vincent had never used racially offensive language to his face. Another witness, Greg Fulks, testified at trial that Vincent, when ranting to Fulks about Dye, had referred to Dye with a racial slur. This is the only witness who testified that Vincent used a racial slur. When asked what Vincent did to him that was either a racial comment or was of a racial nature, Dye explained that Vincent would have Dye do extra things that others didn't have to do. For example, Vincent would have Dye clean extra floors, would look at the showers Dye had already cleaned and make him do it over, and tell him to sweep and mop all the stairways in the dorm when it was too close to clock out

time to finish the job. Dye testified that he felt like Vincent "had it in for me." Dye testified that prior to 1996 he was not treated this way.

With regard to the January 1997 incident involving Dave Baskett, Dye testified that on the Friday before the Martin Luther King holiday, the BSA's were asked to make sure the floors were clean before they left for the holiday weekend. When the BSA's came back on the Tuesday following the King holiday, all of the floors in Pearce Ford Tower had been "trashed" by the students, and the BSA's had to clean them up. Dye testified that he and Baskett had been good friends during the year. After Vincent gave Dye the write-up slip resulting from Baskett's complaint, Dye went to talk to Baskett. Dye testified that he said to Baskett "when you turn stuff into Vinny Vincent, he comes down on us," and then he and Baskett laughed, and then he (Dye) said "well then we have to come down on y'all." Dye testified that he was not mad or upset at Baskett, and that they were both laughing. A few days later, however, Dye got a discipline action report from Vincent that said he had threatened Baskett.

Dye testified that although all of the floors in the dorm had been trashed, he was the only BSA who was written up. Dye subsequently went to talk to Howard Bailey about the situation because he felt that racial discrimination was

involved. Bailey sent Dye to talk to Huda Melky, WKU's Equal Opportunity officer. Dye told Melky that he felt his color had something to do with the way he was treated by Vincent. Melky told him she had checked it out and that she did not see any racial discrimination concerns. (Melky testified that Dye did not mention racial discrimination when speaking to her.) Dye testified that he did not complain to anyone else at WKU about the matter after talking to Melky, although he may have talked to Tony Glisson about it once.

After the Dave Baskett incident, Dye was moved to Keen Hall. In March 1997, Aaron High, a Keen Hall RA, complained to Dye about his floor not being cleaned, in particular, that there were spots on the bathroom mirrors and floors. Dye explained to High that he could only clean once a day, and can't keep spots off the mirrors when the guys brush their teeth after he had already cleaned in the morning, and that some spots on the floor can't be cleaned because they are under the wax. High then got agitated, told Dye he was lying, and yelled. Dye backed away from High, and told him "you ain't got no sense" and left. Dye then went to complain to the assistant dorm director about the way High had talked to him, who said that he would talk to High. Dye testified that he and High rode down in the elevator together, but that he wasn't glaring at High or intentionally breathing heavily or making High feel threatened.

With regard to the Debra Logan incident, Dye testified that on September 25, 1997, he and Debra Logan, another BSA, got into an argument concerning a petition some of the BSA's were involved with. Dye testified that after the argument, he and Logan worked things out and walked away together. Dye testified that Vincent told Dye as long as he and Debra had worked it out, it was OK. The next day, however, Vincent came and got Dye and they went to a meeting with Mark Struss and Terry Hovey, and Dye was told to leave campus. Dye testified that he believed he was intentionally terminated because of his illness and his race.

The jury was instructed on wrongful termination based on race and wrongful termination based on disability. On March 13, 2001, the jury returned a verdict in favor of WKU. The trial order and judgment was entered March 28, 2001. On April 6, 2001, Dye filed a motion for judgment not withstanding the verdict/motion for new trial/motion to alter, amend or vacate the judgment, and on May 18, 2001, filed an amended motion for judgment not withstanding the verdict/motion for new trial/motion to alter, amend or vacate the judgment. An order was entered denying the aforementioned motions on May 21, 2001. Dye filed his notice of appeal on June 19, 2001. WKU filed a notice of cross-appeal on June 27, 2001.

Dye presents a number of arguments on appeal. The first is that attorney Deborah Wilkins should not have been

allowed to testify and be at counsel table because Dye moved for separation of witnesses. Wilkins was general counsel for WKU and her duties are those of in-house legal counsel. All recommendations for termination, including Dye's, have to be reviewed by her. She approved Dye's termination and explained WKU's policies concerning discrimination and termination.

CR 43.09 provides for separation of witnesses but specifically does not apply to parties or attorneys. Also, under Allen v. Commonwealth, 10 Ky. L. Rep. 582, 9 S.W. 703 (1888), this rule does not apply to officers of the court; see also, Webster v. Commonwealth, Ky., 508 S.W.2d 33 (1974). Hence, we see no error.

Next, Dye contends that the court abused its discretion when Huda Melky was allowed to testify because she was not designated as an expert witness. This is a misunderstanding by Dye. Melky was a fact witness who testified that Dye met with her because he wanted to be transferred back to Pearce Ford Tower following his transfer subsequent to the "Baskett incident." Melky testified not as an expert but as to the reason Dye gave her in requesting the transfer. As to the argument that Dye was not permitted to impeach this witness, it was not preserved. Excluded testimony must be preserved by avowal, which was not done in this case. Transit Authority of River City v. Vinson, Ky. App., 703 S.W.2d 482 (1985).

Dye next contends that he did not receive a jury of his peers. Specifically, Dye requested to exclude any juror that was an employee of WKU or had an immediate family member who was an employee of WKU, as WKU is the second largest employer in Warren County, Kentucky. A second part to his request for a jury of his peers was that the jury include "persons of color." The jury ultimately included six people who were connected with WKU, and one African-American, who was also one of the six connected with WKU. Although Dye had filed a motion to exclude any juror connected to WKU, he participated in voir dire and used his strikes without objections for cause. His failure to object failed to preserve, or waived, the error, if any. Payne v. Hall, Ky., 423 S.W.2d 530 (1968).

Dye next contends that it was an abuse of discretion for the court to allow Terry Miles to testify at trial. Dye had filed a motion in limine to exclude the testimony of Terry Miles. Dye alleges that Terry Miles was evasive at his deposition and not cooperative, and that his trial testimony did not match his deposition. However, Dye's designation of the record specifically excludes Miles' discovery deposition, and the deposition was never introduced for impeachment purposes or by avowal, therefore, this Court is unable to review the alleged error. It is the appellant's responsibility to include that part of the record needed to support his argument. CR 75.07(5);

Belk-Simpson Co. v. Hill, Ky., 288 S.W.2d 369 (1956); CR 43.10; Freeman v. Oliver M. Elam, Jr. Co., Ky., 372 S.W.2d 796 (1963).

Dye next contends the court erred in admitting attorney Stivers' summary of allegedly Dye's blood pressure readings. Prior to trial, Dye filed a motion in limine to exclude a summary of Dye's blood pressure readings which was prepared by WKU's counsel, Gregory N. Stivers. The summary was based on medical records of Dye's prior physicians, Dr.'s Gott, Pribble, Tapp, and Lovett, and introduced as an exhibit to the testimony of Dr. John Nadeau. Dr. Nadeau had examined Dye at the request of the defense, and had reviewed the summary. Notice of the intent to use the summary was given to Dye's counsel over two years prior to trial, in WKU's supplemental pretrial compliance filed on August 11, 1998, which stated that WKU may introduce as an exhibit at trial "[a] chart of blood pressure readings from the medical records of Dr. Fred Gott and from the records of Drs. Tapp, Lovett and Pribble." Dr. Nadeau testified by deposition at trial, wherein Dye's counsel was permitted to cross-examine Dr. Nadeau extensively. KRE 1006 allows such summaries provided certain guidelines are followed. We see no error.

Dye next contends that it was an abuse of discretion to allow Vinny Vincent to testify live at trial. Dye contends that WKU prevented him from fully deposing Vincent by never

making him available in person. Dye was able to depose Vincent telephonically, however. WKU had no obligation to produce Vincent because he was no longer employed by WKU. WKU cannot attempt to hide a witness, employee or not. See Thompson v. Mills, Ky., 432 S.W.2d 448 (1968). The mere failure to do Dye's legwork is not grounds for striking a witness. Again, we see no error.

Dye next contends that the trial court abused its discretion in allowing the deposition of Aaron High to be introduced at trial. Dye filed a motion in limine to exclude the deposition of Aaron High, because his counsel did not fully depose High at the August 7, 1998 deposition. While it is true that Dye's attorney got to the deposition 30 minutes late because she got lost, and that direct examination was completed without her present, the story does not end there. Once Dye's attorney arrived, the entire direct examination was replayed for her, and she was given the opportunity to, and did, cross-examine High. There was no abuse of discretion by the trial court in admitting the deposition.

Dye next alleges two improper actions by WKU, the first being that attorney Stivers' was unbecoming of an officer of the court, and the second being that an unnamed "vice-president" of WKU intimidated a witness. These issues were not raised by Dye in the trial court and will not be considered by

this Court on appeal. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

Dye next contends that the trial court improperly denied his motion for a mistrial in six instances.

1. Dye moved for a mistrial when Mark Struss testified about why Dye was fired. Dye contends this information was hearsay and not admissible, and that the letter Struss was referring to, a memo dated March 12, 1997, was based on hearsay and prejudicial information. We disagree. Mark Struss gave WKU's reasons for firing Dye. Mark Struss, as Director of Facilities Management, investigated the complaint by Aaron High. The March 12, 1997 memo had been introduced earlier at trial as defendant's exhibit number 9 without objection. It was a memo from Mark E. Struss, Director of Facilities Management, to Tony Glisson, Director of Human Resources, and Deborah Wilkins, University Counsel, reporting on his investigation and recommending that Robert Dye be terminated. The memo contains statements allegedly made by Tony Glisson, Howard Bailey, and Huda Melky. Tony Glisson was defense witness number one at trial. Howard Bailey was plaintiff's witness number nine. Huda Melky testified as defense witness number thirteen. Mark Struss was defense witness number two. The RA at Pearce Ford Tower mentioned in the memo was Dave Baskett, who testified as defense witness number eight. Pam Reno supposedly

contributed some information for the memo and her deposition was read as defense witness number nine. Aaron High was the other RA mentioned in the memo as a source of information and his video deposition was admitted as defense witness number ten. Deborah Wilkins, one of the individuals receiving the memo, testified as defense witness number fourteen. The other two individuals mentioned in the memo, Kaye Smith and Byron Lightsy, corroborated statements made by the above. All of the statements contained in the memo were subject to cross-examination at trial. Therefore, even if Dye had objected to the introduction of the memo, all of the persons mentioned in the memo, with the exception of Smith and Lightsy, testified in open court (either in person or by deposition) and were subject to cross-examination. CR 46; Division of Parks v. Hines, Ky., 316 S.W.2d 60 (1958); KRE 801. No error occurred.

2. Dye contends the trial court abused its discretion in admitting evidence of an incident wherein a white BSA, Kim Gibson, had been disciplined similar to Dye. This evidence, produced on the third day of trial, was discovered when a former WKU employee, Tom Maachi, was permitted to review WKU's files during the trial. Dye contends that this evidence caused his claim of different treatment to be partially discredited. Dye contends that had he known about this evidence prior to trial, he would have tried a different strategy, and that the trial

court's permitting this evidence to be sprung upon him midway through the trial was an abuse of discretion, and violated his right to due process. Unless Dye can show he requested the information before trial and was not given such during discovery, he cannot complain when the defense puts on proof of a defense. No such allegations were made and therefore, there was no error.

3. Dye contends that the court should have granted a mistrial after the defense attorney asked a defense witness, Mark Struss, to read a document that was found the day of his testimony. Dye contends he should have had more warning of this information. Dye not only gives no authority for this statement but no reason why the court erred, or authority for why the defense should not have been allowed to use said document. We have no issue to review.

4. Dye moved for a mistrial when the defense attorney moved to admit the medical records of Dr. Alan Pribble into the record. Dye contends the exhibit is hearsay and does not meet the business record exception to the hearsay rule. Specifically, Dye contends that the records were not certified; no one from Dr. Pribble's office was present to establish it as a business record; and Dr. Pribble was not present to testify. Contrary to Dye's assertion, our review of the record indicates the records of Dr. Pribble were, in fact, certified, and were

introduced as medical records as defendant's exhibit 23 (rather than as defendant's exhibit 15, as stated in appellant's brief.) We see no error.

5. Terry Hovey testified to employee evaluations found during the third day of trial and Dye again moved for a mistrial regarding Kim Gibson's evaluation. Again, we need to know the grounds for the error as Dye gives us no reason or authority for why this evidence should not have been introduced.

6. The last request for a mistrial was after Pam Reno's deposition was read into evidence. Dye alleges the deposition contained hearsay without exceptions. Pam Reno was the Assistant Director for Facilities University Housing, and had prepared a January 29, 1997, memo to Sal Trobiano, Auxiliary Services Manager, recommending that Robert Dye be transferred based on her investigation of "the recent incident at the desk." The alleged statements in the memo by the "two student staff members," "a couple of female residents," and "some people" are hearsay. However, the error in its admission is harmless considering the wealth of other evidence concerning this same incident, and the fact that the recommended termination was cancelled and Dye was later terminated for another reason. Therefore, there was no need for a mistrial. "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a

manifest injustice." Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 738 (1996).

Dye finally contends that the trial court abused its discretion in allowing WKU to admit into the record by avowal domestic violence petitions. Again, we perceive no error but a misunderstanding by counsel as to the nature of avowal testimony. Avowal testimony is that preserved into the record by authority of CR 43.10 for purposes of appeal. It is not introduced to be considered by the jury.

Because we are affirming on appeal, the protective cross-appeal becomes moot.

For the foregoing reasons, we affirm the judgment of the Warren Circuit Court.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Nancy Oliver Roberts Bowling Green, Kentucky	Greg N. Stivers Scott D. Laufenberg Bowling Green, Kentucky