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 NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000808-MR

ANDREW JONES

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT, FIFTH DIVISION
v. HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 04-CI-001018

HAZELWOOD CENTER AND
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES

APPELLEES

OPINION
AFFIRMING

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BEFORE: LAMBERT AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Andrew Jones appeals from a summary judgment entered by the Jefferson Circuit Court in favor of Hazelwood Center and the Cabinet for Health and Family Services. Jones had filed a civil complaint

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

against Hazelwood and the Cabinet alleging racial discrimination in connection with the termination of his employment at Hazelwood. We affirm.

The Cabinet is a state agency, and Hazelwood is a state facility operated by the Cabinet for the benefit of emotionally disabled persons and their families. Hazelwood is located in Louisville.

Jones began working for Hazelwood as a part-time psychologist in 1989. In 1992 he began working full time for Hazelwood, and in 1998 he became the head of Hazelwood's Psychology Department. Hazelwood terminated Jones's employment effective January 31, 2003.

Jones, a member of a minority race, filed a civil action in the Jefferson Circuit Court against Hazelwood and the Cabinet on November 6, 2004. On January 29, 2007, the court granted summary judgment in favor of Hazelwood and the Cabinet. Jones then filed a motion to alter, amend, or vacate, which the court denied. This appeal by Jones followed.

Before the trial court, Jones first argued he was wrongly discharged from his employment due to allegations that he was involved in sexual harassment in the workplace. He asserted that two other nonminority employees, who he claims were involved in similar conduct, were not discharged. However, Jones later argued to the court that the reasons for his discharge were "irrelevant to these proceedings" and that the sole issue before the court was whether race discrimination occurred throughout the period of his employment. He now rests

his discrimination claim on the single event surrounding his failure to be appointed head of the newly-created Behavioral Services Department at Hazelwood.

Jones was head of Hazelwood's Psychology Department. At one point during Jones's employment, Hazelwood decided to split the Psychology Department into two sections, leaving a Psychology Department with Jones as its head and a Behavioral Services Department. It appointed a Caucasian as head of the Behavioral Services Department. Jones claims he was a victim of race discrimination in connection with the appointment.

Jones testified in his deposition that he disagreed with Hazelwood's decision to have two separate departments. He also testified that ideally he wanted to be head of both psychology and behavioral services. In his brief, Jones characterized his failure to move from head of the Psychology Department to head of the Behavioral Services Department as a "failure-to-promote."

On the other hand, Hazelwood asserted to the trial court that the candidate selected was qualified, a point that Jones did not dispute. Additionally, it stated that Jones had never expressed an interest in the position. Finally, noting that Jones had never alleged prior to this appeal that this was a "failure-to-promote" case, Hazelwood responds in its brief that had Jones been hired as head of the Behavioral Services Department, the move would have been a lateral one and not a promotion. Therefore, Hazelwood contends that Jones could not have been subjected to an adverse employment action in connection with his failure to get the appointment.

Under the Kentucky Civil Rights Act, employers may not discriminate against employees based on race. Kentucky Revised Statutes (KRS) 344.040. “Kentucky courts generally follow federal law in interpreting the Kentucky discrimination statute.” *Stewart v. University of Louisville*, 65 S.W.3d 536, 539 (Ky.App. 2001).

Claims for disparate treatment brought pursuant to the statute must proceed under the three-part burden-shifting analysis in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The first step requires the employee to establish a *prima facie* case of discrimination. 411 U.S. at 802. If a *prima facie* case of discrimination is established, the burden shifts to the employer to “articulate some legitimate nondiscriminatory reason” for the adverse employment action. *Id.* Finally, if the employer meets the second step, the employee has the burden of proving that the employer’s response is merely a pretext for discrimination. *Id.* at 804.

In “failure-to-promote” cases, the employee must establish a *prima facie* case by demonstrating that: 1) the employee is a member of a class of persons protected by the statute; 2) the employee applied for and was qualified for a promotion; 3) despite his or her qualifications, the employee was considered for and denied the promotion; and 4) another employee who was not a member of the protected class received the promotion. *Dews v. A.B. Dick Company*, 231 F.3d 1016, 1020-21 (6th Cir. 2000).

In its orders, the trial court apparently concluded that Jones established a *prima facie* case of discrimination. It thereafter referenced the reasons given by Hazelwood for not appointing Jones as head of the Behavioral Services Department. Finally, the trial court awarded Hazelwood summary judgment on the ground that Jones had failed to present any “cold hard facts” that race was a determining factor in his not getting the appointment. *See Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 700-01 (Ky.App. 1991), *citing Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226 (Ky. 1984).

As a general rule, “[t]he standard of review on appeal of a 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). “The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” *Welch v. American Publ’g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because the trial court did not involve itself in fact finding, we review the decision *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.App. 2000).

We disagree with the trial court’s apparent conclusion that Jones established a *prima facie* case for race discrimination.² While it is true that Jones is a member of a protected class of individuals, that he may have applied for the job (although this issue is in dispute), that he may have been qualified for it, and that a Caucasian was hired instead, we see no evidence that Hazelwood’s failure to hire him constituted an adverse employment action.

Jones has pointed to nothing in the record to indicate that he argued his case to the trial court as a “failure-to-promote” case. More importantly, as argued by Hazelwood in its brief, the move from being head of the Psychology Department to head of the Behavioral Services Department would have been a lateral transfer as the new position carried no additional salary or other benefits. The denial of such a lateral transfer, assuming Jones had actually sought it, would not have been a materially adverse employment action by Hazelwood. *See Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 183 (6th Cir. 2004) (“Non-selection for a position of employment is not always an adverse employment action. In cases where the sought position is a lateral transfer, without additional benefits or prestige, it would be improper to conclude that a denial of such transfer would be a materially adverse action.”).

Having concluded that Jones did not establish a *prima facie* case for discrimination, the remaining issues under the *McDonnell Douglas* test are moot.

² “[A]n appellate court may affirm a trial court for reasons other than those relied on by the trial court, so long as such is sustainable under the record.” *Brewick v. Brewick*, 121 S.W.3d 524, 527 (Ky.App. 2003).

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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