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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001450-MR

GARY W. HEARN, SR. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 09-CI-003156

BROWN-FORMAN CORPORATION APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: Gary W. Hearn appeals an order of the Jefferson Circuit Court granting Brown-Forman Corporation's motion for summary judgment on his claims of racial discrimination, hostile work environment, and retaliation. Upon review of the record, we affirm.

I. FACTUAL BACKGROUND

Hearn began working for Brown-Forman as a security officer in 1995.[1] At the time of his employment at Brown-Forman, he was one of two African-American security officers. Hearn's primary duty as a security officer was to protect employees and visitors on Brown-Forman property as well as to safeguard product. As a security officer, Hearn acknowledged that he was required to abide by the Security Department's Best Practices Plan/Standard Operating Procedures (SOP). The SOP requires Brown-Forman security officers to immediately report a theft or attempted theft by an employee to the Security Manager. Security officers are further obligated by the SOP to report "all incidents, crimes, violations of company rules or other pertinent information which they observe or are made aware of during the course of their employment."

Over the course of Hearn's employment at Brown-Forman from February 1995 until February 2008, he committed numerous infractions resulting in various disciplinary measures, including written warnings and suspensions. His infractions included time clock violations, excessive absenteeism, coming to work under the influence of alcohol, and a threat of violence against a supervisor. Brown-Forman also received complaints about Hearn's unsatisfactory work performance and lack of professionalism by fellow employees as well as vendors.

On January 16, 2008, Hearn reported to Jeff Skillern, Director of Risk Management, that another employee, John Daley, had informed Hearn that theft

[1] Brown-Forman distills, bottles, and sells spirits and wine.

had possibly occurred in the Bottle and Supply Warehouse in the summer of 2006. Daley and Hearn's conversation occurred around Christmas time in 2007. At the same time he informed Skillern of the suspected theft, Hearn also complained to Skillern that he felt that he was being discriminated against. He felt this way because of an incident that occurred with another security officer who he said was harassing him by following him with a company security camera. Hearn also thought that African-American employees were getting searched more than other employees upon leaving the premises. Skillern told Hearn that he would keep the discrimination complaints confidential, but that Hearn should report them to Jim Welch, Vice President of Human Resources at Brown-Forman. Skillern also informed Hearn that he would have to report the suspected thefts. Skillern reported the information about the suspected thefts to Amy Wisotsky, Human Resources Manager for Security, and Lisa Stigler, Supervisor of Security, who were in Hearn's direct chain of command according to the SOP. Hearn testified that he did not report the suspected thefts to Wisotsky or Stigler because he did not trust them with the information. Hearn also testified that he believed Skillern could and would take action on the information regarding the suspected theft. Hearn stated that he did not report the suspected thefts until approximately three weeks after learning about them from Daley because there was "just so much going on it just slipped my mind."

On January 25, 2008, Hearn met with Stigler and her supervisor, Dan Krauth, to discuss the suspected theft. Union steward, Billy Staten, who is also

African-American, was also present at the meeting. Hearn said he was initially thanked for reporting the possible theft. However Daley, who told Hearn about the suspected theft, passed away on January 11, 2008.

A few days after his meeting with Stigler and her supervisor, Hearn met with Jim Massey, Director of Human Resources. In his meeting with Massey, in addition to discussing the suspected thefts, Hearn made his complaints regarding racial discrimination that he had made to Skillern previously. In addition to his previous complaints, Hearn told Massey about a fellow security officer's personal notes that he had found. In the notes, Hearn was referred to as "that black guard" by the contractor in a discussion with the security officer about who gave him his badge to come onto the premises. Hearn also told Massey about a Caucasian security officer that "leaned on" janitorial employees to collect Jack Daniels memorabilia for him, but Hearn said was never disciplined. Massey immediately investigated Hearn's complaints by reviewing security officers' personnel files and employment records and evaluating their records and any disciplinary measures. He spoke with other Human Resource staff members and reviewed summaries of employees' disciplinary history. Massey found nothing indicating Hearn had been treated differently because of his race or otherwise.

Hearn had previously filed two complaints with the Equal Employment Opportunity Commission (EEOC) during his employment at Brown-Forman. The first complaint was filed on May 24, 2005, alleging race discrimination and retaliation for taking part in a 2001 EEOC Investigation. The

second EEOC complaint alleging retaliation was filed on July 26, 2005. Both of the complaints were dismissed for lack of evidence of violation. Hearn did not pursue an appeal for either dismissal.

After his meeting with Hearn, Massey consulted with Stigler, Wisotsky, and Skillern about Hearn and his failure to promptly report the suspected theft. After reviewing the facts and discussions of the incident and the absence of any favorable mitigating factors in Hearn's personnel file, a decision was reached to terminate Hearn's employment from Brown-Forman for failing to timely report a suspected theft and for not using the proper chain of command.

On February 5, 2008, Massey telephoned Hearn to advise him of his termination of employment from Brown-Forman. Stigler, Wisotsky, and union steward, Billy Staten, were present for the telephone conversation. Hearn asked Massey about payment for unused vacation and unemployment compensation. Massey informed Hearn that he would need to return his uniform and that he was no longer permitted to come onto the Brown-Forman premises. This is standard company practice. Hearn testified that Massey told him that if he came back onto the premises "we're going to wrestle you to the ground and hogtie you." Hearn testified that this comment offended him, but he was not sure if he believed it had racial implications. Hearn returned his company-issued uniform a few days later without incident. Hearn filed a third complaint with the EEOC after his termination from Brown-Forman alleging race discrimination and retaliation. This complaint was dismissed as well for lack of evidence of violation. Hearn filed an

action on March 27, 2009, alleging racial discrimination, hostile work environment, and retaliation in violation of the Kentucky Civil Rights Act (KCRA), Kentucky Revised Statutes (KRS) Chapter 344. Brown-Forman filed a motion for summary judgment, which the circuit court granted; and all of Hearn's claims were dismissed with prejudice. Hearn now appeals.

II. STANDARD OF REVIEW

"The 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 evidence of record must be considered in the light most favorable to the party opposing summary judgment. *Id*. "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*." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001).

III. ANALYSIS

Hearn claims that he was subject to racial discrimination, a hostile work environment, and retaliation in violation of the Kentucky Civil Rights Act (KCRA), Kentucky Revised Statutes (KRS) Chapter 344. We now address each of these claims.

A. RACIAL DISCRIMINATION

Hearn's racial discrimination claim presents two issues. The first issue is whether Hearn properly pled a mixed-motive theory of racial discrimination. If so, the second issue is to determine if Hearn is able to succeed in the analysis of this theory.

Discrimination claims are typically classified as either "single-motive" claims or "mixed-motive" claims. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 396 (6th Cir. 2008). A single-motive claim is one in which an illegitimate reason motivated the employer to take adverse employment action. *Id.* A mixed-motive claim is one in which both legitimate and illegitimate reasons motivated an employer's decision. *Id*. A single-motive analysis requires the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff bears the initial burden of proving a *prima facie* case of racial discrimination. *Jefferson County v. Zaring*, 91 S.W.3d 583, 590 (Ky. 2002); *Notari v. Denver Water Dept.*, 971 F.2d 585, 588 (10th Cir. 1992) (citing *McDonnell Douglas* at 411 U.S. at 802, 93 S.Ct. at 1824). Once a *prima facie* case has been established, the burden then shifts to the defendant to articulate a "legitimate non-discriminatory" explanation for its adverse employment action. *Zaring*, 91 S.W.3d at 590. Once an explanation is offered, the plaintiff is provided the opportunity to show that the defendant's justification is a pretext to conceal a truly discriminatory motive. *Id.*

Pursuant to federal law, a mixed-motive claim is based on "an unlawful employment practice is established when the complaining party

demonstrates that race . . . was *a motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added).

> But, the Kentucky Civil Rights Act does not contain the language found in 42 U.S.C. § 2000e–2(m). And, as commented by the Kentucky Supreme Court in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky.1992), when the "language tracks the federal law [it] should be interpreted consonant with federal interpretation" of the Civil Rights Act of 1991. Significantly, however, this particular language has not been incorporated into the Kentucky Civil Rights Act and, thus, the analysis does not necessarily have to rely on federal law.
>
> Furthermore, it has been held that, "[m]ixed-motive theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act's authorization of claims that an improper consideration was 'a motivating factor' for the contested action." *See Serafinn v. Local 722, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 597 F.3d 908, 915 (7th Cir. 2010). Therefore, given that Kentucky has not specifically adopted the "mixed-motive" language found in 42 U.S.C. § 2000e–2(m), we shall review this case according to Kentucky jurisprudence and its reference to "mixed-motive" causes of action.

Mendez v. Univ. of Kentucky Bd. of Trustees, 357 S.W.3d 534, 541 (Ky. App. 2011). In *Meyers v. Chapman Printing*, 840 S.W.2d 814 (Ky. 1992), the Kentucky Supreme Court interprets the mixed-motive cases to mean the party alleging discrimination must show that the discriminatory motive was a "substantial factor," or "contributing or essential factor," and not the "sole cause." *Mendez*, 357 S.W.3d at 541 (citing *Meyers*, 840 S.W.2d at 823-824).

As an initial matter, Hearn's complaint for this action asserted his claims under the Kentucky Civil Rights Act (KCRA), KRS Chapter 344 to correct unlawful employment practices based on racial discrimination. Hearn claims that he was terminated from his employment at Brown-Forman because of his race and his complaints regarding racial discrimination and harassment. He requested compensatory damages as his relief. Hearn asserted for the first time in response to Brown-Forman's motion for summary judgment that his racial discrimination claim should be reviewed under the mixed-motive analysis. Hearn did not concede that damages are limited under this claim.

Under both single-motive and mixed-motive analysis, each claim ultimately requires evidence of a discriminatory motive. Hearn's claim of racial discrimination failed under the single-motive analysis because he was unable to establish a *prima facie* case. Even if he were able to present a *prima facie* case, Brown-Forman is able to articulate a legitimate non-discriminatory reason for its decision to terminate Hearn that he could not show to be pretext.

Assuming Hearn properly pled his mixed-motive assertion, he must now show that Brown-Forman's racially discriminatory motive was a substantial, contributing or essential factor in its decision to terminate his employment. Hearn relies only on his own perceptions and subjective beliefs that his termination from Brown-Forman was based on racially discriminatory motives. He claims that he did not agree with some of his disciplinary infractions and that other white security officers were not subject to the discipline and harassment that he claims to have

experienced. These perceptions, without more, are insufficient to expose a racially discriminatory motive. Brown-Forman's motive for terminating Hearn was to prevent serious breaches in its security. Hearn failed to promptly report a suspected theft, a fundamental part of his job as a security officer, and he also failed to use the proper chain of command as outlined in the SOP when he finally did report it. The fact that Hearn was initially thanked for reporting the suspected theft and Massey's participation in his termination do not provide any evidence that would call into question Brown-Forman's motive for termination. Hearn fails to provide any evidence creating a genuine issue of material fact that race was a substantial, contributing or essential factor in Brown-Forman's decision to terminate his employment. Accordingly, summary judgment was warranted on this claim.

B. HOSTILE WORK ENVIRONMENT

Hearn next argues on appeal that the circuit court misapplied the summary judgment standard on his hostile work environment claim. The Kentucky Supreme Court has emphasized that a hostile environment exists "when 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." *Ammerman v. Bd. of Educ.*, 30 S.W.3d 793, 798 (Ky. 2000); *Williams v. General Motors Corp.*, 187 F.3d 553, 560 (6th Cir. 1999) (citing *Harris v. Forklift Sys. Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). Conduct must be sufficiently continuous

and intensive in order to be considered hostile, not just solitary incidents. *Ammerman*, 30 S.W.3d at 798.

To establish a *prima facie* case of a racially hostile work environment, a plaintiff must demonstrate that (1) he belonged to a protected class; (2) he was subject to unwelcome harassment; (3) the harassment was based on race; (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and (5) the defendant knew or should have known about the harassment and failed to act. *Williams v. CSX Transp. Co.*, 643 F.3d 502, 511 (6th Cir. 2011). When evaluating the conduct within a possible hostile work environment, the Court should consider the totality of 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." *Harris v. Forklift Sys. Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993). A hostile work environment is one that is both objectively hostile to a reasonable person and subjectively hostile to the plaintiff. *Id.*

Hearn highlights several incidents over what he claims to be a pattern of racial harassment during his employment at Brown-Forman. The first incident Hearn presents is when he was referred to as "that black guard" in a fellow security officer's personal notes regarding his conversation with a vendor. The notes suggested that the security officer asked the vendor who gave him a badge that

permitted him to come onto the Brown-Forman premises, and the vendor replied "that black guard" in order to identify Hearn. Hearn was one of only two African-American security officers employed at Brown-Forman. The reference was not included as part of the Company's official log book. Hearn became aware of the reference when he found the security officer's notes in the locker room and read them. A reference to race is not itself derogatory or harassment. Also, the context of the note does not imply racial intolerance. There is no evidence to suggest that the identification of Hearn by the vendor in the personal notes of a fellow security officer as "that black guard" was racially insensitive or harassing.

The second incident Hearn refers to as creating a hostile work environment is when he claims another security officer followed him around the Brown-Forman premises with a camera. Hearn said he parked his car, went through a few buildings to lock up, and then walked to the main gate. At the main gate guard station, Hearn says he saw the security camera zoomed in on his patrol vehicle. Hearn did not ask the security officer at the guard station why the camera was on his patrol vehicle or if there was any suspicious activity in that area which would warrant the use of the zoom on the camera. Hearn could not remember if he filed a formal complaint regarding this specific incident. Hearn testified that the security officers were supposed to keep the cameras on pan, but officers were permitted if it was necessary to investigate possible suspicious activity on the premises to use the zoom on the camera. Hearn also stated that sometimes officers forgot to put the cameras back on pan. There is no further evidence in the record

indicating that Hearn's patrol vehicle was being targeted and followed by the security cameras around the Brown-Forman premises on this one occasion or on a regular basis.

Hearn claims as the third incident within an alleged pattern of racial discrimination creating a hostile work environment the disregard by Brown-Forman to his own reports of co-workers misconduct. However, Hearn has not provided any support to show this affected the work environment, nor has he provided evidence of any instances of when he reported a co-worker's misconduct and no disciplinary action was taken by Brown-Forman.

The fourth incident Hearn claims created a racially hostile work environment at Brown-Forman is the disregard for Hearn's concern over security officers searching a disproportionate number of African-American employees leaving the premises. It was reported that one of the security officers was "leaning on" the janitorial staff to collect Jack Daniel's memorabilia from out of the garbage cans. Due to the report, the janitorial staff, which Hearn says are primarily African-American, was subject to searches prior to leaving the premises. Hearn was never searched, and there is nothing in the record indicating that the janitorial staff was searched because of their race or that the searches created a hostile work environment at Brown-Forman.

The fifth and final incident Hearn refers to in his attempt to show that a hostile work environment existed at Brown-Forman is the comment made by Massey to Hearn when he terminated him. Massey, Director of Human Resources,

told Hearn during their telephone conversation in which Hearn was terminated that if Hearn returned to Brown-Forman's campus that "we're going to wrestle you to the ground and hog-tie you." It is understandable that this comment would be offensive to Hearn; however, while this comment is exceptionally unprofessional and distasteful, it is not sufficiently pervasive to create a hostile work environment as required by law.

Taking into account all of the incidents and circumstances to which Hearn refers, he does not provide adequate evidence to produce a genuine issue of material fact as to the elements purporting to show the existence of a hostile work environment over his thirteen years of employment at Brown-Forman. He is unable to establish a *prima facie* case on this claim. Therefore, we affirm the circuit court's decision to grant Brown-Forman's motion for summary judgment on the hostile work environment claim.

Lastly, Hearn argues that he is able to establish a *prima facie* case for retaliatory discharge and Brown-Forman's stated reason for his termination is pretext. Under Kentucky Revised Statutes (KRS) 344.280(1) it is unlawful for one or more persons to retaliate or discriminate in any manner against a person . . . 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 order to present a *prima facie* case of retaliatory discharge, a plaintiff is required to show (1) he engaged in protected activity; (2) the defendant knew of the plaintiff's engagement in the protected activity; (3) the employer took adverse employment action against him; and (4) a causal connection between the protected activity and the adverse employment action. *Brooks v. Lexington-Fayette Urban Housing Auth.*, 132 S.W.3d 790, 803 (Ky. 2003).

A causal connection between the protected activity and the adverse employment action must be established by circumstantial evidence when no direct evidence exists. *Brooks*, 132 S.W.3d at 804 (citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000)). An inference can be drawn through circumstantial evidence that the protected activity was the likely cause of the adverse action. *Nguyen*, 229 F.3d at 566. This is often shown by the temporal proximity between the protected activity and the adverse action. *Id.* A court may also consider whether the plaintiff was treated differently by the employer than

similarly situated individuals. *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 517 (6th Cir. 2009).

Retaliation claims supported by circumstantial evidence are analyzed under the *McDonnell Douglas* burden-shifting framework. *Fuhr v. Hazel Park School District*, 710 F.3d 668, 674 (6th Cir. 2013). Once a *prima facie* case for retaliation has been established, the burden shifts to the defendant to articulate some legitimate non-retaliatory reason for its decision. *Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003). The burden then shifts back to the plaintiff to show that defendant's stated reason was pretext and not the true reason for its decision. *Id*.

Hearn argues that only the fourth element of causal connection is at issue. Hearn contends that close temporal proximity, without more, can be sufficient to establish the required causal connection demonstrating a *prima facie* case of retaliation. Hearn was terminated approximately one week after he made his complaints of discrimination in his meeting with Massey. At this same meeting, however, Hearn and Massey also discussed at length the delay in the report of the suspected thefts.

To establish a causal connection, the employee must produce sufficient evidence so that it could be inferred that the adverse employment action would not have been taken had the employee not filed a complaint. *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). Hearn puts forth no further evidence of a causal connection other than close temporal proximity between his

complaint and termination. "Temporal proximity alone will not support an inference of retaliatory discrimination when there is no other compelling evidence." *Id*. at 566.

Brown-Forman's stated reason for terminating Hearn was his failure to timely report a suspected theft and failure to use the proper chain of command. Hearn imposed the close proximity by reporting his discrimination complaint at the meeting discussing the suspected theft he failed to immediately report. Without any further evidence to consider, the circumstances surrounding the meeting with Massey demonstrate that Brown-Forman's termination of Hearn was not retaliatory. Hearn is unable to establish the causal connection element of his retaliation claim. Therefore, he is unable to establish a *prima facie* case.

Even if Hearn was able to establish a *prima facie* case for retaliation, Brown-Forman is able to articulate a legitimate non-retaliatory reason for its decision to terminate Hearn. Hearn is unable to show this reason is pretext. Hearn argues that there are three specific pieces of evidence that expose the pretextual nature of Brown-Forman's justification for its decision. First, he argues the temporal proximity of the complaint of racial discrimination and the termination of employment reveal that the former influenced the latter. Second, Hearn cites Massey's participation in the termination action as pretext because he normally does not do so. And third, Hearn claims that the fact he was initially thanked for reporting the theft and then ultimately terminated shortly thereafter indicates that Brown-Forman's stated reason for terminating him was not the true reason.

Temporal proximity, without more, does not support the inference of retaliatory conduct. It naturally follows in this case that it alone does not expose pretext either. Massey's participation in the termination is not sufficient evidence of pretext because Hearn induced Massey's participation by requesting the meeting with him. They also had met concerning other employment issues in the past. Additionally, as the Director of Human Resources, it is not inappropriate that Massey would oversee an employment decision. Finally, the fact that Hearn claims he was initially thanked after reporting the suspected theft and then terminated is not sufficient evidence which supports the assertion that Brown-Forman's reason for Hearn's termination is pretext. Accordingly, we affirm the circuit court's decision to grant summary judgment on the retaliation claim.

IV. CONCLUSION

Summary judgment was appropriate in this case because there is insufficient evidence to support Hearn's claims of racial discrimination, hostile work environment, and retaliation. Accordingly, we affirm the decision of the Jefferson Circuit Court to grant Brown-Forman's motion for summary judgment on all of Hearn's claims.

ALL CONCUR.

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