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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001234-MR

LEXINGTON-FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION, IN THE INTEREST
OF PAUL WILKERSON AND STACY JACKSON WILKERSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 98-CI-02614

METRO MANAGEMENT, INC.;
PICKWAY MANOR APARTMENTS; AND
DIANE MALDONADO IN HER INDIVIDUAL
AND OFFICIAL CAPACITY AS MANAGER
OF PICKWAY MANOR APARTMENTS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Lexington-Fayette Urban County Human Rights Commission has appealed from the opinion and order entered by the Fayette Circuit Court on March 26, 2002, which granted summary judgment in favor of the appellees, Metro Management Inc.,[1] Pickway Manor Apartments, and Diane Maldonado, and

[1] Metro Management Inc. is the managing agent for Pickway Manor Apartments.

dismissed the Commission's housing discrimination claim which had been brought on behalf of Paul and Stacy[2] Wilkerson, an interracial couple.[3] Having concluded that there is no genuine issue as to any material fact and that Pickway is entitled to a judgment as a matter of law, we affirm.

On October 10, 1995, Paul and Stacy Wilkerson applied for an apartment at Pickway Manor in Lexington, Fayette County, Kentucky. Paul and Stacy were not married at the time and Stacy was unemployed. Stacy filled out the application and she listed herself and her son, Marcus, as the proposed occupants of the apartment. Paul's name was not listed on the application, but the Wilkersons insist that the 1995 application was a joint application. The apartment manager, Diane Maldonado, informed Stacy that she did not qualify for an apartment at Pickway because she did not have any income. Paul, who was present when Stacy filled out the application, told Maldonado that he was employed and that he intended to move in with Stacy and Marcus.[4] Maldonado explained that Pickway did not rent to unmarried couples.

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[2] There are several discrepancies in the record as to the correct spelling of Stacy's name. For purposes of this appeal, her name will spelled as set forth in the notice of appeal.

[3] Paul is Caucasian and Stacy is African-American.

[4] Paul is Marcus's father.

On February 11, 1997, Stacy filed a second application with Pickway. Paul was also present when Stacy filled out her second application; however, once again Stacy did not list Paul's name on the application, and the Wilkersons do not claim that Paul was an applicant in 1997. Stacy was unemployed and on her application she did not claim to have any income. Maldonado asked the couple if they were married or if they intended to get married, to which Stacy responded, "No." According to Maldonado, she then told Stacy that she did not qualify for the apartment because she did not have any income. Maldonado also informed Stacy that Pickway did not rent to unmarried couples. Stacy protested that Paul was employed and that he would be moving in with her. Maldonado then explained to Stacy that she would be committing "housing fraud" if she signed a lease as the sole occupant of an apartment and then permitted someone to move in with her. Shortly thereafter, Paul and Stacy moved into a one bedroom apartment at Autumn Park, which is also located in Lexington, Fayette County, Kentucky.

On April 22, 1997, Paul and Stacy filed a complaint with the Commission alleging that they had been discriminated against by Maldonado pursuant to Title VIII of the Fair Housing Amendments Act of 1988 (FHAA)[5] and Lexington-Fayette Urban County

[5] 42 U.S.C. § 3601, et seq. The FHAA is the 1988 amendment to the Fair Housing Act (FHA), which is commonly referred to as Title VIII of the Civil Rights

Local Ordinance 199-94[6] because of their "interracial association." The Commission conducted a preliminary investigation and concluded that probable cause existed to believe that discrimination had occurred.[7] The Commission's determination was based in large part upon an affidavit signed by Matt Maupin, Paul's cousin, which reads in relevant part as follows:

> Rebecca Stamper and I went to Pickway Manor Apartments in April of 1997 to inquire about the possible rental of an apartment unit there. I told the lady there that I was not married, and that Rebecca Stamper would be living with me. The lady at Pickway did not say that we could live there, being unmarried. She actually did not say one way or the other about whether we could live at Pickway, being unmarried.
>
> The Lady at Pickway did not tell us to lie about our marital status. When we asked whether Rebecca should sign on the line marked "spouse" even though we were not married, the lady told us "Yes". We understood that this was simply because there was no other line on the form for Rebecca to sign.
>
> To the best of my recollection, Pickway did not process our application or run a credit check on us, as we decided that we did not like the apartment and did not want to live there anyway.

Act of 1968. In addition to other modifications, the FHAA expanded the coverage of the FHA to reach families with children.

[6] Local Ordinance 199-94 is simply a codification of the Kentucky Civil Rights Act contained in Chapter 344 of the Kentucky Revised Statutes.

[7] See KRS 344.625.

Maupin and Stamper are both Caucasian.

On June 26, 1998, the appellees elected to pursue the case in a civil action in the Fayette Circuit Court pursuant to KRS 344.635.[8] On July 21, 1998, the Commission filed a complaint on behalf of the Wilkersons[9] alleging that they had been discriminated against by the appellees due to their "interracial association" and "familial status" pursuant to the Kentucky Civil Rights Act.[10] The appellees filed an answer on August 3, 1998, in which they averred, among other defenses, that the Wilkersons' housing application was denied for "legitimate, non-discriminatory reasons." The case then proceeded to the discovery process.

On September 20, 2000, the Commission deposed Maldonado, who testified, in part, as follows:

> Q. Did Paul come in with [Stacy] on February 11[, 1997]?
>
> A. Yes.
>
> Q. What do you remember about the conversation that you had with them?

[8] It should be noted that a claim brought "in the interest of" or "on behalf of" two individuals who claim to have suffered an unlawful housing practice is not the functional equivalent of a claim brought directly by those individuals themselves. See Kentucky Commission on Human Rights v. Eastern Kentucky University, Ky.App., 988 S.W.2d 41, 43-44 (1999). See also KRS 344.670(2).

[9] Paul and Stacy were married in January 1998.

[10] See KRS 344.010, et seq.

A. They came in and asked for an application, and I handed them a clip board. She filled out the application and handed it back to me, and I looked it over, and I see that I missed something?

A. What did you miss?

Q. Her child was not there. Her child's name is not there, and I missed that.

. . .

Q. Continue on. Is there anything else you remember?

A. I asked them if they were getting married and--or if they were married, and they said no . . . And I said, "Do you remember when you were here before that we have a policy of not renting to unmarried couples," and she said yes. And I said, "You know, you don't qualify for the apartment on your own because you have no income," and she said, "Well, he's going to move in with me," and I said--

Q. Meaning?

A. Paul Wilkerson was going to move in with her and that he was employed. And I said, "You can't do that. You know, that's housing fraud. You can't sign a lease that you're the sole occupant and then have someone move in with you."

. . .

Q. Is there any . . . Metro Management regulation at the time of February 11, 1997, that would have allowed you to consider Paul's income for Stacy?

A. If they were getting married.

Q. And what time frame are we talking about getting married?

> A. No time frame. Over the years, I've had many people that have come in and--male or female, one or the other is looking for an apartment, they tell me they're getting married, and not looking specifically together but looking toward the planning of their wedding, so--
>
> Q. And you would consider that okay to rent to someone in that situation?
>
> A. We take people at their word. If they say they're getting married, I'm not an investigator, and I take people at their word until I find out differently.

On April 24, 2001, the appellees filed a motion for partial summary judgment[11] arguing that it would be impossible for the Commission to establish a prima facie case for its "familial status" discrimination claim. The appellees pointed out that KRS 344.362 specifically provides that "[n]othing in KRS 344.360 shall apply to . . . [a] landlord who refused to rent to an unmarried couple of opposite sex[.]" Thus, the trial court granted the appellees' motion for partial summary judgment as to the Commission's "familial status" discrimination claim.

On September 21, 2001, the appellees deposed Paul and Stacy Wilkerson. Both depositions are replete with discrepancies, however, given that this is an appeal from an order granting summary judgment in favor of the appellees, we must construe the Wilkersons' deposition testimony in a light

[11] Kentucky Rules of Civil Procedure (CR) 56.03.

most favorable to the position advanced by the Commission on appeal. Since the facts set forth herein are consistent with the position advanced by the Commission on appeal, there is no need to belabor the discrepancies.

On October 30, 2001, the appellees filed a motion for summary judgment arguing that to the extent the Commission's housing discrimination claim was based on the 1995 application, it was barred by the statute of limitations, and, in the alternative, that the Commission had failed to establish a prima facie case of housing discrimination based on the 1997 application. The appellees claimed that the allegations raised in the Commission's complaint stemmed from the Wilkersons' 1995 application, and not Stacy's 1997 application, which was submitted solely on behalf of herself and Marcus. Thus, the appellees argued that since the Commission had filed its complaint on April 22, 1997, over 18 months after the alleged discriminatory practice occurred, the claim was barred pursuant to KRS 344.600(1)(a).[12] In response, the Commission insisted that the alleged discrimination occurred in 1997, when Stacy applied on behalf of herself and Marcus. However, the appellees argued that the Commission failed to establish a prima facie

[12] KRS 344.600(1)(a) states in relevant part that, "[a]n aggrieved person may, not later than one (1) year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the commission alleging a discriminatory housing practice."

case of discrimination based on the 1997 application since Stacy had no income and did not qualify to rent the apartment.

On March 26, 2002, the trial court granted the appellees' motion for summary judgment reasoning that the Commission's housing discrimination claim was barred by the statute of limitations. The trial court cited the Wilkersons' deposition testimony and concluded that both Paul and Stacy had identified their 1995 application as the basis for their housing discrimination claim. The trial court went on, however, to rule that even assuming that the Commission's claim was not barred by the statute of limitations, it was nevertheless barred by the "absence of any factual support of the [Wilkersons'] allegation of racial discrimination." The Commission then filed a motion to alter, amend or vacate the trial court's order pursuant to CR 59.05, which was denied on May 14, 2002. This appeal followed.

The Commission argues on appeal that the trial court erred by granting summary judgment in favor of the appellees because there is a genuine issue as to a material fact concerning whether the discrimination claim was based on the 1997 application. The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was

entitled to a judgment as a matter of law.[13] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[14] In Paintsville Hospital Company. v. Rose,[15] the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[16] There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.[17] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to

[13] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[14] CR 56.03.

[15] Ky., 683 S.W.2d 255, 256 (1985).

[16] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[17] Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

be resolved in his favor."[18] Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[19] With this standard in mind, we now turn to the merits of the Commission's argument.

Although there apparently is no Kentucky case law setting forth the prima facie elements of a housing discrimination claim, the federal courts have addressed the issue on numerous occasions. Since the relevant language of Kentucky's housing discrimination statute[20] is virtually identical to its federal counterpart,[21] the interpretation given by the federal courts is persuasive.[22] Thus, "we are guided by federal case law in the course of our review."[23]

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[18] Steelvest, 807 S.W.2d at 480.

[19] Id. at 482. See also Philipps, Kentucky Practice, Civil Rule 56.03, Vol. 7, p. 321 (5th ed. 1995).

[20] KRS 344.360.

[21] 42 U.S.C. § 3604.

[22] See White v. Rainbo Baking Co., Ky.App., 765 S.W.2d 26, 28 (1988); and Kentucky Commission on Human Rights v. Commonwealth, Ky.App., 586 S.W.2d 270, 271 (1979). See also KRS 344.020(1)(a), which states in relevant part, "[t]he general purposes of this chapter are . . . [t]o provide for execution within the state of the policies embodied in . . . the Fair Housing Act as amended (42 U.S.C. § 360)."

[23] Kentucky Center for the Arts v. Handley, Ky.App., 827 S.W.2d 697, 699 (1991). See also McNeal v. Armour & Co., Ky.App., 660 S.W.2d 957, 959 (1983).

In Mencer v. Princeton Square Apartments,[24] the United States Court of Appeals for the Sixth Circuit adapted the three-part evidentiary standard first articulated in McDonnell-Douglas Corp. v. Green,[25] to a fair housing claim brought under the FHAA. The Court listed the elements of a prima facie case of housing discrimination as follows:

> A prima facie housing discrimination case is shown when the plaintiff provides: (1) that he or she is a member of a racial minority, (2) that he or she applied for and was qualified to rent or purchase certain property or housing, (3) that he or she was rejected, and (4) that the housing or rental property remained available thereafter.[26]

We see no reason not to apply the same standard to housing discrimination claims brought under KRS 344.360.[27]

The Commission claims that it has established facts that would allow a jury to infer that the Wilkersons were discriminated against based upon their race. The crux of the

[24] 228 F.3d 631, 634 (6th Cir. 2000).

[25] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[26] Mencer, 228 F.3d at 634-35 (citing Selden v. United States Department of Housing and Urban Development, 785 F.2d 152, 160 (6th Cir. 1986).

[27] We note in passing that several other circuits have also adapted the McDonnell-Douglas framework to housing discrimination claims. Radecki v. Joura, 114 F.3d 115, 116 (8th Cir. 1997); Gamble v. City of Escondido, 104 F.3d 300, 304-05 (9th Cir. 1997); Massaro v. Mainlands Section 1 & 2 Civic Association, Inc., 3 F.3d 1472, 1476 (11th Cir. 1993); and Soules v. United States Department of Housing & Urban Devolvement, 967 F.2d 817, 822 (2nd Cir. 1992). See also 15 Am.Jur.2d, Civil Rights, § 472 (2000). Furthermore, we also take pause to note that the McDonnell-Douglas framework is generally inapplicable where there is direct evidence of discrimination. Jefferson County v. Zaring, Ky., 91 S.W.3d 583, 591 (2002) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22, 83 L.Ed.2d 523, 534 (1985)).

Commission's argument appears to rest upon the statements contained in Maupin's affidavit. As previously discussed, Maupin stated that when he and his girlfriend, Stamper, applied at Pickway, Maldonado told Stamper to sign on the line marked "spouse" even though the couple was not married. The Commission claims that this is evidence of disparate treatment upon which the jury could infer discrimination. We disagree.

As an interracial couple, the Wilkersons are clearly members of a protected class.[28] Moreover, the appellees concede that the Wilkersons' joint application, which was filed in 1995, and Stacy's individual application, which was filed in 1997, were both rejected. The record also appears to indicate that the apartment remained available. Thus, there is no dispute that the Commission is able to satisfy the first, second, and fourth prongs of its prima facie case of housing discrimination. We take issue, however, with the Commission's ability to meet the second prong of the standard set forth above.

When Stacy applied in 1997, she was not qualified to rent an apartment at Pickway as she was unemployed and unable to satisfy Pickway's minimum income requirement. In fact, in its

[28] One of the stated purposes of the Kentucky Civil Rights Act (KRCA) is "[t]o safeguard all individuals within the state from discrimination because of familial status, race, color, religion, national origin, sex . . . [and to] to protect their interest in personal dignity and freedom from humiliation . . ." KRS 344.020(1)(b). Discrimination against a person because of his or her choice to be a part of an interracial relationship would clearly constitute discrimination because of race.

response to the appellees' motion for summary judgment, the Commission conceded that Stacy's application was denied because her income level did not meet Pickway's threshold requirement.[29]

Although the Commission has admitted in no uncertain terms that Stacy was unable to meet Pickway's income requirements, it nevertheless claims that the Wilkersons would have been eligible for an apartment had Maldonado considered Paul's income. The Commission insists that Maldonado applied a different standard to the Wilkersons than she did to Maupin and his girlfriend. As noted above, this argument appears to rest upon the Commission's contention that Maupin's girlfriend, Stamper, was allowed to sign on the line marked "spouse" even though the couple was not married. This argument must fail.

First, Maldonado explained in her deposition that Pickway has a policy of renting to unmarried couples if they are in the process of getting married. Maldonado specifically asked the Wilkersons if they were getting married, to which Stacy responded, "No." Maupin and Stamper, on the other hand, clearly informed Maldonado that they were getting married as the word "fiancée" appears next to Stamper's name on the couple's application. As previously discussed, Stacy did not include

[29] In its response to the appellees' motion for summary judgment, the Commission stated that "Stacy's application was denied for two reasons, one that she and Paul were not married and two, Stacy did not have any income. The fact that Stacy did not have any income was justifiable, the fact that they were not married was not."

Paul's name on the application she filed in 1997. Thus, there is no evidence that Maupin and Stamper were treated any differently than the Wilkersons.[30] In summary, we hold that the Commission has failed to demonstrate that Stacy was qualified to rent an apartment at Pickway as the record clearly reveals that Stacy was unable to meet Pickway's income requirement,[31] and thus, the Commission has failed to establish a prima facie case of housing discrimination.

Assuming arguendo, that the Commission had made out a prima facie case of housing discrimination, the appellees claim they had legitimate non-discriminatory reasons for denying the

[30] The Commission claims that a second unmarried white couple, Jerry Blocker and Elizabeth Lynkins, also applied for an apartment at Pickway, however, nothing contained in the record indicates that Blocker and Lynkins were treated any differently than the Wilkersons. That is to say, the Commission has failed to introduce any evidence suggesting that Blocker and Lynkins were offered an apartment or that Pickway even considered their application.

[31] See, e.g., Schanz v. Village Apartments, 998 F.Supp 784, 789-90 (E.D. Mich. 1998). The appellees also claim that the Commission's housing discrimination claim is barred by KRS 344.600(1)(a). As previously discussed, the appellees insist that the Wilkersons' discrimination claim was premised upon their 1995 application, as opposed to Stacy's 1997 application. The Commission responds to this contention by claiming that the appellees' argument ignores the discovery rule, i.e., that the limitations period does not begin to run until an aggrieved party discovers, or should have discovered, that he or she was a victim of discrimination. Because we believe the Commission's housing discrimination claim fails on the merits, we need not address the statute of limitations question. As an aside, we comment only that there appears to be a current split of authority among the United States Courts of Appeals on the issue. Compare Hamilton v. 1st Source Bank, 928 F.2d 86, 87-88 (4th Cir. 1990) (holding that the statute of limitations contained in Section 626 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-34, begins to run from the time of the alleged discriminatory act, not the time of discovery of the same), with Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990) (holding that the accrual date in a ADEA claim is not the date on which the wrong that injures the plaintiff occurs, but the date--often the same, but sometimes later--on which the plaintiff discovers that he has been injured).

Wilkersons' housing application.[32] As previously discussed, the Wilkersons insist that they applied jointly in 1995, that Stacy applied solely on behalf of herself and Marcus in 1997, and that they were informed on both occasions that Pickway did not rent to unmarried couples. However, unlike Maupin and Stamper, the Wilkersons never indicated that they were engaged or that they planned to get married. Thus, since there is no evidence to support the Commission's claim that the appellees' reason for denying Stacy's housing application was pretextual, the reason must be held to be legitimate and non-discriminatory.

Based upon the forgoing reasons, the opinion and order of the Fayette Circuit Court granting summary judgment in favor of the appellees is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
Edward E. Dove Lexington, Kentucky	Johann F. Herklotz Lexington, Kentucky

[32] Once a plaintiff establishes the elements of a prima facie case of discrimination, the burden then shifts to the defendant, who must articulate a "legitimate non-discriminatory" reason for the alleged discriminatory action. Handley, 827 S.W.2d at 699 (applying the McDonnell-Douglas framework in an employment discrimination context). Once such a reason is given, it is incumbent upon the plaintiff to demonstrate that the stated reason is merely a pretext to cover the actual discrimination. Id.