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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000879-MR

MARK HILL APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 13-CI-000218

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT
D/B/A MSD APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND D. LAMBERT, JUDGES.

JONES, JUDGE: Appellant, Mark Hill, brings this appeal challenging orders of the Jefferson Circuit Court granting motions for summary judgment in favor of Appellee, Louisville and Jefferson County Metropolitan Sewer District d/b/a MSD ("MSD"). Following review of the record and applicable case law, we affirm as to

the trial court's grant of summary judgment on Hill's claims under the Kentucky Civil Rights Act (the "KCRA"), reverse as to the grant of summary judgment on Hill's claim under the Whistleblower Act, and remand.

I. BACKGROUND

Hill was employed by MSD from 1990 until his termination in October of 2012. At the time that he was terminated, Hill held the position of Administration Services Manager. Hill's responsibilities in that position included procuring contractors for facilities maintenance and approving invoices submitted to MSD for payment.

In July of 2011, the Kentucky State Auditor of Public Accounts (the "APA") began auditing MSD for the period of July 1, 2008 through June 30, 2011. As part of its audit, the APA interviewed Hill in October of 2011. Almost immediately following this interview, Hill obtained an attorney. On October 31, 2011, Hill's attorney sent a letter to officials at MSD, the Jefferson County Attorney, and the Attorney General seeking whistleblower protection for Hill. The letter alleged that Hill had made good faith reports of waste, fraud, mismanagement, and violations of law that occurred at MSD during his interview with the APA. Following Hill's interview with the APA, Hill had allegedly been summoned into the office of Bud Schardein, the executive director of MSD, where

Schardein questioned Hill regarding statements he made to the APA and became angry with Hill.

The day after receiving the letter from Hill's attorney, general counsel for MSD contacted the APA via email. This email informed the APA that Schardein had recently discovered two unauthorized, and potentially criminal, invoices approved by Hill: a $1,900 payment to the Hyatt Regency for a retirement celebration for a former MSD employee (the "Hyatt Invoice") and a $500 payment for repair work done at the residence of a current MSD employee (the "Employee Invoice"). The email additionally requested that APA disclose any information or suspected improprieties it had discovered concerning Hill, so that MSD could address all of Hill's infractions at one time.

The APA conducted a second interview of Hill on November 3, 2011. During the interview, Hill acknowledged that he had not made reports of waste, fraud, mismanagement, and violations of the law occurring at MSD during his first interview with the APA; however, he maintained his contention that, following his first interview, he had been called into Schardein's office where he was berated for giving information about MSD to the APA. When questioned about the Hyatt Invoice, Hill stated that he had concerns with the invoice when he received it for approval. Because of these concerns, Hill contacted his direct supervisor, James Hunt, to determine whether the invoice should be paid. Hunt informed Hill that

Schardein told him to approve the invoice for payment, so Hill did so. Hill acknowledged that the Employee Invoice was mistakenly approved and took responsibility for the mistake. In addition to questions concerning the two invoices, Hill was questioned about record retention, his procurement of air-cards and laptops, his process in procuring vendors, and his personal relationships with certain vendors. On November 4, 2011, Hill received written notice that his authority to approve invoice and check requests had been suspended pending investigation.

The APA completed its audit of MSD in December of 2011 and issued a lengthy report detailing numerous findings of impropriety within MSD. The APA's findings as related to Hill are summarized as follows:

> (1) Hill had purchased laptops and air-cards with MSD funds instead of requesting these items through MSD's Information Technology ("IT") department. Hill had stated that he only did so with his supervisor's permission and that the laptop and air-cards were used for work purposes. Hill stated that his department never purchased equipment through IT because it took IT 2-3 months to process a request. Hill believed other departments did so as well. The APA found that there was at least one other group who did not consistently purchase computers through IT; however, that group was granted an exception in MSD policy. MSD policy dictated that Hill was required to purchase the air-cards and laptops through MSD's IT department.
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> (2) Hill had used his position to give MSD mowing business to private vendors with which he close/personal relationships, displaying favoritism in violation of

> MSD's employee conduct policy. In total, MSD had paid $530,981 to vendors with which Hill had some personal connection. This sum included $338,503 in payments made to one of Hill's high school friends. When questioned on this issue, Hill conveyed to the auditors "that's what you do in business—help each other out—help people you know."
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> (3) Hill had stored personal files on his MSD computer in violation of MSD policy. Many of these files showed created, modified, and accessed dates and times that would have been during Hill's normal work hours. The audit showed that Hill had used his computer for his private communications business, his work as a pastor, and his wife's private events business.
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> (4) Hill had improperly approved the Hyatt Invoice and the Employee Invoice. The APA report noted that Hill informed the APA that he had asked Hunt about the Hyatt Invoice and had been told that Schardein had approved payment. Schardein disputed this. Concerning the Employee Invoice, the report notes that employee's statement that Hill had offered to have someone do the work for him and had told him not to worry about payment. Additionally, the report states that the vendor who did work at the employee's home had a personal affiliation with Hill and that the expenditure was higher than it should have been for the work done.

R. 137-44. On January 19, 2012, Hill received written notice that he was being suspended with pay. Thereafter, MSD retained an attorney to independently investigate Hill's misconduct in light of the APA's findings. As part of this investigation, the attorney reviewed the audit report and interviewed Hill and other MSD employees. The independent investigation corroborated the APA's findings

and additionally found that a computer issued to Hill by MSD was missing. Hill was terminated from his position at MSD on October 19, 2012.

In January of 2013, Hill filed a complaint against MSD contending that it had violated Kentucky's Whistleblower Act[1] and discriminated against him based on his race[2] in violation of the KCRA.[3] Concerning his whistleblower claim, Hill contended that he had made several reports to the APA and MSD concerning suspected waste, fraud, mismanagement, abuse of authority, and violations of law occurring within MSD and had been terminated from his position at MSD as a result of making those reports. As to his race discrimination claim, Hill alleged that he was made a scapegoat for offenses committed by white coworkers and that he was accused of rule violations that were commonly committed by white coworkers, but that he was the only employee to be terminated for those violations. Accordingly, Hill contended that MSD had discharged him from employment based on his race.

Following discovery, MSD moved for summary judgment. MSD contended that Hill did not have a claim under the Whistleblower Act because MSD was not considered an "employer" as the word is defined in the Act. KRS 61.101(2) defines "employer" as:

[1] Kentucky Revised Statutes (KRS) 61.101, *et seq.*
[2] Hill is African American.
[3] KRS Chapter 344.

> [T]he Commonwealth of Kentucky or any of its political subdivisions. Employer also includes any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions, with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees.

The Whistleblower Act does not define "political subdivision." MSD acknowledged that it is a political subdivision; however, it contended that it was unclear as to whether MSD was the *Commonwealth's* political subdivision. MSD argued that when it is unclear as to whether an entity is a political subdivision of the Commonwealth, courts must resolve the issue by determining whether the entity is protected by sovereign immunity. If it is, then that entity is a considered an "employer" under the Whistleblower Act. MSD argued that it is not protected by sovereign immunity because it does not serve a function integral to state government. Accordingly, MSD argued that it could not be considered an "employer." In the alternative, MSD argued that Hill's claim under the Whistleblower Act must fail because Hill had not made reports of misconduct to the APA in good faith, but had only done so out of fear that he might lose his job. Additionally, MSD argued that Hill's race discrimination claim must fail because Hill had been unable to identify a similarly situated non-African American who had been treated differently than he had and because Hill had failed to allege any facts that could lead to the conclusion that Hill's termination was racially motivated.

In addition to contending that MSD was an "employer" under the Whistleblower Act and that Hill had made reports in good faith, Hill's response argued that the proper standard under which to evaluate his racial discrimination claim was a "mixed motive" standard, which does not require that the claimant identify a similarly situated individual who had received different treatment. Hill argued that, at its core, his claim was a retaliation claim that should be analyzed under KRS 344.280. Additionally, Hill contended that he had been "put under a microscope" at MSD because of his relationships with minority enterprises. MSD's reply in support of its motion for summary judgment noted that Hill had not adequately pled a "mixed motive" claim or a retaliation claim. On January 19, 2014, Hill filed an amended complaint, without seeking leave of the court, adding a claim for retaliatory discharge from employment under KRS 344.280. MSD moved to strike the amended complaint as untimely.

Following a hearing, the trial court entered an order denying MSD's motion for summary judgment. In addressing Hill's whistleblower claim, the trial court concluded that MSD was a political subdivision of the Commonwealth and, therefore, met the definition of an "employer" under the Whistleblower Act. In reaching this conclusion, the trial court agreed with MSD that whether it qualified as an "employer" under the Whistleblower Act depended on whether it was protected by sovereign immunity. However, the trial court found that MSD had

been created by the legislature, its "parent" was the Louisville-Jefferson County government, and that MSD operated on a county-wide level performing services integral to state government. Accordingly, the trial court concluded that MSD was a political subdivision of the Commonwealth and, therefore, was an "employer" under the Whistleblower Act. Because the trial court was unable to determine whether Hill had made his reports in good faith, it determined that summary judgment was inappropriate. The trial court noted that Hill had only produced circumstantial evidence in support of his race discrimination claim. However, the trial court concluded that, with further discovery, Hill could produce evidence at trial warranting a judgment in his favor. The trial court stated that it was allowing Hill's claims to proceed, but that Hill must amend his complaint to give proper notice that he was alleging "mixed motive" race discrimination.

In November of 2015, MSD moved for partial summary judgment on Hill's claim under the Whistleblower Act. MSD contended that the Kentucky Supreme Court had recently rendered an opinion, *Coppage Construction Co. v. Sanitation District No. 1*, 459 S.W.3d 855 (Ky. 2015), reaffirming MSD's previous argument to the trial court. In *Coppage*, the Court held that a sanitation district does not perform functions integral to state government, but rather serves local and propriety functions. Accordingly, the Court concluded that such entities are not protected by sovereign immunity. While sanitation districts and sewer districts,

such as MSD, are governed by different statutory authority, MSD argued that the sovereign immunity analysis would be the same for a sewer district as it is for a sanitation district. Therefore, MSD urged the trial court to reconsider its previous order denying summary judgment on Hill's whistleblower claim.

Hill's response conceded that the *Coppage* decision would likely change the trial court's determination that MSD served a function integral to state government. However, Hill argued that while such a determination would affect whether MSD was entitled to sovereign immunity, it should not affect whether MSD was an "employer" under the Whistleblower Act. Hill argued that a finding that an entity was not entitled to the protections of sovereign immunity was not dispositive of whether that same entity was covered under the Whistleblower Act. Rather, Hill contended that by the looking to the definition of "employer" under the Act, it was clear that the Act was more expansive than the narrow coverage of sovereign immunity.

The trial court entered an order granting partial summary judgment in MSD's favor on February 9, 2016. In that order, the trial court concluded that the analyses under sovereign immunity and the Whistleblower Act were the same. Additionally, the trial court found that the *Coppage* opinion made clear that MSD would not be entitled to sovereign immunity. Accordingly, the trial court determined that MSD was not an "employer" under the Whistleblower Act,

granted partial summary judgment in favor of MSD, and dismissed Hill's whistleblower claim.

On February 8, 2017, MSD moved for summary judgment on Hill's race discrimination claims. MSD noted that, in the two years since the trial court had denied MSD's first motion for summary judgment, Hill had failed to properly amend his complaint, had not deposed a single witness, and had not presented any evidence to the trial court or to MSD to bolster his allegations that his termination from employment was motivated in any way by race discrimination. Additionally, MSD contended that *Walker v. Commonwealth*, 503 S.W.3d 165 (Ky. App. 2016), had confirmed that a "mixed motive" analysis for race discrimination claims had not been adopted in Kentucky. Accordingly, Hill was required to show that a similarly situated non-African American employee had been treated differently than he had in order to make a *prima facie* case. MSD contended that, not only had Hill failed to do so, he had failed to produce any evidence raising an inference of discriminatory intent or making the legitimate reasons for his termination appear pretextual. Hill moved for and was granted additional time in which to respond to MSD's motion.

On April 3, 2017, Hill responded to MSD's motion for summary judgment and moved for leave to file a second amended complaint. The tendered second amended complaint stated that, while race may not have been the only

factor in his termination, it was a substantial factor motivating MSD's decision to terminate him. Additionally, Hill clarified that he intended to allege "mixed motive" type discrimination for all of his allegations arising under KRS Chapter 344. In his response to MSD's motion for summary judgment, Hill argued that—contrary to MSD's assertions—*Walker* had not held that a "mixed motive" analysis could not be applied to race discrimination claims under Kentucky law. Further, Hill contended that he had presented sufficient evidence for a jury to conclude that race was a substantial factor in MSD's decision to terminate his employment. Hill argued that Hunt's deposition testimony had shown that other MSD employees had violated the same MSD policies that Hill had, but that those employees had not been terminated for this behavior. Hill contended that this demonstrated that a primary motive behind his termination was his race and that the legitimate reasons MSD had given for Hill's termination were pretextual. Further, Hill noted that during his deposition, he had testified that there was a history of racial discrimination throughout his tenure at MSD.

On April 20, 2017, the trial court granted MSD's motion for partial summary judgment on Hill's remaining claims. By that order, the trial court stated that it was granting Hill's motion to file a second amended complaint and had taken into consideration all allegations that Hill raised in his improperly filed first amended complaint and in the second amended complaint. The trial court

determined that *Walker* had not held that a "mixed motive" analysis could not be used for claims brought under the KCRA. Rather, the *Walker* court had declined to apply that analysis because the plaintiff in *Walker* had never alleged that both legitimate and discriminatory motives were behind her employer's decision to terminate her. However, the trial court concluded that Hill's race discrimination claims could not survive summary judgment even when analyzed under the "mixed motive" analysis, as Hill had failed to put forth any affirmative evidence to support his claim that he was terminated based on his race or to support his claim for retaliation. In contrast, the only affirmative evidence in the record supported MSD's contentions that it had terminated Hill based on violations discovered in the audit. Accordingly, the trial court concluded that Hill's claims under the KCRA failed as a matter of law.

This appeal followed.

II. STANDARD OF REVIEW

A grant of summary judgment is appropriate when there is no genuine dispute as to any material fact and, "as a matter of law, it appears that it would be impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor." *3D Enters. Contr. Corp. v. Louisville and Jefferson Cty. Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005) (citing *Steelvest, Inc. v.*

Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991); CR[4] 56.03). The word "impossible" is meant in "a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

III. ANALYSIS

On appeal, Hill contends that the trial court erred as a matter of law when it concluded that MSD did not qualify as an employer under the Whistleblower Act and when it found that Hill had failed to allege sufficient facts to succeed on his claims under the KCRA. We address each argument in turn.

A. Whistleblower Act Claim

Kentucky's Whistleblower Act makes it unlawful for an employer to:

> [S]ubject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges or otherwise brings to the attention of . . . the [APA] . . . any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.

[4] Kentucky Rules of Civil Procedure.

KRS 61.102(1). Hill testified that he disclosed information protected under the Act during his interviews with the APA and was subsequently fired as a result of doing so. For Hill to have a viable claim, however, MSD must first qualify as an "employer" as defined in the Act. As noted *supra*, p. 6, the Whistleblower Act defines an "employer" as "the Commonwealth of Kentucky or any of its political subdivisions." KRS 61.101(2).

There is no Kentucky case specifically indicating whether a joint metropolitan sewer district, such as MSD, is considered an "employer" under the Whistleblower Act. Hill contends that an extensive analysis is unnecessary to determine whether MSD qualifies as an employer, as a plain reading of MSD's enabling statute, KRS 76.010, dictates that it does. Indeed, KRS 76.010 states that a joint metropolitan sewer district "shall be a public body corporate, and political subdivision . . . ." MSD concedes that it is a political subdivision; however, it argues that this designation is insufficient to bring it into the purview of the Whistleblower Act's definition of "employer." MSD argues that the Act does not define an "employer" to include *any and all* political subdivisions, but rather limits the definition to political subdivisions *of the Commonwealth*. Because KRS 76.010 does not include the phrase "of the Commonwealth," MSD contends that it is not a political subdivision of the Commonwealth and, accordingly, is not an "employer."

In *Northern Kentucky Area Planning Commission v. Cloyd*, this Court considered and rejected an identical argument when determining whether planning commissions were considered "employers" under the Whistleblower Act. 332 S.W.3d 91, 93-94 (Ky. App. 2010). The appellant in *Cloyd* agreed that under KRS 147.660(1), planning commissions were characterized as political subdivisions. Like KRS 76.010, however, KRS 147.660(1) simply states that an area planning commission "shall be a political subdivision," with no reference to whether it is considered a political subdivision of the Commonwealth. The appellant argued that attaching "of the Commonwealth" to its designation as a political subdivision would violate fundamental principles of statutory construction. This Court disagreed and found that "[g]iven the plain language of the statute, it is perhaps most logical to conclude that 'political subdivision' presumes a political subdivision 'of the Commonwealth.'" *Id.* at 94. Accordingly, the Court concluded that "it was the intent of the legislature to create area planning commissions as political subdivisions of the Commonwealth and to subject these commissions to the Whistleblower Act." *Id.*

Two years after this Court's opinion in *Cloyd*, the Kentucky Supreme Court decided *Wilson v. City of Central City*, which addressed the specific issue of whether a city was considered an "employer" under the Whistleblower Act. 372 S.W.3d 863 (Ky. 2012). As in *Cloyd*, the *Wilson* court began its analysis by

looking to the plain language of KRS 61.101(2) and the statutory terminology used to refer to a "city." After noting that a "city is both a 'municipality' and a 'municipal corporation,'" the Court found that there were "numerous Kentucky laws in which the General Assembly has designated municipalities as separate from either the Commonwealth or its political subdivisions." *Id.* at 866-67. However, the Court noted that "there are several provisions in the KRS that include 'cities' in a list of 'political subdivisions.'" *Id.* at 867. Because of the disparities between the legislature's inclusion of cities as political subdivisions and exclusions of cities as political subdivisions in various statutory provisions, the *Wilson* court found that cities fell into a "gray area" and determined that whether a city was subjected to the Whistleblower Act should be analyzed under a "similar inquiry" as conducted by courts when determining whether an entity is protected by sovereign immunity. *Id.* at 868-69.

MSD effectively contends that *Wilson* rejected the premise held in *Cloyd*—that a designation of an entity as a political subdivision is insufficient to bring that entity into the purview of the Whistleblower Act. MSD argues that under *Wilson*, courts must use a sovereign immunity analysis to determine the Act's applicability to a given entity. This is not the case. *Wilson* did not purport to overrule *Cloyd*. In *Wilson*, the Court first noted that there were statutes expressly stating that a city was not a political subdivision and statutes expressly including

cities in lists of political subdivisions. It was only after noting this discrepancy and determining that cities fell into a "gray area" that the Court looked to principles of sovereign immunity to determine whether a city was an "employer" under the Whistleblower Act. Accordingly, under *Wilson,* if the entity against which a plaintiff brings a whistleblower claim falls into a "gray area," then courts should employ a sovereign immunity analysis to determine whether that entity is an "employer" under the Act; however, if the entity does not fall into this "gray area," there is no need to conduct such analysis.

MSD does not fall into this "gray area." Unlike the situation in *Wilson*, there is no conflicting statutory authority or constitutional provision suggesting that MSD should not be considered a political subdivision. MSD's enabling statute, KRS 76.010, clearly tells us that MSD is a political subdivision. Therefore, under *Cloyd*, the fact that KRS 76.010 classifies joint metropolitan sewer districts as "political subdivision[s]" leads us to "believe it was the intent of the legislature to create [joint metropolitan sewer districts] as political subdivisions of the Commonwealth and to subject these [districts] to the Whistleblower Act." *Cloyd*, 332 S.W.3d at 94; *see also Louisville/Jefferson Cty. Metro Ethics Comm'n v. Schardein*, 259 S.W.3d 510 (Ky. App. 2008) (holding that MSD is not an agency of Louisville Metro, an urban-county government). Because the trial court dismissed Hill's claim on summary judgment on the sole ground that MSD is not

an "employer" under the Whistleblower Act, we do not address the viability of Hill's claim against MSD under the Act.

B. KCRA Claims

We next address Hill's claims brought under the KCRA. Hill initially contended that MSD impermissibly discriminated against him and, ultimately, terminated him from employment based on his race in violation of KRS 344.040(1)(a). By his first amended complaint, Hill added a claim of retaliatory discharge under KRS 344.280(1), contending that MSD retaliated and discriminated against him after he complained of racial disparity and discrimination at MSD. In his second amended complaint, Hill clarified that he intended to allege "mixed motive" type discrimination to all allegations arising under the KCRA. While the trial court allowed Hill's race discrimination claim to proceed on a "mixed motive" theory, it ultimately concluded that neither the race discrimination claim, nor the retaliatory discharge claim, could survive summary judgment, as Hill had failed to demonstrate that his race played a role in MSD's decision to terminate him.

i. Standard Applied to Discrimination Claim

Before delving into the substance of the parties' arguments, we must address the proper standard to be applied to Hill's discrimination claim. As noted, Hill's second-amended complaint made clear that he was alleging a "mixed

motive" theory of discrimination for his claims under the KCRA. The trial court allowed Hill to do so and, accordingly, analyzed Hill's race discrimination claim under a "mixed motive" analysis. MSD argued at the trial level, and continues to argue on this appeal, that Kentucky does not recognize a "mixed motive" theory and that, while the trial court's outcome was ultimately correct, it applied the wrong analysis to Hill's claim.

Under the KCRA, it is unlawful for an employer 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 . . . ." KRS 344.040(1)(a). "The [KCRA] was enacted in 1966 to implement in Kentucky the Federal Civil Rights Act of 1964." *Jefferson Cty. v. Zaring*, 91 S.W.3d 583, 586 (Ky. 2002) (citing 1966 Ky. Acts, ch. 2, Art. I, § 101; KRS 344.020(1)). "Thus, the provisions of the KCRA are virtually identical to those of the Federal Act." *Id.* (citing *Mills v. Gibson Greetings, Inc.*, 872 F.Supp. 366, 371 (E.D. Ky. 1994)). Accordingly, Kentucky courts analyzing claims brought under the KCRA must consider the way the Federal Civil Rights Act (the "FRCA") has been interpreted. *Id.* (citing *Harker v. Fed. Land Bank of Louisville*, 679 S.W.2d 226 (Ky. 1984)).

Congress set forth standards applicable in "mixed motive" cases in Section 107 of the Civil Rights Act of 1991, which are codified at 42 U.S.C.[5] § 2000e-2(m). *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94, 123 S.Ct. 2148, 2151, 156 L.Ed.2d 84 (2003). 42 U.S.C. § 2000e-2(m) provides that:

> [A]n unlawful employment practice is established when the complaint party demonstrates that race, color, religion, sex, or national origin was a **motivating factor** for any employment practice, even though other factors also motivated the practice.

(Emphasis added). Accordingly, when a plaintiff brings a claim under the FCRA alleging that both legitimate and unlawful considerations led to an adverse employment practice, the plaintiff only has the burden of showing that an unlawful employment practice was a motivating factor. Once the plaintiff has made this showing, "the burden of proof shifts to the defendant to avoid liability by showing that the same employment decision would have been made 'in the absence of the impermissible motivating factor.'" *First Prop. Mgmt. Corp. v. Zarebidaki*, 867 S.W.2d 185, 188 (Ky. 1993) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).

In contrast, when a plaintiff brings a race discrimination claim on a "single motive" theory under either the KCRA or the FCRA, courts utilize the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under the *McDonnel Douglas* framework, a

[5] United States Code.

plaintiff establishes a *prima facie* case of race discrimination by proving that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for his position; and (4) a similarly situated employee outside the protected class was not subjected to adverse action. *Tiller v. Univ. of Kentucky*, 55 S.W.3d 846, 849 (Ky. App. 2001) (quoting *Pierce v. Commonwealth Life Ins. Co.*, 825 F.Supp. 783 (E.D. Ky. 1993)). Once the plaintiff has made a *prima facie* case, the burden shifts to the employer to articulate a legitimate reason for its decision to terminate the plaintiff. *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 577 (Ky. 2016).

MSD correctly notes that the KCRA does not contain an equivalent to 42 U.S.C. § 2000e-2(m). Because of the lack of an express provision in the KCRA allowing a plaintiff bringing a race discrimination claim to allege that claim under a "mixed motive" theory, MSD contends that there is no place for "mixed motive" claims under Kentucky law. This argument fails, however, in light of the fact that Kentucky courts *have* allowed plaintiffs suing under KRS 344.040 to allege "mixed motive" theory claims and have applied a different analysis to those claims, albeit a slightly different analysis than is applied to "mixed motive" claims brought under the FCRA. *See Meyers v. Chapman Printing Co.*, 840 S.W.2d 814 (Ky. 1992); *Bd. of Trs. Of Univ. of Kentucky v. Hayse*, 782 S.W.2d 609 (Ky. 1989), *overruled on other grounds by Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001); *see*

also Zarebidaki, 867 S.W.2d 185 (Ky. 1993). Where our courts have declined to apply a "mixed motive" analysis, it has been because the plaintiff in those particular cases failed to properly allege a "mixed motive" claim, not because the court found that such claims were not viable. *See Mendez v. Univ. of Kentucky Bd. of Trs.*, 357 S.W.3d 534, 540 (Ky. App. 2011) ("Because Mendez has not given notice that the case is one involving 'mixed motives,' it is not necessary for us to even consider whether the jury instructions properly stated the 'mixed-motive' analysis."); *Walker v. Commonwealth*, 503 S.W.3d 165, 173 (Ky. App. 2016) ("The mixed-motive analysis Walker wishes us to apply is inapplicable. . . . Walker has never alleged that legitimate reasons accompanied the alleged discriminatory motives behind KET's decisions concerning him. He has only alleged the latter.").

In addressing the appellant's contention that the federal "mixed motive" analysis should be applied, the *Walker* court did note that "Kentucky has not expressly adopted the 'mixed motive' analysis." *Id.* (citing *Mendez*, 357 S.W.3d 541). This is correct. To the extent that the Kentucky Supreme Court has given any direction on the issue, it has "describe[d] the "mixed-motive" analysis as one that provides the party alleging discrimination must show that the discriminatory motive was 'a *contributing and essential* factor'. . . ." *Mendez*, 357 S.W.3d at 541 (quoting *Meyers*, 840 S.W.2d at 823) (emphasis added). "The

[*Meyers*] Court interpreted the phrase 'because of' in KRS 344.040 to mean 'substantial factor,' 'contributing and essential factor,' or 'essential ingredient,' and not 'sole cause.'" *Id.* (quoting *Meyers*, 840 S.W.2d at 823-24).

So, while *Meyers* did not expressly adopt the federal "mixed motive" analysis, it interpreted the language in KRS 344.040 to contrive a similar, but distinct, analysis for "mixed motive" discrimination claims. The trial court in the case *sub judice* found that for Hill's race discrimination claim to survive summary judgment, Hill was required to "demonstrate that race was a contributing and essential factor in the employer's action before the burden shifts to MSD to prove by a preponderance of the evidence that it would have terminated Hill's employment had it not considered Hill's race." R. 772. In light of *Meyers* and the case law interpreting it, this was the appropriate standard to employ in analyzing Hill's race discrimination claim.

ii. Hill's Discrimination Claim

Having determined the proper standard under which to analyze Hill's race discrimination claim, we turn to the substance of the parties' arguments. Hill contends that we must reverse the trial court's order on summary judgment because he produced ample evidence of disparities in treatment between white employees and African American employees as well as evidence of MSD's general animus against African Americans. Additionally, Hill contends that he

demonstrated that he was terminated for committing minor violations, while white employees have committed both minor and major violations of MSD policy and faced no consequences. Further, Hill argues that MSD produced no evidence showing that it would have terminated him if he was white.

To support his contentions, Hill directs our attention to portions of both his and Hunt's deposition testimony. The cited portions of deposition testimony are summarized as follows:

> (1) Hill testified that "that were other people who had done things that had been made public . . . they were white, and to [his] knowledge, nothing has been done to them." Hill named one specific employee, Bruce Seigle,[6] who Hill testified had paid his wife in excess of $300,000 over a period beginning when Seigle and his wife were dating and continuing after their marriage for MSD work. Seigle was not terminated. Additionally, Hill testified that there was a history of racial discrimination at MSD, and that he had verified this by "checking out" MSD's file at the Human Rights Commission. Hill Dep. 21-22: 3-18, Sept. 30, 2014; R. 72-73.
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> (2) Hill testified that there were cases where MSD employees overslept. Hill told of an instance where an alarm was going off in a pump station and, "as the story goes," a white employee did not respond to the alarm, which resulted in millions of gallons being spilled into the Ohio River. Hill testified that MSD submitted a false report to the EPA to protect this employee. He stated that he had not seen this report, but that he was "pretty sure that's a fact." Hill acknowledged that he had not heard any of this information first hand, but that it was

[6] Different spellings of Seigle's name are used throughout the record. We adopt the spelling used in the trial court's order of April 20, 2017.

> "second, third hand information." *Id.* at 24-26: 11-3; R. 73-74.
>
> (3) Hill testified that he had never complained to anyone at MSD that he was being treated differently because of his race. However, Hill stated that he had asked an attorney why he was one of the lowest paid managers at MSD. Hill could not recall when he spoke with this attorney, and he estimated it could have been eight years ago. *Id.* at 75-76: 21-11; R. 81.
>
> (4) Hunt testified that contractors retained by MSD frequently had prior friendships and familial relationships with employees of MSD. As examples, Hunt recalled two former MSD employees who had started their own businesses and subsequently provided services for MSD. Hunt dep. 45: 4-21, Jan. 30, 2014; R. 68.

At the trial court level, Hill additionally pointed to the fact that, when questioning him about his personal relationships with contractors, the APA had only asked about minority contractors, despite the fact that the majority of the contractors hired by Hill were white. Hill also submitted an affidavit to the trial court, in which Clay Calloway, a former MSD employee, testified that while he worked at MSD it was common for all employees to use their work computers for personal matters and that he was unaware of anyone every being disciplined for this practice.

We agree with the trial court that the evidence proffered by Hill does not demonstrate that his race was a contributing and essential factor in MSD's decision to terminate him. Throughout his deposition testimony, Hill makes vague

allegations of a history of race discrimination at MSD; however, when asked to describe a particular instance of discrimination, he is unable to do so. Hill contends that other MSD employees violated the same MSD policies that he did and suffered no consequences. Both Hunt and Calloway offered testimony in support of this contention; however, neither were able to name a specific person who had violated those policies. To demonstrate that race was an essential factor in MSD's decision to terminate him, Hill must offer something more than vague allegations and anecdotes.

Throughout this litigation Hill has only been able to specifically point to one other MSD employee, Seigle, as someone who committed violations of MSD policy of comparable gravitas to the violations committed by Hill. However, a review of the APA report indicates that the APA investigated the allegations Hill raises against Seigle and found that, while an employee reporting to Seigle may have been put in a conflict of interest because of Seigle's marriage to a contractor retained by MSD, Seigle himself had acted appropriately and had committed no violation of MSD policy.[7] The APA report does not reveal any other MSD

[7] In regard to Seigle, the APA report found the following:

> The sole officer of a consulting firm that did business with MSD during our period of examination and MSD's CIO [Seigel] were married in December of 2010. Prior to and from the date of the marriage until or about June 30, 2011, the sole officer was supervised by MSD's Project WIN Information Management Administrator, who reported directly to MSD's CIO. The Project

employee who was found to commit as many violations of MSD policy as Hill did and retained their job. In contrast to the vague allegations Hill puts forth to support his claim of race discrimination, MSD has given specific reasons to supports its decision to terminate Hill's employment and supported those reasons with affirmative evidence. With the exception of the Hyatt Invoice, Hill admitted that he committed each violation cited by MSD in support of Hill's termination. Accordingly, we agree with the trial court that Hill has presented insufficient evidence to demonstrate that his race was a substantial factor in MSD's decision to terminate his employment.

iii. Hill's Retaliation Claim

Under the KCRA, it is unlawful for a person, or for two or more people to conspire:

> To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by [KRS Chapter 344], or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under [KRS Chapter 344.]

> WIN Information Management Administrator also approved and signed the sole officer's invoices. Between FY 2009 through 2011, MSD paid the sole officer of the consulting firm a total of $328,200. Even though the CIO may have appropriately abstained from involvement in any supervision of the sole officer, the fact that he supervised the Project WIN Management Administrator caused her to be conflicted in her supervision of the sole officer of the consulting firm and her duty to act independently on behalf of MSD.

R. 648.

KRS 344.280(1). To establish a *prima facie* case of retaliation, a plaintiff must show that: (1) he engaged in a protected activity; (2) he was disadvantaged by an act of his employer; and (3) there was a causal connection between the activity engaged in and the employer's act. *Kentucky Ctr. for the Arts v. Handley*, 827 S.W.2d 697, 701 (Ky. App. 1991). "[I]f the employer articulates a legitimate, non-retaliatory reason for the decision, the employee must show that 'but for' the protected activity, the adverse action would not have occurred." *Id.* (citing *De Anda v. St. Joseph Hosp.*, 671 F.2d 850 (5th Cir. 1982)).

Hill is unable to make his *prima facie* case. In arguing his retaliation claim, Hill asserts that several individuals at MSD, as well as MSD as a whole, conspired to terminate Hill from employment after Hill had made complaints of racial disparity and discrimination at MSD. Yet, Hill testified that he had never made a complaint concerning race discrimination or harassment to anyone at MSD. Hill dep. 75-77: 18-14, Sept. 30, 2014; R. 81. Hill has not presented any evidence demonstrating that he complained of race discrimination to the APA. To support his retaliation claim, Hill's cites to several instances during his deposition where he brings up racial discrimination occurring at MSD; this testimony was given *after* Hill had been terminated from MSD. Accordingly, Hill is unable to show that he engaged in a protected activity and cannot make a *prima facie* case. The retaliation claim was properly dismissed on summary judgment.

IV. CONCLUSION

In light of the foregoing, we AFFIRM the trial court's grant of summary judgment on Hill's claims brought under the KCRA, but REVERSE the order of summary judgment on Hill's claim under the Whistleblower Act, and REMAND for further proceedings consistent with this opinion.

ALL CONCUR.

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