RENDERED: October 3, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002124-MR

JASON CHAPMAN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-01237

KENTUCKY STATE UNIVERSITY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a summary judgment entered by the Franklin Circuit Court dismissing a former employee's racial discrimination claim against Kentucky State University (KSU). For the reasons stated hereafter, we affirm.

Appellant Jason Chapman was first employed by KSU on February 28, 1994, as a parking and traffic control officer. Some nine months later, he was promoted to the position of KSU police officer. Chapman was placed on paid suspension on August 28, 1997, after he was involved in the arrest of eight KSU

students. He remained on suspended status until his one-year appointment ended and was not renewed on June 30, 1998.

Chapman, a Caucasian, then filed this action alleging that KSU violated the Kentucky Civil Rights Act (KCRA), KRS 344.010 et seq., by racially discriminating against him as to the terms, conditions, compensation and privileges of his employment. The Franklin Circuit Court granted KSU's motion for summary judgment, finding that Chapman failed to satisfy his burden of establishing a prima facie case of reverse discrimination. This appeal followed.

Chapman insists that his claim is not a reverse discrimination case. However, we are not persuaded by this assertion, since the term "reverse discrimination" simply refers to a claim in which, as here, "a white employee alleges to be the victim of discrimination." 45A Am.Jur.2d Job Discrimination § 121, at 242 (2002).

Issues concerning the KCRA and alleged reverse racial discrimination were recently addressed in Jefferson County v. Zaring, Ky., 91 S.W.3d 583 (2002). There, the supreme court noted that because the KCRA "was enacted in 1966 to implement in Kentucky the Federal Civil Rights Act of 1964," and because the provisions of the two acts are "virtually identical," we must give consideration to federal courts' interpretation of the federal act. Zaring noted that the following tripartite

analysis has been established for reviewing claims of employment discrimination based on race:

> "First, the plaintiff must establish a prima facie case of discrimination. Second, if the plaintiff carries his initial burden, the burden shifts to the defendant to 'articulate some legitimate nondiscriminatory reason' for the challenged workplace decision. Third, if the defendant carries this burden, the plaintiff has an opportunity to prove that the legitimate reasons the defendant offered were merely a pretext for discrimination."

Zaring, id. at 590 (quoting Notari v. Denver Water Dept., 971 F.2d 585, 588 (10th Cir. 1992), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)). Zaring further quoted McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824, in noting that the first portion of a plaintiff's burden, that of establishing a prima facie case of discrimination, may be satisfied

> "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."

91 S.W.3d at 590-91. This analysis framework "must be appropriately adjusted" in reverse discrimination cases which result from affirmative action plans. Id. at 591. Thus, in a reverse discrimination claim, the first prong of a prima facie case "'is established upon a showing that background

circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" Id. at 591 (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)). The second prong of a prima facie reverse discrimination case is established upon a showing "that the employer treated differently employees who were similarly situated but not members of a protected class." Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796, 801 (6th Cir. 1994). See also Zambetti v. Cuyahoga Cmty. College, 314 F.3d 249 (6th Cir. 2002).

Here, we are not persuaded that Chapman satisfied his initial burden of establishing that a genuine issue of material fact exists as to whether he could establish a prima facie case of discrimination. Chapman asserts that he met his burden of proving that KSU is "that unusual employer who discriminates against the majority," Murray, 770 F.2d at 67 (citations omitted), by showing both that KSU is a "historically Black institution," and that all of his supervisors were African-Americans. However, Chapman admitted in his deposition below that after his employment ended, his position was subsequently filled by two different Caucasian individuals. Further, it is undisputed that when the employment of Chapman's African-American supervisor ended, a Caucasian was hired for that position. Simply put, the record shows that Chapman raised

no allegations which, even if proven true, would support a suspicion that KSU is "that unusual employer who discriminates against the majority."

Moreover, we are not persuaded that Chapman established that a genuine issue of material fact exists as to whether KSU rendered different treatment to "employees who were similarly situated but not members of a protected class." Pierce, 40 F.3d at 801. First, Chapman alleges that although he was reprimanded for being tardy to work, a fellow African-American officer was not reprimanded for being even tardier on the same day. However, even if evidence could be adduced at a trial to support this allegation, the simple fact remains that the counseling letter placed in Chapman's file does not constitute a materially adverse employment action for purposes of appellant's race discrimination claim. Allen v. Michigan Department of Corrections, 165 F.3d 405 (6th Cir. 1999). Similarly, we need not consider another disciplinary incident which resulted in a suspension which was set aside and never served by Chapman.

Next, Chapman alleges that he was disproportionately disciplined after he lost a KSU master key which, as he admits, operated some 90% of the doors on the KSU campus. Chapman acknowledged that he violated KSU policy by removing the key from its key chain, that he lost the key while pursuing a

suspect across campus, and that the loss compelled KSU to change all campus locks at a cost of $85,000. A KSU Vice-President recommended that Chapman's employment be terminated, but KSU's African-American police chief intervened and ultimately Chapman was suspended without pay for two weeks and was placed on probation for six months. Although Chapman opined below that this punishment was reasonable, he asserts that discrimination occurred because the African-American police chief allegedly lost a master key on an earlier date but was not disciplined. Even if this allegation could be proven at trial, however, and even if it could be said that Chapman was similarly situated to the police chief and other KSU employees who lost master keys, the record clearly shows that Chapman admitted that his own discipline was much less severe than that meted out to an African-American maintenance employee whose employment was terminated after he lost the master key to a single building. Hence, even if evidence could be adduced at trial to show that they were similarly situated and that Chapman received less favorable treatment than the police chief, in light of the discipline afforded the maintenance employee it could not be said that a genuine issue of material fact exists as to whether Chapman was disproportionately treated for the loss of the key.

Finally, we are not persuaded that a genuine issue of material fact exists in regard to Chapman's contention that his

final suspension and the loss of his employment raised an inference of discrimination. The final incident involved an August 1997 student dance. In a nutshell, when students failed to obey the officers' orders to disperse after the dance, Frankfort police were called and eight KSU students were arrested. Although another Caucasian officer who arrested two students was not disciplined, there is no evidence that he had any prior disciplinary problems. Moreover, both Chapman and his African-American supervisor were placed on paid suspension as a result of the incident, and they remained on that status until their employment ended on June 30, 1998. Given the fact that Chapman was treated in the same way as his African-American supervisor, we cannot agree with his argument that he was afforded disparate treatment. Further, a different result clearly is not compelled by Chapman's argument that his actions were necessitated by his need to obey his supervisor or face dismissal for insubordination.

The court's summary judgment is affirmed.

ALL CONCUR.

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