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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002599-MR
NO. 2007-CA-000019-MR
AND
NO. 2007-CA-000364-MR

CLAIRE SCHUSTER — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 03-CI-01205

BEREA COLLEGE — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, AND
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: ACREE, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Claire Schuster appeals from the Madison Circuit Court's judgment (Appeal No. 06-CA-002599) and supplemental judgment (Appeal No. 07-CA-000364) in favor of Berea College following a jury trial. Berea College

cross-appeals from the first judgment (Appeal No. 07-CA-000019). For the following reasons, we affirm in part, and vacate and remand in part.

Schuster began working at Berea College in 1995 as a visiting professor. She accepted a position as an Assistant Professor of Nursing for the 1995-96 academic year and was awarded tenure in the spring of 2001. Schuster was promoted to Associate Professor of Nursing in the spring of 2002 at a yearly salary of $47,000 beginning in September 2002.

Around the same time, Berea's nursing department hired Robert Cornette, its first male faculty member, as an Associate Professor of Nursing for the 2002-03 academic year at a yearly salary of $59,000. Schuster filed suit against Berea College alleging, *inter alia*, sex discrimination under the Kentucky Civil Rights Act.[1] In support of this claim, Schuster alleged in part that Cornette's salary "substantially exceeded the salaries paid to female nursing faculty members with equal or better credentials" and that while Cornette had no teaching experience, he was hired as an associate professor rather than as an assistant professor, as was customary.

The matter proceeded to a jury trial, where after the close of all of the evidence, the jury responded "NO" to the following instruction:

> State whether you are satisfied from the evidence that an intention to discriminate against Claire Schuster because she is female was a substantial motivating factor in Berea College's decisions concerning the hiring of Robert

[1] The trial court ultimately granted summary judgment in Berea College's favor on all of Schuster's other claims. She does not appeal that decision.

> Cornette, but for which Berea College would not have made those particular decisions.

The trial court entered judgment for Berea College accordingly. Thereafter, the court denied Schuster's motion for permission to contact the jurors and awarded certain costs to Berea College. These appeals and cross-appeal followed.

First, Schuster argues that the trial court erred by limiting the scope of her discovery before trial. We agree in part.

In Schuster's discovery requests she asked, *inter alia*, that Berea College identify "each and every faculty member and/or administrator, past or present, employed by Berea within the Commonwealth of Kentucky" and further state each individual's "sex, birth date, hiring date, starting and present title, starting and present salary, and present supervisor." Berea College sought a protective order limiting the scope of Schuster's discovery to the nursing department during the single year when Cornette was hired, 2002-03. The trial court ultimately entered a protective order limiting discovery "to the Department of Nursing at Berea College from 1994 to the present[,]" July 1, 2004. After Schuster conducted discovery in accordance with the limitations of the protective order, she moved for the trial court to reconsider its protective order, but the court denied her motion.

Pursuant to CR[2] 26.02(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" As a general rule, the "control of discovery is a matter of

[2] Kentucky Rules of Civil Procedure.

judicial discretion." *Primm v. Isaac*, 127 S.W.3d 630, 634 (Ky. 2004). The parties agree that the "standard of review in matters involving a trial court's rulings on evidentiary issues and discovery disputes is abuse of discretion. 'The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4, 8 (Ky.App. 2006) (internal citations omitted).

Schuster alleges that Berea College discriminated under the administrations led by President Larry Shinn and then-Dean of Faculty Dr. John S. Bolin. Because Schuster further alleges that these administrations were "in office since the fall of 1994 (as to Shinn)," we cannot say that the trial court erred by limiting the scope of Schuster's discovery from 1994 to "the present." This period includes the time when both Schuster and Cornette began working at Berea College, in 1995 and 2002, respectively.

The more difficult issue, then, is whether the trial court erred by limiting the scope of Schuster's discovery to solely the nursing department. Schuster argues that the information regarding the other departments at Berea College relates to the College's alleged discriminatory intent, pretext, and motive. She further argues, citing cases from several federal circuits, that the scope of discovery in discrimination cases is particularly broad.[3] *E.g.*, *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995) ("discovery in discrimination

[3] Because the Kentucky Civil Rights Act is designed to implement the policies of the Federal Civil Rights Act of 1964, Kentucky courts often look to federal case law for guidance regarding issues of sex discrimination. *Bank One, Ky., N.A. v. Murphy*, 52 S.W.3d 540, 548 (Ky. 2001).

cases should not be narrowly circumscribed"); *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 906 (6th Cir. 1991) ("information concerning an employer's general employment practices is relevant . . . to a Title VII individual disparate treatment claim"). While we recognize this general rule, we also recognize that the "desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant." *Scales*, 925 F.2d at 906. Hence, the abuse of discretion standard applies.

Schuster further cites to *Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 995 (5th Cir. 1984), in which Duke, a biology professor, filed suit against the university individually and as a class representative of all female faculty members alleging "sex discrimination in pay, promotion and teaching opportunities." Duke sought discovery regarding all of the university's departments that employed male and female faculty members; however, the trial court confined discovery to the biology and math departments.[4] While Duke failed at her individual trial to prove that the reasons given for her disparate treatment were pretextual, the appellate court held that Duke's ability to prove the same "was prejudiced by the cropping of her opportunity to discover the practices of the other university departments." *Id.* at 996. The court reversed and remanded for further discovery and a new trial, finding that the trial court abused its discretion in limiting Duke's discovery requests, which were relevant to Duke's individual claim. *Id.* at 997. While we

[4] The trial court previously consolidated Duke's case with a similar suit filed by a math professor at the university. *Duke*, 729 F.2d at 995.

recognize that there are distinctions between *Duke* and the matter *sub judice*,[5] the matters are, on the whole, very similar, and we find *Duke* to be persuasive.

Ultimately, we hold that the trial court erred by limiting the scope of Schuster's discovery to solely the nursing department. The United States Supreme Court has opined that "'(s)tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) (quoting *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974)). Without the benefit of discovery from other departments, Schuster was compelled to attempt to prove her case using employment information regarding only one male—Cornette. Berea College argues that a comparison of the faculty in different departments has little value because the needs of each department are different. However, the issue is not whether, using Berea College's example, professors in the nursing department were treated differently from the professors in the English department. Instead, the proper question is how women within each department of the college were treated, as compared with their male colleagues within the same departments.[6]

We are not persuaded by Berea College's citation of several cases involving similar allegations, where the courts limited the scope of discovery to the

[5] Curiously, Berea College does not discuss *Duke* in its brief.

[6] We do not intend by this language to limit the manner in which any newly-discovered evidence might be used. We merely refute Berea College's assertion that evidence regarding departments other than the nursing department is wholly irrelevant.

plaintiffs' employing units, as the employment decision in each of those cases was made locally rather than by the employers' highest administrators. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1084 (11th Cir. 1990) (decision to terminate Earley and Noe was made at the local level); *Scales v. J.C. Bradford & Co.*, 925 F.2d at 907 (employment decisions were made locally). Here, while the nursing department recommended Cornette from a pool of applicants, the ultimate decision of whether to hire him was vested in President Shinn and Dean Bolin, and Dean Bolin determined starting salaries for new faculty members.

In light of our holding thus far, we need not address the following issues which Schuster raises: whether the trial court erred by 1) excluding from trial evidence of the personnel information regarding faculty members who were hired by Dean Bolin for departments other than nursing; 2) denying her the opportunity to speak with the jury after the trial; and 3) awarding certain costs to Berea College. Nor do we need to address the following issues which Berea College raises: whether the trial court erred by 1) failing to grant summary judgment or a directed verdict in its favor; 2) excluding evidence of the qualifications of faculty members hired outside the nursing department; and 3) permitting Schuster to seek "back pay," i.e., damages for each of the five years prior to Cornette's hire. In short, these issues either are unlikely to reoccur on remand, or may be reconsidered on remand in light of any newly-discovered evidence pursuant to our conclusions herein. However, we will address other arguments which seem likely to reoccur on remand.

Schuster argues that the trial court erred by excluding at trial evidence of personnel information regarding certain female nursing department faculty members who were hired after Cornette. Berea College argues in response that the trial court should have excluded not only this evidence, but also evidence regarding certain female nursing department faculty members who were hired prior to Cornette.[7]

We first note that our standard of reviewing a decision regarding the admissibility of evidence is abuse of discretion, i.e., "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Manus, Inc.*, 191 S.W.3d at 8. Schuster, as the plaintiff in this sexual discrimination suit, had the ultimate burden of persuading the trier of fact that Berea College intentionally discriminated against her, *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). Any evidence relevant to this issue is admissible pursuant to the general rule of relevancy, KRE[8] 402.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a black man alleged that he was not rehired due to his race when he applied for employment subsequent to being laid off in a general reduction in the corporation's work force. The corporation denied the allegation,

[7] However, Berea College does not argue for the exclusion of "evidence of the circumstances of employment" of Connie Lamb, a woman who was hired for the nursing department in the same year as Cornette.

[8] Kentucky Rules of Evidence.

asserting that it did not rehire the man due to his participation in an unlawful "stall-in" protest of the corporation. The Court held that the following evidence was admissible on retrial:

> On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.
>
> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

411 U.S. at 804-05, 93 S.Ct. at 1825-26 (internal footnotes and citations omitted).

Here, Schuster alleged that Cornette's salary "substantially exceeded the salaries paid to female nursing faculty members with equal or better credentials" and that while Cornette had no teaching experience, he was hired as an associate professor rather than as an assistant professor, as was customary. Since

Berea College maintains that the salary at which Cornette was hired was determined by market forces, and that his rank was based upon his salary, Schuster must be afforded a fair opportunity to show that this stated reason for the circumstances of Cornette's hire was in fact pretext. This showing might include, for example, evidence as to the market conditions surrounding the hiring of certain female nursing faculty members, as compared to the market conditions surrounding Cornette's hire.[9] Indeed, Cornette testified that he would have accepted his position at a salary lower than that at which he was hired. As such, the trial court did not err by permitting Schuster to introduce personnel information regarding certain female nursing department faculty members who were hired prior to Cornette. Further, we hold that the trial court erred by excluding from trial evidence of personnel information regarding certain female nursing department faculty members who were hired after Cornette, and that this evidence should be admitted insofar as it relates to the date of Cornette's hire until the date the court restricted discovery, i.e., July 1, 2004.

Next, Berea College argues that the trial court erred by refusing to give the jury the following instruction it proposed regarding the business judgment rule:

> In determining whether Berea College unlawfully discriminated against Claire Schuster, you are not to substitute your own judgment for the College's judgment or to determine whether you would have made a different decision in the circumstances. Berea College, like all

[9] Again, we do not intend by this language to limit the manner in which this evidence might be used.

> other employers, has the legal right to make business decisions, so long as unlawful discrimination is not a substantial motivating factor in those decisions.

We disagree.

Berea College cites to several federal authorities which endorse business judgment instructions in employment discrimination cases. For example, in *Langlie v. Onan Corp.*, 192 F.3d 1137, 1141 (8th Cir. 1999), the court held that the lower court did not err by instructing the jury in reliance on Instruction 5.94 from the manual of Model Civil Jury Instructions for the Eighth Circuit (1998), which provides: "You may not return a verdict for plaintiff just because you might disagree with defendant's conduct or believe it was harsh or unreasonable." Indeed, the *Langlie* court reiterated its previous holding that, "in employment discrimination and retaliation cases, 'a business judgment instruction is crucial to a fair presentation of the case, and the district court must offer it whenever it is proffered by the defendant.'" *Id.*

However, as Kentucky follows the practice of providing "bare bones" instructions in civil rights and other cases, instructions are to be minimal but then "fleshed out" during closing argument. *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601, 605 (Ky. 2005). As described by the Kentucky Supreme Court,

> "[b]are bones" instructions are proper if they correctly advise the jury about "what it must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof" on that issue. The question to be considered on an appeal of an allegedly

> erroneous instruction is whether the instruction misstated the law. It is within a trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion.

Olfice, Inc. v. Wilkey, 173 S.W.3d 226, 229 (Ky. 2005) (internal citations omitted). Here, Berea College does not question the propriety of the court's instruction that the jury should find for Schuster if an intention to discriminate "was a substantial motivating factor" in Berea College's decisions concerning Cornette's hire. Further, even if the jury found that the terms of Cornette's hire were in part the result of a business decision, that would not necessarily preclude a finding for Schuster under the instruction given to the jury. Thus, we hold that the trial court did not abuse its discretion in failing to give the jury a "business judgment" instruction.

Berea College also argues that the trial court erred by failing, after a *Daubert* hearing, to exclude the testimony of Schuster's expert witness, Mitzi Schumacher, who opined that Dean Bolin hired Cornette as an associate professor with an inflated salary because of his gender. We disagree.

An expert witness's testimony is admissible when, *inter alia*, 1) she is qualified to render an opinion on the subject matter; 2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*;[10] and 3) the opinion will assist the trier of fact. *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997). Berea College argues that Schumacher's testimony failed to meet each of the three *Stringer* requirements. Appellate review of a trial court's

[10] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

decision to admit expert testimony occurs pursuant to the abuse of discretion standard. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176, 143 L.Ed.2d 238 (1999).

Schumacher, who has a Ph.D. in social psychology with a minor in quantitative psychology, teaches the "psychosocial aspects of health and illness" to medical and other students at the University of Kentucky. She was commissioned for fiscal year 2000 through fiscal year 2006 to conduct gender equity studies for the salaries of faculty in all departments at the University of Kentucky. In that capacity, she studied the ranks, salaries, and other workplace conditions of the faculty members and several benchmark institutions, including the University of Minnesota, the University of Arizona, and The Ohio State University. She has examined the salaries for possible benchmark institutions of Berea College, including Transylvania University, Union College, and Cumberland College. She has also served on committees to review promotion and tenure decisions at the college level. Based upon these credentials, we cannot say that the trial court erred by finding that Schumacher was qualified to give expert testimony regarding faculty gender equity issues, as well as general information regarding specific practices in the academic setting, including the differences between the various levels of professorship. To the extent that Berea College argues that Schumacher was not qualified to testify in this matter because she has limited experience working with nurses, in small colleges, and the like, such arguments are proper

inquiries for cross examination which go toward the weight of Schumacher's testimony rather than its admissibility.

With regard to the substance of Schumacher's testimony, the trial court's function under *Daubert* is to act as a "gatekeeper" and exclude unreliable, pseudoscientific evidence. *Miller v. Eldridge*, 146 S.W.3d 909, 913 (Ky. 2004). Here, Schumacher testified at the *Daubert* hearing that when forming her opinions in the matter *sub judice*, she studied faculty salary trends at the regional and national levels, as well as salaries in private practice versus academia. She also reviewed the depositions in the matter, several salary letters, and Berea College's faculty manual. Based upon these factors and her expertise in the field, Schumacher opined that Berea College did not follow its faculty manual in hiring Cornette. She further ruled out several possible causes for Cornette's high salary, including salary compression and market value, and opined that Berea College hired Cornette as an associate professor with an inflated salary because of his gender. In short, we cannot hold that the trial court abused its discretion by holding that Schumacher's testimony met *Daubert*'s reliability requirement. Through her studies and experience, Schumacher has accumulated an intricate knowledge of college faculty salaries, the requirements for various ranks, and gender equity disparity issues. The trial court did not err by permitting her to testify regarding the application of her knowledge to the facts in the matter *sub judice*, and to provide her expert opinion as to the various factors at work in this matter, including any possible gender discrimination.

Moreover, the trial court did not err by finding that evidence of Schumacher's expert opinions would help the jury. The court noted that not only it, but also the jurors likely had little knowledge of the inner-workings and culture of college academic departments and professorial ranks. Certainly, having a "fundamental education" of the practices in academia, as the trial court described it, was beneficial to the jury in making its decisions. Further, Schumacher's expertise in quantitative psychology enabled her to analyze market forces and salary discrepancies, and to report whether these forces were in play in the matter *sub judice*. Accordingly, the trial court did not err by permitting Schumacher's testimony.

Finally, Berea College argues that the trial court erred by denying its motion for the costs it incurred in seeking a protective order with regard to Schuster's discovery requests. As we have held that Schuster was entitled to obtain the requested discovery, we affirm the trial court on this issue.

The Madison Circuit Court's judgments are affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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