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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000229-MR
AND NO. 2002-CA-000293-MR

STEVE YANCEY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 96-CI-02892

SHERIFF OF JEFFERSON COUNTY, KENTUCKY — APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND VANMETER, JUDGES.

DYCHE, JUDGE. This action began as one based on claims of racial discrimination and harassment by multiple plaintiffs against appellee, James Vaughn, who was Jefferson County Sheriff from 1994 to 1999. During the lower court proceedings, several plaintiffs' claims were dismissed in their entirety, leaving four plaintiffs. The trial court granted partial summary

judgment on several of the remaining claims and bifurcated the trials of the separate plaintiffs.

The matter before this Court involves the case of appellant, Steve Yancey, who proceeded to trial on claims that he was demoted based on race and that he was subjected to a hostile work environment.[1] After a seven-day trial, the jury returned a verdict in Yancey's favor awarding him $762,002.12. Vaughn moved for judgment notwithstanding the verdict, which the trial court granted.

The relevant background facts include that Yancey, an African American, was hired as a deputy in 1993 by the then Jefferson County Sheriff, Jim Greene. Yancey had no prior experience as a police officer. Sheriff Greene, for reasons unrelated to the present action, was removed from office and was replaced by Bremer Ehrler. Sheriff Ehrler promoted Yancey to the rank of sergeant.

In 1994, Vaughn became Jefferson County Sheriff and promoted Yancey immediately to the rank of lieutenant in the criminal processing division. It was undisputed that Vaughn did so on the basis of race. Vaughn's testimony during the trial included that he wanted to promote African Americans. Vaughn asked Ehrler who was promotable, and Ehrler recommended Yancey. Vaughn had been advised that Yancey had completed the training

[1] Although Yancey included evidence and arguments regarding disparate treatment, a jury instruction was not given specifically for such.

at Eastern Kentucky University Police Academy, and Vaughn was looking for persons with this training to promote.

The deposition testimony of Richard Lynch, the Director of Administration under Vaughn, was read into evidence at the trial, and he testified accordingly. Lynch testified that, prior to Vaughn's taking office, promotions were given mainly to white males who were friends of whomever was sheriff at a given time. Lynch testified that Vaughn agreed with him that minorities should have access to desired positions.

Yancey maintains, however, that he was promoted in name only and was not given supervisory responsibilities. However, the trial testimony included that Yancey was very inexperienced for his rank, particularly in management skills. Yancey remained as a lieutenant until December of 1994, when he was demoted to the rank of a deputy. He claimed that his demotion was based on his race. Yancey also alleged that he was exposed to a hostile work environment during his tenure as lieutenant.

We now review the evidence to determine if the trial court's decision to grant Vaughn's motion for judgment notwithstanding the verdict was in error. A court should only grant such a motion if there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ. Washington v.

Goodman, Ky. App., 830 S.W.2d 398, 400 (1992).[2] All reasonable inferences should be drawn in favor of the nonmovant. Baylis v. Lourdes Hosp., Inc., Ky., 805 S.W.2d 122, 125 (1991).

Because KRS Chapter 344 mirrors Title VII of the Civil Rights Act of 1964, Kentucky courts use federal standards when evaluating race discrimination claims. Stewart v. Univ. of Louisville, Ky. App., 65 S.W.3d 536, 539 (2001). Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment. See Faragher v. Boca Raton, 524 U.S. 775, 786-787, and n.1 (1998).

I. Yancey's claims of hostile work environment

Title VII of the Civil Rights Act of 1964 recognizes hostile work environment claims based on racial harassment. See Smith v. Leggett Wire Co., 220 F.3d. 752, 758 (6th Cir. 2000). "In order to establish a racially hostile work environment under Title VII, the plaintiff must show that the conduct in question was severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and that the victim subjectively regarded it as abusive." Id. at 760. The plaintiff must also prove that his employer tolerated or condoned the situation or knew or should have known of the alleged conduct and did nothing to correct the situation. Id.

[2] The standard for reviewing a judgment notwithstanding the verdict is the same standard used to review directed verdicts. See Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985).

(citing Jackson v. Quanex Corp., 191 F.3d 647, 658-59 (6th Cir. 1999)).

Courts must "determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Faragher, 524 U.S. at 787-88 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)). In reviewing the claims, courts must not disaggregate episodic harassment into discrete and isolated incidents. "'[T]he issue is not whether each incident of harassment standing alone is sufficient to sustain the cause of action in a hostile environment case, but whether--taken together--the reported incidents make out such a case.'" Jackson, 191 F.3d at 659 (quoting Williams v. General Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999)).

The conduct must be "severe," "pervasive," and "extreme." The Supreme Court of the United States has explained that "[a] recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher, 524 U.S. at 788 (internal citation omitted). "Thus, '[w]hen the

workplace is permeated with "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," Title VII is violated.'" National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002) (quoting Harris, 510 U.S. at 21) (citations omitted in Morgan). The conduct must be extreme enough to amount to a change in the terms and conditions of employment. Faragher, 524 U.S. at 788. In other words, the harassment must have "adversely affected the employee's ability to do his or her job." Moore v. KUKA Welding Sys. and Robot Corp., 171 F.3d 1073, 1079 (6th Cir. 1999)(citation omitted).

The "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-[or race] related jokes, and occasional teasing.'" Faragher, 524 U.S. at 788 (internal citations omitted).

Yancey only claimed he was exposed to a hostile work environment during the eleven-month period he was a lieutenant from January 1994 through December 1, 1994.[3] To facilitate our

[3] Specifically, the jury instruction on racial harassment read as follows:
Do you believe from the evidence:

review, we have categorized the incidents relied upon by Yancey to support his hostile environment claim.[4]

A. Comments made or reported to Yancey after his demotion

Deputy Rodney Lindauer testified that he overheard Major John Quigley, who was one of Yancey's supervisors, say that Yancey was a "nigger" or "just a nigger." This comment was made during Yancey's tenure as lieutenant. Lindauer did not know to whom Quigley was speaking, or whether he was on the telephone, or if someone else was in his office. However, Lindauer did not report this incident to anyone and did not tell Yancey about it until two years later.

Deputy Myskela Carter testified that she heard a joke, which she characterized as racial, that was directed at Yancey. She did not know the full joke, but it involved African Americans and a "357" which she believed was in reference to a handgun. However, this comment was made after Yancey was demoted to deputy, not during the period he was a lieutenant.

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1. That during the period in which the Plaintiff, Steve Yancey, was employed by the Defendant, Sheriff, in the position of lieutenant, the Plaintiff, because of his race, was subjected to offensive and intimidating conduct; and
2. That such conduct was sufficiently severe or pervasive to alter the conditions of the Plaintiff's employment and create a hostile working environment that unreasonably interfered with Plaintiff's work performance; and
3. That the Defendant, Jefferson County Sheriff, knew, or should have known, of the offensive conduct and failed to take reasonable steps to eliminate it.

[4] Ultimately, the evidence must be reviewed together. We only categorize it to determine which incidents meet the requirements of relevant evidence to be considered under the totality of circumstances.

Deputy John Rivera testified that he overheard a comment made by a sergeant regarding some deer meat that a deputy had given to Yancey. The sergeant was not Yancey's or Rivera's supervisor. Rivera testified that the sergeant said that he could not believe "the deer meat was given to that nigger." It was undisputed that Yancey did not hear the remark, but Rivera reported hearing it to Yancey. However, this comment was also made after Yancey's demotion.

The evidence at trial also included testimony regarding allegations that Yancey was discriminated against in not being permitted to use bereavement leave after the death of his fiancé. Although the testimony was very weak in proving that white officers were allowed to use bereavement leave for persons not specifically included in the policy,[5] we find no reason to make any such comparison. This is so because Yancey's fiancé died in 1996, while Yancey's claim was for hostile work environment in 1994.

Because the bereavement issue and the remarks overheard by Carter and Rivera occurred after Yancey's demotion, they are not relevant evidence of a hostile work environment during the period in question. Although the racial slur

[5] The written bereavement policy provided in pertinent part that: The Sheriff's Office grants leave, with pay, to regular employees who are absent due to death in the employee's immediate family. Immediate family members includes [sic] spouses, children, brothers, sisters, parents or grandparents of the employee.

overheard by Lindauer occurred during the relevant time period, he did not tell Yancey about it until two years later. There is no evidence that Lindauer told anyone else about it during the relevant time period.

Yancey was required to show that a reasonable person would have viewed the environment as hostile or abusive and that he subjectively regarded it as such. Black v. Zaring Homes, Inc., 104 F.3d 822, 826 (6th Cir. 1997). Because the incidents in this category were unknown to Yancey during his tenure as lieutenant or occurred thereafter, this evidence cannot support his hostile environment claim. See Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 249 n.4 (6th Cir. 1998). Accordingly, they cannot be reviewed with other evidence under the totality of circumstances.

B. Incidents witnessed personally by Yancey

Yancey observed two specific incidents on which he based his claim in part. He overheard a comment made by Deputy Dan Gainweyer in the presence of Major Connie Voyles,[6] Yancey's immediate supervisor at that time, that Gainweyer had "just rolled some papers in the West End and you know, everybody down there had gold teeth in their mouth." Although Yancey did not report this comment to other supervisors, Major Voyles was

[6] At times Major Voyles is also referred to as Major or Captain Ashley, or Captain Voyles.

present when the comment was made. There was no evidence that she took any action against Gainweyer for making this comment.

Yancey also testified that he saw Deputy Gainweyer wearing a ring with a Nazi insignia on it. He was offended by it and reported it to Major Voyles. Major Voyles questioned Deputy Gainweyer about the ring. She testified that it was a Fiesta bowl ring Gainweyer's father had given him and that there was nothing offensive about it. No disciplinary action was taken against Gainweyer. Yancey did not report the ring to any other supervisor.

While our standard of review mandates that we give Yancey a favorable inference on these two incidents, we are left with gaping holes regarding these allegations. For example, in reference to the ring incident, although Yancey testified that Gainweyer did not hide the ring from anyone, he presented no evidence or testimony as to the duration of time or frequency Gainweyer wore this ring, or if Gainweyer continued to wear it after Voyles questioned him.

This evidence is highly relevant because Yancey is required to prove that Vaughn knew or should have known of Gainweyer's conduct and did nothing to correct it. See Smith, 220 F.3d at 760. "[A] plaintiff may hold an employer directly liable if [he] can show that the employer knew or should have known of the conduct, and that [his] response manifested

indifference or unreasonableness." Jackson, 191 F.3d at 663 (citing Blankenship v. Parke Care Centers, Inc., 123 F.3d 868, 873 (6th Cir. 1997)).

Major Voyles was Yancey's immediate supervisor. The question then is whether her notice is sufficient to impute such notice to Sheriff Vaughn. "The general consensus is that the knowledge of or notice to a low-level employee without authority or power cannot be imputed to the employer." Clark v. United Parcel Service, Inc., 286 F. Supp. 2d 819, 829-30 (W.D. Ky. 2003) (citing Torres v. Pisano, 116 F.3d 625, 634-35 (2d Cir. 1997) (actions of "low-level supervisor" in management hierarchy cannot be imputed to employer); Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992) (same); Williamson v. City of Houston, 148 F.3d 462, 466 (5th Cir. 1998) (notice to employer does not turn on labels in management hierarchy, and "a more important consideration [may be] whether notice was given 'to those with authority to address the problem'"); Young v. Bayer Corp., 123 F.3d 672, 675 (7th Cir. 1997) (notice to the proper person can be judged by whether the person complained to "has the authority to terminate the harassment" and "could reasonably be expected to refer the complaint up the ladder" to the personnel able to act on it)).[7]

[7] A similar issue was raised in Brewer v. Hillard, Ky. App., 15 S.W.3d 1 (1999), wherein the jury believed that a low-level supervisor was in a position to report the harassment and that the employer should have known

The evidence at trial included that Voyles was responsible for daily assignments and general supervisory tasks, but there was no evidence that she had the authority to independently discipline Gainweyer. While Voyles was a major, title alone is not enough to infer disciplinary authority. This is a close issue, and we conclude that Yancey is entitled to a favorable inference on this point.

Other allegations by Yancey included that he was discriminated against because he was not given a desk, office, or file cabinet. The undisputed testimony at trial, however, was that office space was very limited. Those individuals who did have offices had to share them, and they were of a higher rank than Yancey. Even Sheriff Vaughn shared an office. The evidence was clear that the condition of office space was bad for everyone, and Yancey failed to present evidence that he was treated differently from those of a similar rank, tenure, and experience. Moreover, Yancey did not show that Vaughn was personally responsible for Yancey's office conditions or that Vaughn knew or should have known about them.

Further, there was no evidence linking the conditions in the office to Yancey's race. Yancey did testify that he

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about it from other co-workers who were present when the on-going harassment took place. This Court affirmed the trial court's judgment. Brewer is, however, distinguishable from the present case because the facts in it included numerous and on-going incidents of open harassment and sexually-oriented touching.

spoke to Major Voyles regarding it, and she responded that he would not get an office. There was no evidence that Voyles made any racial remarks or did anything racially discriminatory in regard to Yancey. Instead, the undisputed trial testimony was that Voyles and Yancey had a personality conflict and did not like each other. Disparate treatment must be based on a protected status, not personal animosity, to be actionable.

As to the file cabinet, Yancey received one within two months of becoming a lieutenant. However, Kimberly McNear, a white lieutenant during Yancey's tenure as lieutenant, did not have her own file cabinet and instead, shared a "community" file cabinet.

Yancey also alleged he was discriminated against because he was not given a take-home car. The undisputed testimony was that he could only name one person who had a take-home car, a Sergeant Bowman. Sergeant Bowman was Sheriff Vaughn's personal adjutant and driver. Yancey knew of no one else who had a car, regardless of race, and there was no other evidence of disparate treatment on the basis of race in regard to vehicle usage.

Yancey further testified that he was treated differently because he was kept out of meetings, not invited to lunches and there were hushed tones when he walked into offices. However, Yancey could not specifically identify meetings from

which he was excluded. As to the lunches, Yancey did not produce evidence that the lunches were directly related to a benefit at work, and, without some evidence of their content, hushed tones are not actionable.

Further, if Yancey was exposed to this treatment, the evidence was undisputed that many of the people with whom he worked were jealous of his promotion to lieutenant because of his lack of experience and short tenure in the sheriff's office. He was a higher rank than many other officers with more experience. "'[P]ersonal conflict does not equate with discriminatory animus.'" Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791 (6th Cir. 2000) (quoting Barnett v. Dep't of Veterans Affairs, 153 F.3d 338, 342-43 (6th Cir. 1998), cert. denied, 525 U.S. 1106 (1999)). Civil Rights laws do not prohibit all harassment in the work place; instead, they are only directed at discrimination based on a protected status. See Bowman v. Shawnee State University, 220 F.3d 456, 463 (6th Cir. 2000) (citing Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998)).

In summary, this category produces only the actions of Gainweyer to be included in an analysis of the totality of circumstances. All other allegations in this category have not been shown on any level to be related to race, and Yancey is not entitled to a favorable inference regarding such.

C. Incidents reported to Yancey

Yancey also called Jeanette Vize to testify. She worked in Yancey's division during the Vaughn administration. She recalled Major Voyles reviewing the chain of command with her. Vize testified that Voyles started with the sheriff, and finished with a captain. When Voyles left out Yancey, who was a lieutenant, Vize asked what Yancey's role was in the chain of command. Voyles answered her saying, "He's nothing to you." Vize reported this statement to Yancey.

Reviewing Vize's testimony as a whole, however, we find nothing racial in the least, nor is there a reasonable inference of such. Vize admitted that she did not know that at the time of her conversation with Voyles that Yancey was no longer under Voyles's supervision. He had been moved to Captain Hettich's supervision. Moreover, there were other lieutenants, who were white, but who were also omitted in Voyles's description of the chain of command.

Vize also testified that Voyles did not use any racial epithets in referencing Yancey. Moreover, there was no evidence that Voyles ever used any inappropriate racial comments at all.

On the other hand, the evidence was undisputed that Voyles and Yancey did not get along well and eventually Yancey was glad to be moved to work with Captain Hettich so he would not have to work with Voyles. In reviewing Vize's full

testimony, we find that it would be unreasonable to conclude that Voyles's statement was racially motivated as the evidence of such a conclusion is totally lacking.

Yancey also called Pam Greenwell, a former deputy who worked in Yancey's division, to testify at the trial.[8] She recalled a comment made by Major Quigley in regard to the O.J. Simpson trial that his former wife "deserved to have her throat slit because she slept . . . with a nigger." Major Quigley was the head supervisor of Yancey's division. It was undisputed that Yancey was not present when the comment was made and that the remark was not directed at him. Greenwell told Yancey's partner about the comment, and he passed it on to Yancey.

The evidence supports a finding that Vaughn was made aware of this incident and had it investigated. The investigation concluded that Quigley had used racial slurs. Vaughn met with and questioned Quigley in regard to it. Vaughn testified that Quigley admitted using the slur but asked not to be fired because his wife was ill. Vaughn did not terminate him but, instead, decided to let him make his own departure.

[8] Pam Greenwell's testimony included that the use of racial slurs was commonplace in the sheriff's department. However, she could only cite to the one specific statement made by Quigley regarding O.J. Simpson's wife when asked to identify such remarks. Such vague assertions that there was a general attitude of discrimination is insufficient. Smith, 220 F.3d at 761 (citing Wixson v. Dowagiac Nursing Home, 87 F.3d 164, 171 (6th Cir. 1996) (holding that the plaintiffs failed to create issue of fact by alleging numerous instances of disparate treatment and hostile work environment in conclusory terms with no reference to names, titles, occasions)).

Quigley retired about one year later and was not subjected to any discipline regarding the incident.

The highly offensive comment made by Quigley in regard to O.J. Simpson's former wife did occur during the relevant time in question. Yancey was not present, and the comment was not directed at him. However, because Yancey learned of the comment during the time at issue, it is relevant evidence for this Court to consider on his hostile work environment claim. See Jackson, 191 F.3d at 661 (citing Moore, 171 F.3d at 1079) (crediting "evidence of racial harassment directed at someone other than the plaintiff when the plaintiff knew a derogatory term had been used"). "[R]acial epithets need not be hurled at the plaintiff in order to contribute to a work environment that was hostile to [him]." Id. (citing Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 673-75 (7th Cir. 1993)).

In sum, when the trial evidence is categorized and objectively reviewed, there was only one highly offensive racial comment (the O.J. Simpson comment), and the two Gainweyer incidents over an eleven-month period. However, none of these incidents were directed at Yancey, and the O.J. Simpson comment was not made in his presence. Furthermore, as to the Gainweyer incidents, the "gold teeth" comment was only mildly offensive, see, e.g., Johnson v. Box USA Group, Inc., 208 F. Supp. 2d 737,

743 (W.D. Ky. 2002), and there was no evidence of how often or for what duration Gainweyer wore the ring.

The other allegations made by Yancey have not been shown to be related to race; were outside the relevant time period; or were unknown by Yancey. Accordingly, they cannot be included as evidence in reviewing the totality of circumstances.

The three incidents noted above are simply not sufficient to support a finding of a hostile work environment when the facts of this matter are compared with other cases. Hostile work environment cases involve much more egregious, severe, pervasive, and ongoing conduct. See, e.g., Brewer, 15 S.W.3d at 4 (Plaintiff continually called sexually explicit names by harasser, who also grabbed his buttocks and made offensive comments, as well as requesting oral and anal sex.); Abeita, 159 F.3d at 252 (denying summary judgment where conduct was commonplace, ongoing daily for seven years); Moore, 171 F.3d at 1079 (“Racial slurs and offensive jokes were part of the every-day banter on the shop floor.”); Williams v. General Motors Corp., 187 F.3d at 562-66 (Issue of material fact where plaintiff complained of fifteen separate allegations of persistent foul language and sexually explicit comments directed at her, three of which involved an “element of physical invasion.” There was also evidence of offensive comments towards women in general, denial of the plaintiff’s overtime,

viewed collectively, created issue of fact regarding hostile work environment."); compare Burnett v. Tyco Corp., 203 F.3d 980, 984-85 (6th Cir. 2000), (holding that "under the totality of the circumstances, a single battery coupled with two merely offensive remarks over a six-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment"); Morris v. Oldham County Fiscal Court, supra.

Furthermore, although racial conduct need not be directed at a plaintiff in order to violate Civil Rights laws, actions or comments not directed at a plaintiff contribute to a conclusion that the alleged harassment was not severe enough to create an objectively hostile environment. Black, 104 F.3d at 826 (citing Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 541 (1st Cir. 1995) (finding that plaintiffs' allegations were not so severe as to create an objectively hostile environment, in part because the sexual comments were not directed at the plaintiffs)). None of the three incidents in the case at bar were directed at Yancey, and the most offensive one was not made in his presence. Pursuant to federal standards, this contributes to a finding that Yancey was not exposed to an objectively hostile work environment.

We do not and cannot condone nor sanction the incidents in the Sheriff's Department brought to light in this

case. Individuals such as Quigley place our society in a very dark light and are reprehensible. Nonetheless, sporadic behavior that is not pervasive is not the type protected under Civil Rights laws. Accordingly, we conclude that the trial court correctly granted Vaughn's judgment notwithstanding the verdict on Yancey's claims of hostile work environment.

II. Yancey's Demotion

Yancey also claimed that his demotion in December of 1994 was motivated by race. Yancey may establish racial discrimination either by introducing direct evidence of discrimination or by proving inferential and circumstantial evidence, which would support an inference of discrimination. Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

Yancey has no direct evidence of racial discrimination on the part of Vaughn and, therefore, must prove his case under the familiar burden shifting mechanism set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as refined in Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

The burden shifting approach requires a plaintiff to first prove a prima facie case of discrimination. Burdine, 450 U.S. at 252-53. If he meets this requirement, the burden then shifts to the defendant to articulate a legitimate,

nondiscriminatory reason for the employee's rejection. Id. at 253 (quoting McDonnell Douglas, 411 U.S. at 802. If the defendant is successful in meeting this burden, the plaintiff then must show that the reasons offered by the defendant were not his true reason, but instead were a pretext for discrimination. Burdine, 450 U.S. at 253 (citing McDonnell Douglas, 411 U.S. at 804).

To establish a prima facie case of discrimination, Yancey must show that: "(1) he [was] a member of a protected class; (2) he was qualified for his job and performed it satisfactorily; (3) despite his qualifications and performance, he suffered an adverse employment action; and (4) that he was replaced by a person outside the protected class or was treated less favorably than a similarly situated individual outside his protected class." Johnson v. Univ. of Cincinnati, 215 F.3d 561, 572-73 (6th Cir. 2000) (citing McDonnell Douglas, 411 U.S. at 802).

There is no real dispute that Yancey has met the first three prongs of his prima facie case. The trial testimony was undisputed that when Yancey was demoted; Jerome Henderson, an African American deputy whom Vaughn had promoted to sergeant when he took office in January of 1994, was placed in Yancey's

former position.[9] Accordingly, Yancey must meet his prima facie case by proving "'that a comparable non-protected person was treated better.'" Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992). Hence, we must compare the circumstances surrounding Yancey's case with those of others.

The incident resulting in Yancey's demotion from lieutenant to deputy took place on November 5, 1994, at a nightclub in Louisville called O'Malley's.[10] At some time around 2:00 a.m. or 3:00 a.m., a disturbance erupted over a bar tab between Yancey's acquaintance, Jerome Harmon, and a waitress. The testimony at trial included several different versions of what actually transpired, but ultimately it appears that a bartender called Harmon a "nigger" and called for bouncers to remove him from the bar. Yancey, who was off duty at the time, became involved in the incident. The incident became physical, and the bouncers forcibly removed Harmon from the bar. Yancey followed them out and tried to assist Harmon. The Louisville Police Department responded to the situation, which was described by several as a near riot. Thirty to thirty-five people were either involved in the situation or were spectators.

The trial testimony was very conflicting regarding Yancey's role in the initial disruption. However, the conduct

[9] Henderson, however, was not promoted to the rank of lieutenant, but did take over Yancey's duties.

[10] O'Malley's was a local club frequented by police officers. Several were present on the night at issue.

which ultimately resulted in the internal investigation related to Yancey's actions toward William Lewis, a sergeant in the Louisville police department. Lewis maintained that Yancey refused to produce identification until threatened with arrest and that he was loud and obnoxious. Lewis called for the on-duty officer of the Sheriff's department, and Major Quigley responded to the scene.

Yancey presented the testimony at trial of several witnesses of the O'Malley's incident, which were very favorable to how he reacted at the scene. Of course, Vaughn put on contrary testimony. While the testimony of the witnesses at the scene was very comprehensive but conflicting, the focus of the present inquiry must stay on the information Vaughn had at the time he made the decision to demote Yancey. This information is summarized below.

Sergeant Lewis wrote a letter to Major Quigley regarding the incident. In summary, his letter included that Yancey became very belligerent and refused to show him his identification when asked. The letter goes on to state that on subsequent requests to see Yancey's identification he became angry. Sergeant Lewis then told Yancey that if he refused to show him his identification that he "stood a good chance of being arrested." Thereafter, Yancey produced his badge. In his letter, Lewis stated that Yancey was verbally abusive, loud and

obnoxious, and stated that he did not have to take orders from a sergeant.

Quigley wrote a letter to Major Larkin of Internal Affairs regarding the incident, which likewise included that Yancey refused to identify himself to Louisville police officers. He also reported that Yancey was involved in pushing and shoving at the scene.

On November 17, 1994, Sergeant Goatley of Internal Affairs wrote a report to Vaughn regarding the investigation of the O'Malley's incident. The report summarized the information gathered from various persons interviewed during the investigation. Twelve individuals, including Yancey, were interviewed. Of those twelve, four were employees of O'Malley's and four were officers with the Louisville Police Department. The statements of two deputies were taken.

Overwhelmingly those interviewed stated that Yancey was at fault and acted unprofessionally. Most stated that he was loud and obnoxious. Others stated that Yancey was the problem and that he had escalated the fight by his interference.

Deputy Troy Cammack, who was interviewed, stated that he heard Yancey identify himself as a police officer. He also stated that Yancey became upset when he was told his badge did not carry any weight in the bar.

A second deputy, Joe Weis, stated that Yancey was trying to help Harmon, but was very loud. He also stated that when he tried to separate Yancey and a bouncer, Yancey attempted to get around him to get to the bouncer. Weis stated that he heard Yancey refuse to identify himself and that Yancey was aggressive and belligerent to the Louisville officers.

Officer Jeff Schmitt, of the Louisville Police Department, was also present as a patron of the bar. He stated that Yancey did produce identification to the Louisville police when requested, but was not present when Sergeant Lewis approached Yancey.

Yancey himself was interviewed. He stated he tried to help Harmon because the bouncers had thrown him on the ground and had a knee in his throat. He identified himself as a police officer, but felt that Lewis was disrespectful to him. Yancey therefore refused to show identification to Lewis. Yancey thought Lewis was “nasty” toward him. Yancey admitted being angry at that time. He stated that one or two of the bouncers informed the Louisville police that he had done nothing wrong.

Yancey acknowledged that he was asked for identification by three different Louisville police officers and only produced it when threatened with arrest. He denied making any statement regarding Lewis’s rank as a sergeant compared with

his as a lieutenant. During his interview, he stated that he did not perceive the incident as racially motivated.

Upon completion of the investigation, it was concluded that Yancey

> may have violated a number of Rules of Standards and Conduct. There may be violations of R.S.C. 3.021 (Required to be Courteous); R.S.C. 3.022 (Failure to Produce Identification on Request); R.S.C. 3.012 (No weapon off duty); and R.S.C. 4.013 (Use of Authority for Personal Reasons).

The report summarized above was dated November 17, 1994. Vaughn sent Yancey a letter dated November 21, 1994, informing him that he had been demoted based on the information in the report.

We are currently reviewing the fourth prong under Yancey's prima facie case-—that he was treated less favorably than similarly situated individuals outside his protected class. The case of Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998), explains this requirement in detail. A plaintiff is "'required to prove that all of the relevant aspects of his employment situation were "nearly identical" to those of [the non-minority's] employment situation.'" Id. at 352 (citing Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994)). Relevant factors to consider in cases alleging differential disciplinary action include that "'the individuals with whom the plaintiff seeks to compare his/her

treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" Ercegovich, 154 F.3d at 352 (quoting Mitchell, 964 F.2d at 583). Ercegovich, 154 F.3d at 352, goes on to explain that:

> Courts should not assume, however, that the specific factors discussed in Mitchell are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, as this court has held in Pierce, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the *relevant* aspects." Pierce, 40 F.3d at 802 (emphasis added).

It was Yancey's burden to produce evidence of comparables, and he failed to meet the requirements explained above. The comparables referenced by Yancey at trial were in no way similar to the O'Malley's incident. Nor were the officers involved at the same rank as Yancey, and their misconduct was not nearly as severe. It was not enough for Yancey to show that he was treated differently. Instead, he was required to make

the showing of being similarly situated in all relevant aspects, and he failed to do so. Thus, Yancey has failed to even prove a prima facie case.

Alternatively, even if Yancey had presented a prima facie case, he has not shown pretext. Vaughn stated his reason for demoting Yancey was the O'Malley's incident and that he relied on the investigative report findings in making this decision. Accordingly, Vaughn presented a legitimate nondiscriminatory reason for Yancey's demotion. Thus, the burden then shifted to Yancey to show pretext.

Proving a pretextual motive requires that "the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation." Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994) (citing Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1109 (8th Cir. 1994)).

> "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Center [v. Hicks], 509 U.S. [502], at 512 n.4, 113 S.Ct. 2742 [(1993)]. "It is not enough, in other words, to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519, 113 S.Ct. 2742. In this regard, the plaintiff retains the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff[.]" Burdine, 450 U.S.

> at 253, 101 S.Ct. 1089; St. Mary's Honor Center, 509 U.S. at 597, 113 S.Ct. 2742; Haynes v. Miller, 669 F.2d 1125, 1126-27 (6th Cir. 1982).
>
> Further, an employer may make employment decisions "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984). Even if the court were to disagree with defendant's reasons for its actions or believe that defendant was unnecessarily harsh toward plaintiff, this would not be enough; an affirmative finding of discrimination must be made. See id. (finding no discrimination even if plaintiff was fired for violating a rule he did not violate.). See also Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1083 (6th Cir. 1994); Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1994), cert. denied, 514 U.S. 1108, 115 S.Ct. 1958, 131 L.Ed.2d 850 (1995); Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988).

Evans v. Toys R Us-Ohio, Inc., 32 F. Supp. 2d 974, 985 (S.D. Ohio 1999).

Yancey may prove pretext by introducing evidence that proves one of three arguments: "(1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the action], or (3) that they were *insufficient* to motivate [the action]." Manzer, 29 F.3d at 1084 (quoting McNabola v. Chicago Transit Auth., 10 F.3d 501, 513 (7th Cir. 1993)) (emphasis in original).

Because the O'Malley's incident was investigated and a compelling negative report of Yancey's conduct was given, it cannot reasonably be found that the proffered reason was not factual nor insufficient to motivate Yancey's demotion. Thus, Yancey must present evidence that his actions at O'Malley's did not actually motivate his demotion.

Yancey attempts to tie in racial statements made by Quigley to support his claim. "In assessing the relevancy of a discriminatory remark, we look first at the identity of the speaker. An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decision is not considered indicative of . . . discrimination." Ercegovich, 154 F.3d at 354 (citation omitted). Hence, "'"statements by nondecisionmakers . . . [cannot] suffice to satisfy the plaintiff's burden . . ." of demonstrating animus.'" Smith, 220 F.3d at 759 (citing Bush v. Dictaphone Corp., 161 F.3d 363, 369 (6th Cir. 1998) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989); McDonald v. Union Camp Corp., 898 F.2d 1155, 1161-62 (6th Cir. 1990) (holding that statements of intermediate level management officials were not indicative of discrimination when the ultimate decision to discharge is made by an upper-level official); Wilson v. Stroh Cos., Inc., 952 F.2d 942, 945-46 (6th Cir. 1992) (holding that racial animus by plant manager could not be imputed to upper-level manager who made the

decision to terminate absent proof of connection); cf. Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1249 (6th Cir. 1995) (holding that repeated racial slurs by two owners constituted direct evidence that the plaintiff's termination might have been racially motivated)). Thus, we must discern what, if any, role Quigley played in the ultimate decision to demote Yancey.

All of the testimony at trial, with the exception of one reference made in Lynch's deposition testimony, was that Vaughn alone made the decision to demote Yancey. Lynch's testimony included a reference to a meeting which Vaughn had with Yancey's "commanding officers" on either the day of or the day before Yancey's demotion. However, Lynch also stated that he had no direct knowledge of the facts surrounding the demotion, and he was not involved in the meeting.

Unfortunately, Lynch did not go on to detail who specifically was involved in the pre-demotion meeting. Given that Lynch stated that it was Yancey's commanding officers, we will give Yancey a reasonable inference that Major Quigley was at this meeting.

Nonetheless, there was no evidence that Quigley's racial animus had any influence on Vaughn's decision. In fact, Yancey testified that he could not say if Quigley had any influence on the decision. Furthermore, in Yancey's written appeal of his demotion, he requested a hearing with a select

board, including Major Quigley,[11] although he was already aware of at least one racial remark made by him. It is not reasonable to find that Yancey feared Quigley when he did not object to him being included on his appeal board.

Further, assuming that the meeting referenced by Lynch actually took place and that Quigley was a part of it, there was no evidence that Vaughn did not independently rely on the unbiased internal investigation report which was highly damaging toward Yancey. The report was dated November 17, 1994, and Vaughn would have had it prior to the meeting.

This matter is somewhat analogous to Wilson, 952 F.2d 942, wherein the plaintiff alleged that the plant manager harbored racial animus toward him and wanted to terminate him. The Court refused to find that the plant manager's animus infected the decision-making process absent evidence of such wherein an independent investigation had been conducted. Id. at 946.

Further, to any extent Yancey argues that Quigley was responsible for the internal investigation, such is insufficient to prove his case. See id. Certainly, the O'Malley's incident was sufficiently serious to have warranted an investigation.

[11] Yancey included testimony regarding his withdrawal of the appeal. Testimony included that Col. Cain and Stanley Patton advised him that Vaughn would fire him if he pursued it. Even if this were accurate, there was no evidence linking this to race. Further, there was no claim of retaliation by Yancey.

Moreover, Yancey would have had to show some type of discriminatory bias on the part of Major Jim Larkin and Sergeant Jim Goatley, who conducted the investigation, and on those persons who were interviewed, many of whom were disinterested witnesses. The evidence at trial was completely void on this issue, and Yancey is not entitled to a reasonable inference on this point.

Thus, Yancey has not shown that Quigley's racial animus influenced Vaughn. Further, Yancey presented no evidence to support a reasonable inference that ultimately Vaughn alone did not make the final decision to demote Yancey based on the results of the investigation.

More compelling is that a jury must believe that a plaintiff was intentionally discriminated against on the basis of race. Id. Yancey was therefore required to produce "sufficient evidence from which the jury may reasonably reject [Vaughn's] explanation." Wilson v. Dana Corporation, 210 F. Supp. 2d 867, at 887 (W.D. Ky. 2002)(citing Manzer, 29 F.3d at 1083).

Yancey's burden was not met for several reasons. First, it was Vaughn who promoted Yancey in the first place. And, second, Yancey was replaced by another African American. It is beyond logic and totally unreasonable to find that Vaughn intentionally discriminated against Yancey on the basis of race

by promoting him, then demoting him, and finally by replacing him with a person of the same race.

Further, the evidence at trial in regard to Vaughn's decision making was that it was inconsistent across the board, regardless of race. Yancey called James Cain as his witness. Cain was one of Yancey's supervisors and worked under the Vaughn administration. He testified at trial that when asked if he perceived Vaughn having any inclination towards one race or another, he stated that "I guess he was an equal opportunity harsh guy, I guess you'd probably say." Jim Larkin, called by Vaughn, testified accordingly when he stated that "I think he [Vaughn] was equally severe." Micheal Hettich, who was white, testified that he was demoted by Vaughn and transferred to auto inspection without any reason whatsoever. When Hettich asked Vaughn the basis for his decision, he stated that Hettich's work performance was very good, but he wanted to give someone else a chance. Hettich testified in reference to Vaughn that he was not consistent in his discipline and that he was sometimes harsh and sometimes lenient regardless of race. For example, Hettich testified that one time Vaughn learned that a deputy had fallen asleep while working as an off duty security guard and suspended him for several days.

While Vaughn may have been very inconsistent in his personnel decisions, unless his decisions were based on race,

they were not actionable. See, e.g., Evans, 32 F. Supp. 2d at 985. In other words, an employer who treats everyone badly is not liable for discrimination.

The evidence is totally lacking for a finding of pretext. Yancey has, therefore, failed to prove that his demotion was based on his race. We hereby affirm the trial court on this issue.

III. The court's denial of evidence of discrimination toward others

Yancey complained that the trial court erred in not allowing evidence at trial of alleged incidents of harassment and discrimination experienced by other employees. Our first comment on this issue is that it is difficult to grasp why Yancey believes this prejudiced his case when the jury found in his favor. While the trial court granted Vaughn's motion notwithstanding the verdict, the court was already familiar with all the evidence Yancey wanted to include concerning other employees.[12] Had this case involved an instance where the jury returned a defense verdict, we could more easily understand Yancey's argument.

Nonetheless, we believe it is important to review this issue on the merits as many facts in the trial were somewhat unclear. It is a long-standing rule in the Commonwealth that

[12] At the hearing regarding the avowal testimony, Yancey's counsel conceded that its purpose was for the trial court's further consideration.

rulings regarding evidentiary matters are within the discretion of the trial court. "[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000)(citations omitted).

Courts are consistent in determining that harassment and discrimination not necessarily directed at a particular plaintiff or conducted in his presence may be relevant to support a hostile environment claim. See Black, 104 F.3d at 826; Jackson, 191 F.3d at 664-65 . However, courts also consistently require evidence that the plaintiff was subjectively aware of the discrimination or harassment allegedly directed at other employees. See Jackson, 191 F.3d at 661 (citing Moore, 171 F.3d at 1079) ("We have also credited evidence of racial harassment directed at someone other than the plaintiff when the plaintiff knew a derogatory term had been used."); Abeita, 159 F.3d at 249, n.4 (rejecting as irrelevant testimony concerning harassment about which plaintiff knew nothing during her employment); Wilson v. Dana Corp., 210 F. Supp. 2d at 878 ("[T]he fact that the challenged conduct must be examined on both an objective and subjective basis . . . requires that the plaintiff must at least have been aware of harassment [involving other employees] while employed by the

defendant.”). It is on this point that Yancey’s case is deficient.

No evidence was presented at trial that Yancey was aware at any level of other relevant incidents of alleged harassment or discrimination. Yancey testified in his deposition in reference to other plaintiffs that he did not know what they knew or to what they were going to testify.

Yancey did, however, testify in his deposition that he had heard of a racial statement Vaughn had made in reference to Stanleo Patton, the highest ranking African American officer under Vaughn’s administration at the time. Yancey testified that he did not know if it was true. However, even if Yancey did in fact know of the statement and even if he believed it to be true, it was not relevant to his case because it was made after his demotion.

Furthermore, the evidence at trial showed that there was very little contact between Yancey and the other plaintiffs during his tenure as lieutenant. For example, Carter testified at trial that she never worked at the same time and same place as Yancey, and that they did not discuss their jobs with one another.

Patton testified that he worked in a separate unit from Yancey and only had contact with him occasionally. Henderson testified similarly stating he worked in a separate

building from Yancey and did not have a lot of interaction with him.

Yancey has pointed this Court to no evidence whatsoever that he knew of others' treatment during the relevant time at issue. In absence of such, we find no error in the trial court's exclusion of this evidence.

For the reasons stated, we hereby affirm the trial court's granting judgment notwithstanding the verdict to Vaughn, and the exclusion of evidence of other employee's racial allegations. Vaughn's cross-appeal is thereby mooted.

ALL CONCUR.

BRIEF FOR APPELLANT/ CROSS-APPELLEE:	BRIEF FOR APPELLEE/ CROSS-APPELLANT:
Kenneth L. Sales Sales, Tillman & Wallbaum Louisville, Kentucky	David Leightty Leightty & Associates Louisville, Kentucky