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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001237-MR

LORETTA CRAWFORD — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 97-CI-03515

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLEE

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KELLER, JUDGE: Loretta Crawford has appealed from the dismissal of her employment discrimination action against Lexington-Fayette Urban County Government (LFUCG), arguing that the Fayette Circuit Court erred in granting a summary judgment. We affirm.

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[1] Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Crawford is an African-American female with a date of birth of December 28, 1959.[2] As a teenager, she sustained a gunshot injury, which left her paralyzed below the T3 level of her spine and has caused her to be confined to a wheelchair. Crawford did not obtain a college degree, although she attended Lexington Technical Institute for approximately one and one-half years. She began working for the Mayor's Training Center ("MTC"), a part of LFUCG, as a part-time, temporary receptionist in 1988. Soon thereafter, Crawford obtained a permanent, full-time position, and she has continued to work in the MTC. She currently works as a Staff Assistant Senior, and her job responsibilities include Management Information System work, testing and certification, as well as occasional receptionist duties.

This case had a lengthy procedural history in the circuit court, much of which was caused by the evolution of the applicable law. For a full understanding, we shall set forth that history. In early 1997, Crawford filed a Charge of Discrimination with the Lexington-Fayette County Human Rights Commission, alleging that she had been subject to discrimination and unlawful employment practices based upon her gender, disability, and race. Because she did not believe that she was receiving fair treatment from the Human Rights Commission, she withdrew her claim and obtained a Notice of Right to Sue from the Equal Employment Opportunity Commission. Crawford filed suit against LFUCG on October 7, 1997, seeking damages pursuant to KRS Chapter 344 for racial, gender, and disability discrimination and for retaliation, citing LFUCG's failure to promote her; for breach of contract; for breach of an implied covenant of good faith and

[2] At the time she filed her complaint in 1997, Crawford was thirty-seven years old.

fair dealing; for intentional infliction of emotional and physical distress/outrageous conduct; and for fraud, deceit, and misrepresentation. LFUCG filed an answer specifically asserting that Crawford's claims were barred by the doctrine of sovereign immunity as well as by her failure to exhaust her administrative remedies. Discovery ensued.

On LFUCG's motion, the circuit court granted a partial dismissal of Crawford's suit on August 20, 1998, holding that her common law claims for breach of an implied covenant of good faith and fair dealing; intentional infliction of emotional and physical distress; and fraud, deceit and misrepresentation were barred by the doctrine of sovereign immunity. The circuit court took Crawford's breach of contract claim under advisement. In late 1999, the matter was set for a jury trial to take place in April 2000. However, prior to trial, the circuit court placed the case in abeyance pending decisions in the appellate courts addressing the impact of a person's decision to seek redress for discrimination through the Human Rights Commission on the right to pursue a civil action under KRS Chapter 344. The effect of sovereign immunity on those actions was addressed by the appellate courts as well.

Once the decisions in those cases became final, the present action was returned to the active docket in early 2001. LFUCG immediately filed a motion for summary judgment on Crawford's claims of discrimination, retaliation, and breach of contract. On March 28, 2001, the circuit court issued a 17-page Opinion and Order

granting LFUCG's motion on all but Crawford's retaliation claim. We shall summarize the circuit court's holdings below:

- Crawford's claims for breach of contract and for breach of implied covenant of good faith and fair dealing were dismissed based upon the doctrine of sovereign immunity.
- Election of Remedies: The circuit court determined that Crawford "elected" her remedy with regard to her claims of disability discrimination under the Kentucky Civil Rights Act that arose prior to the date she filed her Charge of Discrimination with the Human Rights Commission, relying upon the case of *Founder v. Cabinet for Human Resources*, 23 S.W.3d 221 (Ky. 1999). For this reason, the circuit court held that Crawford was precluded from raising those claims for disability discrimination that occurred prior to the date she filed her Charge of Discrimination in her civil suit.
- Discrimination due to failure to hire: The circuit court held that Crawford could not establish a *prima facie* claim of race, gender, or disability discrimination and that no direct evidence or conduct indicated that a discriminatory animus existed on the part of LFUCG. While Crawford met the first prong of the *McDonnell Douglas*[3] test as she is an African-American female with a disability, she was unable to

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

prove that she was qualified for the positions she applied for, but did not receive. Furthermore, the circuit court held that even if she had met her burden, there was no evidence that LFUCG's failure to hire her was based upon reasons that were a pretext for illegal discrimination.

- Discrimination for failure to provide training: The circuit court found no evidence to support Crawford's claims that she was not allowed to attend various motivational and/or training seminars due to her race, gender, or disability.

- Retaliation: Citing *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697 (Ky.App. 1991), the circuit court denied LFUCG's motion for summary judgment on Crawford's retaliation claim:

> By failing to grant summary judgment on this issue this Court is in no way indicating that there exists a prima facie case of retaliation, only that it is possible that the Plaintiff could meet her burden based on the evidence in the record. The Plaintiff clearly did engage in a protected activity by filing a claim with the EEOC and filing this subsequent suit, but it is unclear whether she was disadvantaged by an act of the LFUCG. The term "disadvantaged" is so vague under case law that this court has little choice but to find that it is possible that Plaintiff could present evidence sufficient to meet this requirement of a prima facie retaliation case. The Plaintiff routinely in her deposition points to instances where she gained new work responsibilities after the date of the initiation of her discrimination actions. Additionally, it is not impossible for the Plaintiff to show that certain disadvantageous actions taken by the LFUCG were because of the filing of the various discrimination claims.

Crawford moved the circuit court to alter, amend, or vacate its ruling on April 9, 2001, arguing that the circuit court's reliance on *Founder* was misplaced. She also asserted that her discrimination claim was based upon a hostile work environment, as opposed to a failure to promote. In its response, LFUCG addressed the *Founder* argument, but asserted that Crawford had not stated a claim for hostile work environment. Furthermore, LFUCG argued that the circuit court properly held that Crawford failed to establish a *prima facie* case of discrimination. On January 15, 2002, the circuit court entered an order denying Crawford's motion to alter, amend, or vacate, holding that it must follow *Founder*'s holding regarding election of remedies pursuant to the doctrine of *stare decisis*. As to permitting Crawford to present her discrimination claims on the basis of a hostile work environment, the circuit court stated that LFUCG did not move for summary judgment on that issue, that it did not consider the issue in its previous order, and that the issue was therefore not properly before it on the motion to alter, amend, or vacate.

The following day, Crawford moved the circuit court to set aside its January 15, 2002, order and hold the case in abeyance pending a final determination in a newly released opinion of the Court of Appeals addressing the election of remedies. The circuit court granted the motion and set aside its January 15, 2002, order in light of the pending decision in *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky.App. 2001). The *Wilson* opinion became final in June 2002 upon the denial of a motion for discretionary review by the Supreme Court. At that time, Crawford requested that the circuit court set

aside its previous ruling and reinstate her claims, arguing that any reliance on *Founder* was misplaced because of *Wilson*'s holding that the filing of administrative charges had no impact on her claims in the civil suit. In response, LFUCG pointed out that the circuit court limited its ruling regarding the election of administrative remedies issue to Crawford's claim for disability discrimination that occurred prior to the date she filed her Charge of Discrimination (January 23, 1997). Thus, LFUCG maintained that Crawford's request to set aside was flawed, as the only claim that could be reinstated would be her disability discrimination claim. However, LFUCG disputed the effect *Wilson*'s holding would have on this case, and asserted that, in any event, Crawford failed to establish a *prima facie* case. Finally, LFUCG requested that the circuit court return the case to the active docket solely to reconsider its ruling on Crawford's retaliation claim based upon the Court of Appeals decision of *Lexington-Fayette Urban County Housing Authority v. Brooks*, 1999-CA-001578-MR.[4] LFUCG followed up on July 12, 2002, with another motion for summary judgment on Crawford's retaliation claim and urged the circuit court, on reconsideration, to enter a summary judgment on her disability discrimination claims that it had decided to reconsider in light of *Wilson*. After resolving, in LFUCG's favor, a dispute as to whether LFUCG's motion for summary judgment was timely, the circuit court permitted Crawford to file a response and LFUCG to file a reply, which they both did. Crawford also filed an affidavit in support of her claims. The matter stood

[4] At the time LFUCG made this request, the decision of the Court of Appeals was pending on a motion for discretionary review, which was later granted. The Supreme Court issued its opinion in May 2004. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004).

submitted upon the filing of LFUCG's reply on September 27, 2002.

Although the matter was ripe for a decision, no further action was taken in the case until the circuit court entered a notice to dismiss for lack of prosecution in July 2004. The matter stayed on the docket, and the parties filed status briefs delineating the pending motions and setting forth their respective positions as to the case as a whole. After issuing another notice to dismiss for lack of prosecution eighteen months later, the circuit court entered the following Order on February 23, 2006:

> This matter is before the Court for clarification of this Court's previous rulings as well as reconsideration or renewal of previous motions. The parties were present before the Court and represented by counsel. The Court, having considered the arguments of counsel, the pleadings and the record herein and being sufficiently advised, hereby renders the following order.
>
> It is hereby ORDERED AND ADJUDGED as follows:
>
> 1. Plaintiff argues she has made a claim for hostile work environment. The Court has reviewed the pleadings herein and hereby finds Plaintiff has not asserted a specific claim for hostile work environment against Defendant. Though there may be short vague references to some of the elements that are required to be alleged in a claim for hostile work environment, the Court finds there is no such specific claim made in these proceedings.
>
> 2. The Court in its Opinion and Order of March 28, 2001 overruled Defendant's Motion for Summary Judgment on Plaintiff's claim of retaliation. Subsequent to the Court's Opinion and Order Defendant moved the Court to reconsider the Court['s] prior ruling and/or renewed its prior motion of summary judgment. Both parties have had the opportunity to file briefs setting forth their respective positions on the issue as well as the Court has considered the arguments of counsel at the most recent hearing conducted on January 10, 2006.

The Kentucky Supreme Court recently rendered the opinion of *Brooks v Lexington-Fayette Urban County Government [sic]*, *Ky., 132 S.W.3d 790 (2004)* wherein the Kentucky Supreme Court adopted federal law in determining a[] claim of retaliation. Specifically, the Kentucky Supreme Court found a material adverse change in the terms and conditions of employment forming an actionable retaliation claim must be more disruptive than a mere inconvenience or an alteration of job responsibilities such as termination, demotion evidenced by a decrease in wage or salary, less distinguished title, material loss of benefits or diminished material responsibilities or other indices that might be unique to a particular situation. *Brooks*. The Court finds there is no such material adverse change in Plaintiff's employment conditions, taking all allegations in the light most favorable to the Plaintiff, and accordingly there being no issue of material fact Defendant is entitled to a summary judgment on the retaliation claim as a matter of law.

3. Finally, the Court will reconsider its ruling as to the claim of disability discrimination. The Court previously ruled based upon the election of remedies issue without addressing the underlying factual issues. The Court, finds it[s] reliance on *Founder v. Cabinet for Human Resources*, Ky., 23 S.W.3d 229 [sic] (2001) was misplaced and the Court erred in dismissing the claim under the election of remedies theory. However, the Court finds that summary judgment is appropriate on this claim as well in that Plaintiff has failed to set forth a prima facie case of disability discrimination there being insufficient evidence presented to support the claim. The Court finds there are no genuine issues of material fact[. T]he defendant is entitled to a summary judgment as a matter of law.

Accordingly, for the reasons as herein expressed as well as the rulings and reasons as set forth in this Court['s] Opinion and Order dated March 28, 2001 the within matter is hereby dismissed with prejudice. There being no just cause for delay this is a final and appealable judgment.

Thereafter, Crawford moved the circuit court to alter, vacate, or amend its order, asserting that the ruling was overly broad in that it went beyond the scope of what the parties were directed to address in their status briefs. For this reason, she argued that she was not permitted to address the merits of her claims. In response, LFUCG continued to assert that Crawford failed to establish a *prima facie* case of any type of discrimination or retaliation and did not plead a claim for hostile work environment. The circuit court denied Crawford's motion, and this appeal followed.

Our standard of review in an appeal from the entry of a summary judgment is well settled in Kentucky:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest[, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the

> trial court's decision and will review the issue *de novo*.
> (citations in footnotes omitted)

Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky.App. 2001). With this standard in mind, we shall address the issues Crawford raises.

First, we disagree with Crawford's assertion that the circuit court erred by prematurely dismissing her claim, before she was permitted to properly address the merits of the case. The record clearly establishes that Crawford exhaustively addressed all of the issues that had been raised in the various motions. We perceive no error in the circuit court's entry of an order dismissing, as this case had been pending for several years on substantive motions for summary judgment or to alter, amend or vacate previous orders. Accordingly, we shall turn our attention to the merits of Crawford's appeal.

HOSTILE WORK ENVIRONMENT

Throughout the course of this litigation, the parties have disputed whether Crawford stated a claim for hostile work environment in her initial complaint. While Crawford argues that she had provided testimony supporting such a claim, LFUCG maintains that she failed to sufficiently plead one. Rather, it argues that Crawford based her cause of action for discrimination on LFUCG's failure to promote her. Based upon our review of the record, in particular the complaint, we agree with LFUCG that Crawford did not state a cause of action for hostile work environment.

In the Factual Background of her complaint, Crawford specifically referenced being passed over for promotions:

> 10. Over the past nine years, certain employees of the LFUCG have received promotions to various positions with the LFUCG, notwithstanding the fact that Plaintiff applied for and was better qualified and more experienced than the individuals promoted to said positions and/or had complied with the appropriate criteria which the other individuals had not yet successfully completed. Moreover, Plaintiff had to train numerous of these employees as to certain of their job functions after they received their promotions, and was also asked for advice by these employees and instructions on how they should perform their job duties and responsibilities.
>
> 11. On various occasions, Plaintiff complained to Defendant, as to Plaintiff's concerns about having been passed over for promotions and as to claims with respect to possible discrimination on the basis of race, gender, and disability.

Under Count I of her complaint, Crawford outlined her claim for race, gender, and/or disability discrimination. In support of her claim, Crawford specifically pled:

> 16. Throughout Plaintiff's tenure with the LFUCG, in spite of Plaintiff's qualifications and suitability for each position, the LFUCG failed to promote and/or rejected Plaintiff for enhanced positions. Each employee placed into these positions achieved a pay level and benefit level substantially above those offered to Plaintiff.
>
> 17. Despite several promotional openings that became available in the LFUCG during Plaintiff's tenure, Defendant systematically refused to offer these positions to Plaintiff, while placing less qualified employees, most of whom had less seniority than Plaintiff, into higher paid positions.
>
> 18. Plaintiff's service and qualifications were persistently ignored in favor of less able and less qualified employees, including specifically male Caucasian employees. In addition, after Defendant informed Plaintiff that she would not be considered for positions she was amply qualified for, in favor of less qualified male Caucasian employees, and after Plaintiff filed formal discriminatory charges, Plaintiff has had

> to endure an increased amount of discriminatory and retaliatory behavior by the Defendant herein.

Crawford then relied upon her complaints of the same practices in Count II, in which she pled her case for retaliation.

The Sixth Circuit Court of Appeals addressed the cause of action for a hostile work environment in *Smith v. Leggett Wire Co.*, 220 F.3d 752, 760 (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. *See Jackson v. Quanex Corp.,* 191 F.3d 647, 658-59 (6th Cir. 1999); *see also Burnett v. Tyco Corp.,* 203 F.3d 980, 982-83 (6th Cir. 2000). 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. *See Jackson,* 191 F.3d at 659.

There is no question that Crawford did not plead a cause of action for hostile work environment in her complaint; she based her entire complaint on the allegation that she was not promoted. Furthermore, although the issue was argued earlier, it does not appear that Crawford sought to amend her complaint to include such a cause of action until 2006, almost nine years after she filed her complaint. Even if we were to consider this claim, we would not hold that the record establishes the existence of a hostile work environment. Therefore, we hold that the circuit court properly found that Crawford did not plead a cause of action for hostile work environment and did not abuse its discretion in denying her motion to amend her complaint.

RETALIATION

We shall now address Crawford's claim that she was retaliated against in violation of the Kentucky Civil Rights Act. She focuses this argument for the most part on the allegation of a hostile work environment, which we have determined she did not raise. Nevertheless, we shall review this issue as it was established in the record.

Through KRS 344.280(1), the General Assembly enacted legislation making it unlawful for a person:

> To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

In *Brooks v. Lexington-Fayette Urban County Housing Authority,* 132 S.W.3d 790, 803 (Ky. 2004), the Supreme Court of Kentucky defined a *prima facie* case of retaliation as a demonstration:

> (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Id. citing *Christopher v. Strouder Memorial Hospital*, 936 F.2d 870 (6th Cir. 1991), *cert. denied*, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991). In the present matter, there is no dispute that Crawford engaged in a protected activity by filing a Charge of Discrimination with the Human Rights Commission, and later a civil suit, and that LFUCG was aware that she had exercised her civil rights. Where Crawford fails in her

efforts to establish a *prima facie* case is under the third prong; namely, that LFUCG took an employment action adverse to her.

In *Brooks*, the Supreme Court addressed the adverse employment action element, relying upon several federal court cases:

> A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Brooks, 132 S.W.3d at 802, citing *Hollins v. Atlantic Co., Inc*, 188 F.3d 652, 662 (6th Cir. 1999). In addition, the *Brooks* Court stated, "[a] material modification in duties and loss of prestige may rise to the level of adverse action." *Id.* at 803.

Turning to the present case, Crawford testified that the retaliation started days after she filed her complaint with the Human Rights Commission. She received reprimands from her superior, was forced to work overtime, kept out of meetings, forced to stay in her workstation, and was either ignored or given dirty looks in the hallway by her superior. In her affidavit, Crawford made several additional allegations, including having to work alone in an unsafe environment, and that she had been "repeatedly humiliated by my supervisor, screamed at, belittled, and degraded in front of my co-workers, staff, and customers, to the point of having to receive medical treatment."

However, the record fails to support Crawford's allegations. Although we shall not address every issue raised by Crawford, as LFUCG adequately addressed these issues in its brief, we do note that the oral warning dating from September 1997 was certainly justified, because Crawford left work early without informing her supervisor.

Looking again to *Brooks*, we cannot hold that Crawford established that she sustained a materially adverse change in the terms and conditions of her employment. She was not terminated or demoted, was not given a lesser title, and did not experience a loss of benefits or responsibilities. Even in a light most favorable to her, we hold that Crawford failed to establish a *prima facie* case of retaliation. Accordingly, the circuit court properly entered a summary judgment in favor of LFUCG on this cause of action.

DISCRIMINATION

For this claim, Crawford argues that she was subject to discrimination on the basis of her race, gender, and disability.

In KRS 344.040(1) of the Kentucky Civil Rights Act, the General Assembly made it an unlawful practice for an employer:

> To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or non-smoker, as long as the person complies with any workplace policy concerning smoking[.]

The United States Supreme Court set out the elements a plaintiff must establish in order to prove a *prima facie* case of discrimination in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973):

> This may be done 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.

In the arena of disability discrimination, the elements differ slightly:

> [A] plaintiff establishes a prima facie case of disability discrimination if she proves that (1) she was "disabled" within the meaning of the Act; (2) she was qualified for the position, with or without an accommodation; (3) she suffered an adverse employment decision with regard to the position in question; and (4) a non-disabled person replaced her or was selected for the position that the disabled person had sought.

Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 882 (6th Cir. 1996).

The Supreme Court set out the burden shifting formula applicable in discrimination actions in *McDonnell Douglas*. Once a plaintiff establishes a *prima facie* case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If the employer meets this burden, "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept.*

of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

The circuit court's original 2001 ruling on this issue exhaustively detailed the facts related to Crawford's discrimination claim and appropriately applied the law to those facts. Therefore, we shall adopt those portions of the circuit court's March 28, 2001, order as our own:

> There is absolutely no direct evidence of discriminatory animus in this case. Interpreting all evidence in favor of the Plaintiff one finds *nothing* which *directly* indicates that any action taken against her was based on her race, gender, or disability. "Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact without interference or presumption." Carter v. Miami, 870 F.2d 578, 581-82 (11th Cir. 1989). "[C]ourts have found that only the most blatant remarks, whose intent could be nothing other than to discriminate . . . , to constitute direct evidence of discrimination." Id. at 582. The Plaintiff tries hard to hide the absence of direct evidence by pointing to a host of supposedly egregious occurrences, but not one of these occurrences indicate an action taken *directly* because of race, gender, or disability. One must not be mislead [sic] by the Plaintiff's mis-characterization of the evidence in the record. While this court is obligated to view the record in a light most favorable to the Plaintiff and resolve all doubts in her favor, this court is not obligated to accept the Plaintiff's view of the record.
>
> Because of the absence of direct evidence of discriminatory animus, analysis will focus on the process outlined by the Supreme Court in McDonnell Douglas Corp. v. Green.
>
> . . .
>
> It is impossible for the Plaintiff herein to make out a prima facie case of discrimination. There can be no argument

that the Plaintiff meets the first element of a prima facie case being that she is an African American female with a handicap. However, the Plaintiff cannot meet the second element of a prima facie case. Based on the record the Plaintiff was not qualified for the positions for which she applied and did not receive: Eligibility Counselor Senior and Eligibility Counselor.

The position of Eligibility Counselor Senior was not open to someone in the Plaintiff's position. All positions in the LFUCG are classified civil service positions unless otherwise designated. (Charter, LFUCG Code of Ordinances, Section 9.02; KRS 67A.210). Positions designated as 'exempt' from the classified civil service rules by the Lexington-Fayette Urban County Council (the "unclassified civil service" positions) are set forth by Local Ordinance, Chapter 22. (Charter, LFUCG Code of Ordinances, Chapter 22).

Only "classified" civil service employees are "internal" employees who are eligible to apply for positions which are posted as being open to "internal" applicants only. The Eligibility Counselor Senior position was such a position open only to "internal" applicants. The job posting announcement for the position clearly identified the position as such. <u>See</u> Defendant's Memorandum in Support of Motion for Summary Judgment, Exhibit 3. As an employee in the Mayor's Training Center, the Plaintiff is an "unclassified" civil service employee. Because Plaintiff was an "unclassified" civil service employee, rather than a "classified" civil service employee, she was not an "internal" applicant and therefore was not eligible for the position of Eligibility Counselor Senior. Plaintiff was then not qualified for the position, and she cannot establish a prima facie case of discrimination in this regard. As the Defendant indicates, Plaintiff's subjective belief and misunderstanding that the job was open to all LFUCG employees at the time she applied is insufficient to establish a prima facie case of discrimination or to create a genuine issue of material fact on the issue. Defendant's Memorandum in Support of Motion for Summary Judgment, p. 11. Plaintiff even acknowledges her

misunderstanding as to the true nature of the position in her deposition. See Loretta Crawford Depo. p. 105-107.

The Eligibility Counselor position was not limited to internal applicants. However, the minimum qualifications for the position were rather strict. Most telling was the requirement that the applicant, to be considered for the position, have

> completion of two years of college-level work in social sciences or directly related discipline and two (2) years of responsible experience in public assistance programs and the delivery of social services, *or equivalent* combination of experience, education and training which provides the required knowledge, skill, and abilities.

Defendant's Memorandum in Support of Motion for Summary Judgment, Exhibit 5 (Emphasis added). Under the LFUCG's Civil Service system, when a civil service position is vacant, a job vacancy is posted, applications are received, and the top five applicants are certified to be considered for hiring by the department where the position is open. An applicant must meet the minimum qualifications for the position *and* make the "Top 5" certified list of eligible candidates in order to be considered for a position. See KRS 67A.270(1). Based on these requirements only five individuals, out of one hundred and fifty-five who applied, were certified as eligible candidates for the position of Eligibility Counselor in the Division of Adult Services. Because the Plaintiff did not have the requisite education, experience and/or training, she did not meet the minimum qualifications for the position and was not certified as one of the "Top 5" for consideration by the department where the position was open. Loretta Crawford Depo. p. 109. Various parties' depositions make this lack of qualification clear. Most telling, Diane Simpson, who was the Human Resources Analyst in the Division of Human Resources who reviewed the applications for the Eligibility Counselor position in the Division of Adult Services, testified that she stood by her decision to reject Plaintiff from the job process because she did not meet the

minimum qualifications as set forth in the job specification. Simpson 9/10/98 Depo. p. 119. The Plaintiff was not qualified for the position of Eligibility Counselor.

As the Defendant states in his motion, an employer is entitled to establish its own preferred qualifications (See Hassen [sic] v. Auburn University, 833 F.Supp. 866, 872 (M.D.Ala. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994)) and may legitimately consider experience as a major factor in evaluating candidates (See Shipkovitz v. Board of Trustees of Univ. of District of Columbia, 914 F.Supp. 1, 3 (D.D.C. 1996), *aff'd* 124 F.3d 1309 (D.C.Cir. 1997)). Additionally, no discrimination exists where an employer chooses a candidate it believes is more suitable to its needs. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 259.

It should be pointed out as well that this Court's finding that there is insufficient evidence to support the contention that the Plaintiff was qualified for the positions which she applied in no way makes this Court unique. There exist[] numerous cases where the ruling court determined that the plaintiff did not establish a prima facie case of discrimination because of lack of qualification for the position(s) sought. See Turner v. The [sic] Pendennis Club, Ky.App., 19 S.W.3d 117 (2000); Browning v. Rohn & Haas Co., 1999 U.S.App. LEXIS 28513 (6th Cir. 1999).

It is important to note as well that the Plaintiff *cannot* establish a prima facie case of discrimination with respect to the positions for which she did not apply. There are certain situations where an individual alleging discrimination need not establish that he applied for the position in question, but none of those situations are present here. In Babrocky v. Jewel Food Co. and Retail Meatcutters Union, Local 320 [sic], 773 F.2d 857 (7th Cir. 1985), female meat wrappers brought a Title VII action alleging they had been denied meatcutter positions solely because of their sex. The Seventh Circuit concluded that their failure to formally apply for the positions in question was not fatal "[b]ecause an employer may create an atmosphere in which employees understand that their applying for certain positions is fruitless, even non-applicants can in appropriate circumstances qualify for

relief." Id. at 867. Further in Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980), it was indicated that victims of gross and pervasive discrimination are not required to formally apply for a position if they can establish that but for the employer's discriminatory practices they would have applied for a job. There are no allegations or evidence that these types of situations exist in the present case.

Therefore, Ms. Crawford can only allege a prima facie case of discrimination for the positions she applied. Cases such as Box v. A. & P. Tea Co., 772 F.2d 1372 (7th Cir. 1985), *cert. denied*, 478 U.S. 1010 (1986), apply more to her situation. In Box an employee brought a Title VII action alleging that she was denied a promotion because of her sex. With regard to her failure to formally apply for a promotion, the Seventh Circuit held that if her employer "had a formal system of posting job openings and allowing employees to apply for them, [her] failure to apply for [a promotion] would prevent her from establishing a prima facie case." Id. at 1376. See also, Wanger v. G.A. Gray Comp. [sic], 872 F.2d 142 (6th Cir. 1989); Williams v. Hevi-Duty Elec. Co., 819 F.2d 620 (6th Cir. 1987). It has also been established that in such a situation as that outlined above, a generalized expression of interest in a position is insufficient to qualify as an application for employment. Wagner [sic] v. G.A. Gray Company, 872 F.2d 142, 145-46 (6th Cir. 1989); Williams v. Hevi-Duty Elec. Co., 819 F.2d 620 (6th Cir. 1987).

It is clear from the record that the LFUCG had a formal system of posting job openings and allowing employees to apply for them through an application process. The Plaintiff testified in her deposition that when positions became open they were posted on a bulletin board in the Mayor's Training Office. Loretta Crawford Depo. Vol. 1 p. 110. She also indicated throughout her deposition that positions were gained through a formal application process. The Plaintiff then can only allege a case of prima facie discrimination for the positions she applied. Requiring a plaintiff to apply for a position before allowing her to bring a claim of discrimination "is grounded in common sense. For if an application were not necessary, then nearly every decision to hire or promote would be subject to challenge." Reilly v.

Friedman's Express [sic], Inc., 556 F.Supp. 618, 623 (M.D.Pa. 1983).

> The above determination is critical because the Plaintiff has spent a large amount of time and energy attempting to prove a prima facie case of discrimination in relation to the position of Client Assessment Counselor, but the Plaintiff *never* formally applied for this position even though she knew it to be open. Crawford Depo. Vol. 1, pp. 104-112. She did submit a letter expressing interest in the position, but when the position ultimately became available she never formally applied for it. Crawford Depo. Vol. 1, pp. 76-77. As indicated by the cases cited above, expressing a general interest in a position is not the same as applying for it when the employer utilizes a formal application process to file the position. She therefore cannot allege a case of prima facie discrimination in regards to the position of Client Assessment Counselor.
>
> In conclusion, this Court finds that there is absolutely no evidence to support a case of prima facie discrimination with respect to the positions Plaintiff formally applied for. Furthermore, even if she had meet [sic] her prima facie burden there is absolutely no evidence from which it can be concluded that the Defendant's reasons for not hiring her were a pretext for illegal discrimination. There is no evidence that any action taken against the Plaintiff in any way had anything to do with her race, gender, or disability. There is also no evidence that Walker Skiba *in anyway* impacted the application process for the positions above. The Defendant is entitled to summary judgment on Plaintiff's claims of race, sex, and disability discrimination.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James M. Morris
Sharon K. Morris
Lexington, Kentucky

BRIEF FOR APPELLEE:

Robert L. Roark
Erica L. Keenan
Lexington, Kentucky