

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-000048-MR

ROOSEVELT JOHNSON, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 15-CI-00417

LEXINGTON-FAYETTE URBAN COUNTY  
GOVERNMENT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

KRAMER, JUDGE: Roosevelt Johnson, Jr. appeals from an order and judgment of the Fayette Circuit Court summarily dismissing his claims of discrimination, retaliation, and failure to comply with KRS<sup>1</sup> Chapter 67A against appellee, Lexington Fayette Urban County Government (LFUCG). We affirm.

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<sup>1</sup> Kentucky Revised Statutes.

## FACTUAL AND PROCEDURAL HISTORY

Johnson began working for LFUCG's Division of Solid Waste in 2001, in the position of Equipment Operator, Senior.<sup>2</sup> During the course of his employment with LFUCG, Johnson completed specialized management and supervisory training (known as the "Academy" at LFUCG) in 2006. He obtained 24 credit hours from the Kentucky Community and Technical College system in 2009. He was also a military veteran, honorably discharged. Johnson continually received satisfactory annual performance evaluations and standard pay increases. From 2010 – 2014, Johnson applied for, but was denied, numerous promotions for which he claims he was qualified.<sup>3</sup> Johnson asserts he was unlawfully denied the promotions on the basis of race, age, and later, retaliation.

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<sup>2</sup> Prior to employment in the Division of Solid Waste, Johnson was employed in another division at LFUCG since 1991. The record indicates that Johnson retired from LFUCG in 2018. At the time of his retirement, he still held the position of Equipment Operator, Senior.

<sup>3</sup> The actual number of promotions unsuccessfully applied for by Johnson is unclear. There is no evidence in the record that he applied for the position of Public Service Supervisor, Senior, that was awarded to Darrell Stevens on March 14, 2013. However, both parties identify it as one of the promotions that Johnson applied for and was denied. Therefore, we will also treat it as such for the sake of argument. It is also unclear whether Johnson applied for the position of Public Service Supervisor, Senior, that was awarded to Stephon Brown on October 21, 2014. LFUCG argues that Brown was initially appointed to the position and that the appointment did not have an interview process because the position was temporary. The record shows that Brown and Johnson interviewed, with other candidates, for the position of Public Service Supervisor, Senior, on or about June 21, 2010, and again on October 25, 2012. Neither Brown nor Johnson was marked as "Selected" for those positions. Both men also interviewed for the position again on or about February 5, 2014, and Brown was marked as "Selected." It is unknown if this is the same position that was ultimately awarded to Brown in October 2014.

On August 26, 2014, Johnson filed a grievance with LFUCG's

Department of Human Resources that stated, in relevant part,

I have been discriminated against because of my age/race and unfairly treated, during the past 2 – 3 years, I have been selected and interviewed as a qualified candidate for 10 Public Service Supervisory Positions and of all 10 positions I have been passed over and wasn't selected to fulfill the position.

On 8/6/14, I had another interview, and I was not selected also I disagree with the promotion on 8/22/14, for the Supervisory position of the other candidate because I am more qualified to hold the position after over 22yrs., [sic] of supervisory experience.

The grievance was subjected to an investigation and review by LFUCG's Department of Human Resources pursuant to internal policy. Human Resources interviewed eight employees in the Division of Solid Waste, many of whom were on the panels that had interviewed Johnson for the various promotions.<sup>4</sup> The record contains a memorandum issued by the Department of Human Resources on December 8, 2014, in addition to three written interviews with employees who had interviewed Johnson for promotions. The memorandum issued by the Department of Human Resources found that most of Johnson's claims were unsubstantiated. However, the claim regarding the position awarded

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<sup>4</sup> Three individuals who were on panels that interviewed Johnson had since retired or resigned and were unable to be interviewed by Human Resources.

to Manwell Benton was inconclusive because no one who had interviewed Johnson and Benton was available for the investigation.

Johnson applied for two additional promotions during the course of the investigation. After the application and interview procedures, LFUCG again selected other applicants to fill the positions over Johnson. This is the basis of his retaliation claim.<sup>5</sup>

Johnson filed suit in the Fayette County Circuit Court on February 3, 2015, alleging breach of KRS Chapter 67A, breach of contract, race and age discrimination, and retaliation. LFUCG filed for summary judgment on September 15, 2017, and the circuit court summarily dismissed all of Johnson's claims. This appeal followed. Further facts will be developed as necessary.

### **STANDARD OF REVIEW**

When a trial court grants a motion for summary judgment, the standard of review for the appellate court is *de novo* because only legal issues are involved. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the

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<sup>5</sup> The record shows that there were different panels, comprised of different interviewers, who interviewed Johnson for the various promotions over the course of his employment at LFUCG.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rule of Civil Procedure (CR) 56.03. The movant bears the initial burden of demonstrating that there is no genuine issue of material fact in dispute. The party opposing the motion then has the burden to present, “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Steelvest Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). A party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914 (Ky. 1955). “[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation.” *O’Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (quoting *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant (*i.e.*, Johnson) and must further consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 780 (Ky. App. 1996).

## ANALYSIS

Pursuant to KRS 344.040(1)(a), it is unlawful for an employer to “fail or refuse to hire . . . any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual’s race, color, religion, national origin, sex, [or] age forty (40) and over[.]” The Kentucky Supreme Court has consistently interpreted the civil rights provisions of KRS Chapter 344 consistent with applicable federal anti-discrimination laws. *See Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005) (citations omitted).

In establishing a discrimination case, a plaintiff must satisfy the burden-shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This burden-shifting approach allows a victim of discrimination to establish a case through inferential and circumstantial proof in the absence of any direct evidence of discriminatory animus. *Williams*, 184 S.W.3d at 495. It is undisputed that Johnson has not offered any direct evidence of discriminatory animus.

Therefore, Johnson needs to establish a *prima facie* case comprised of four elements for his claims of race and age discrimination for failure to promote. Johnson has to show that: (1) he is a member of a protected class; (2) he applied and was qualified for a promotion; (3) he was considered for and denied the

promotion; and (4) other employees of similar qualifications who were not members of the protected class received promotions. *Walker v. Commonwealth*, 503 S.W.3d 165, 174 (Ky. App. 2016) (citation omitted). For Johnson’s age discrimination claim, the fourth element is modified to require promotion not of a person outside the protected class, but promotion of a substantially younger person. *Williams*, 184 S.W.3d at 496. If a plaintiff establishes a *prima facie* case, the employer must rebut the presumption of discrimination by proffering a legitimate, nondiscriminatory reason for its decision. The plaintiff then bears the burden of showing, by a preponderance of evidence, that the defendant’s proffered reason is pretextual and that he is the victim of intentional discrimination. *Walker*, 503 S.W.3d at 174.

### **I. Race Discrimination Claim**

Johnson satisfies the initial phase of the *McDonnell Douglas* framework in establishing a *prima facie* case for racial discrimination. His race (African American) places him within a protected class; from July 19, 2010 – September 8, 2014, he applied for ten promotions for which he was objectively qualified;<sup>6</sup> he was considered for and denied each of the ten promotions; and other employees of similar qualifications who were not in a protected class received

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<sup>6</sup> At this initial phase, it is not Johnson’s burden to persuade the trier of fact that he was as qualified as the applicant who filled the position. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 699 (Ky. App. 1991).

promotions. It is undisputed that the majority of available promotions Johnson applied for were awarded to other African Americans; thus, Johnson failed to establish a *prima facie* case in those instances. However, three of the promotions within the stated time frame went to Caucasian men: Darrell Stevens, Ronald “Gary” Warner, and Eric Wheeler.<sup>7</sup>

To refute the *prima facie* case, LFUCG is required only to articulate a legitimate nondiscriminatory reason not to promote Johnson. At this stage, LFUCG bears only the burden of production and persuasion is not required. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981). LFUCG argues that Johnson was not selected for promotion due to his poor performances during the interview phase of the promotion process, rather than due to his race. LFUCG emphasizes the importance of interview performance because the position of Public Service Supervisor, Senior, is required to frequently and effectively communicate with the public.

LFUCG produced an affidavit from Tamara Walters, Deputy Director of Human Resources, that describes the two-step procedure utilized by LFUCG during the hiring or promotion process. First, human resources pre-screens all applicants based on objective qualifications such as experience, education, military experience, whether the applicant has attended LFUCG’s Academy, and previous

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<sup>7</sup> John Day, who received a promotion over Johnson on October 10, 2014, was also Caucasian; however, this position will be addressed with the retaliation claim.

job performance. After this initial screening, the hiring manager selects candidates for interviews and the pre-screened applicants are interviewed by a panel in the second phase of the hiring process. The panels then make a recommendation to the hiring manager on the best candidate for the position.

LFUCG also produced an affidavit from Shadrick Edmonds, Operations Manager. Edmonds, who is African American, was chosen over Johnson for promotion on two occasions. Edmonds also states that he was on at least two of the panels that interviewed Johnson for promotion. Edmonds emphasizes the importance of the interview in the promotion/hiring process due to the public communication requirements of supervisory positions at LFUCG. Edmonds then goes on to state that Johnson performed poorly in his interviews in that he gave single-word answers to open-ended questions, without elaboration, and appeared annoyed that he was required to undergo an interview.

After a defendant has met the burden of providing a legitimate, nondiscriminatory reason for failure to promote, the *McDonnell Douglas* framework disappears. *Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 133, 142, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000). Johnson must now demonstrate, by preponderance of the evidence, that LFUCG intentionally and unlawfully discriminated against him and that the reasons given by LFUCG are merely pretextual. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 700

(Ky. App. 1991). “While intentional discrimination may be inferred from circumstantial evidence, there must be cold hard facts presented from which the inference can be drawn that race . . . was a determining factor.” *Id.* Plaintiff may do this by showing (1) the proffered reason is false; (2) the proffered reason did not actually motivate the decision; and (3) the plaintiff could show that the reason given was insufficient to motivate the decision. *Williams*, 184 S.W.3d at 497 (citation omitted). After careful review of the record, Johnson provided no testimony or evidence to contradict LFUCG’s legitimate nondiscriminatory reason for selecting other candidates.

Johnson asserts only that former Division Director Steve Reese, who is Caucasian, made the ultimate decision to promote three Caucasian men over Johnson. However, other than this broad assertion, Johnson offers no evidence in support of his racial discrimination claim. Johnson did not depose Reese or any employee of LFUCG, past or present, including any identified panel members who interviewed Johnson. Johnson does not address the fact that Reese routinely promoted other African Americans to positions that Johnson also applied.<sup>8</sup> He did not refute or attempt to refute the affidavits submitted on behalf of LFUCG by Tamara Walters and Shadrick Edmonds that detailed the hiring process and Johnson’s poor performance in the interviews.

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<sup>8</sup> African Americans received seven of the ten promotions for which Johnson applied and interviewed from July 19, 2010 – September 8, 2014.

Johnson argues that LFUCG's legitimate nondiscriminatory reason for not promoting him has no basis in fact because he received satisfactory performance evaluations in his position as Equipment Operator, Senior. Johnson did submit evidence of his annual performance evaluations, but failed to demonstrate how these relate to his performance during promotional interviews and to the performance required for a supervisory position. There is also no evidence in the record that whomever completed Johnson's annual performance evaluations was in a decision-making role with regard to promotions at LFUCG.

Johnson submitted an affidavit from Lonnie Winn, former Public Service Supervisor, Senior, at LFUCG (the same position that Johnson applied for in each instance that he alleges discrimination) which states that Winn believes Johnson was qualified to become a supervisor. However, there is no evidence in the record that Winn was in a position to hire or promote employees at LFUCG, or that Winn ever interviewed Johnson. Johnson also submitted an affidavit from Patrick Wright, former employee at LFUCG, that stated he believed Johnson was "more than qualified" to become a supervisor. However, Wright held the same position as Johnson (Equipment Operator, Senior) and, therefore, was not involved in making decisions about hiring or promoting employees at LFUCG.

Johnson argues that LFUCG's legitimate, nondiscriminatory reason has no basis in fact because LFUCG "has provided no evidence even as to the

actual Interview Panels for the promotions given . . . LFUCG had provided no information as to the identity of the Panel members, nor of the names they gave to the Director, nor of any of the Panel member's opinions." However, in the context of the *McDonnell Douglas* framework, this is not LFUCG's burden. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. LFUCG was required only to articulate some legitimate nondiscriminatory reason for Johnson's rejection. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. Evidence regarding the interview panels, its members, and their opinions of Johnson could have been obtained from LFUCG through discovery and could have potentially been used by Johnson to bolster his argument of pretext. However, Johnson conducted very little discovery during the more than two and one-half years that this case was on the trial court's active docket prior to entry of summary judgment.<sup>9</sup>

While the interview phase of the hiring process utilized by LFUCG is undoubtedly subjective, an employer is not prohibited from using his discretion in choosing among qualified candidates as long as the selection is not based on discriminatory criteria. *Burdine*, 450 U.S. at 259, 101 S.Ct. at 1096. The record is

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<sup>9</sup> The record shows only that Johnson propounded interrogatories and requests for production of documents on LFUCG on May 27, 2015.

devoid of any facts, absent broad assertions, from which racial discrimination could be inferred.

## **II. Age Discrimination Claim**

Johnson also established a *prima facie* case for age discrimination. His age (Johnson was born in 1956) places him within a protected class at all relevant times; from July 19, 2010 – September 8, 2014, he applied for approximately ten promotions for which he was objectively qualified; he was considered for and denied each of the promotions; and other employees who were substantially younger than Johnson received promotions.<sup>10</sup> Of those promoted over Johnson, five were substantially younger than Johnson, even though they were also in the protected age class.<sup>11</sup>

To refute the *prima facie* case, LFUCG again argues that Johnson was not selected for promotion due to his poor performances during the interview phase of the hiring process, as opposed to his age. The affidavit from Shadrick Edmonds, offered by LFUCG to detail Johnson’s performances during interviews, states that Edmonds was born in 1964; thus demonstrating that he is not substantially younger

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<sup>10</sup> See *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). In *Balderston v. Fairbanks Morse Engine Div. of Coltec Industries*, 328 F.3d 309, 322 (7th Cir. 2003), the United States Court of Appeals for the 7th Circuit defined “substantially younger” as ten years younger.

<sup>11</sup> John Day and George Cummins, promoted on October 10, 2014, were also younger than Johnson by ten or more years; however, those promotions are addressed with the retaliation claim.

than Johnson and also placing him in the same protected class as Johnson with respect to age (over 40). LFUCG's reason for not promoting Johnson refuted the *prima facie* case of age discrimination.

As with his claim for racial discrimination, Johnson must now demonstrate—by preponderance of the evidence—that LFUCG intentionally and unlawfully discriminated against him and that the reasons given by LFUCG are merely pretextual. *Handley*, 827 S.W.2d at 700. In short, he must again produce “cold hard facts . . . from which the inference can be drawn that [age] . . . was a determining factor.” *Id.* After careful review of the record, we conclude that Johnson has failed to prove pretext.

Johnson again offers only broad assertions and no evidence in support of his age discrimination claim. He leaves unaddressed that LFUCG routinely promoted individuals in the protected age class, whether younger or substantially younger than Johnson. He again did not refute or attempt to refute the affidavits submitted on behalf of LFUCG by Tamara Walters and Shadrick Edmonds which detailed LFUCG's hiring procedures and the stated importance of the interview in selecting candidates for promotion.

There is no evidence in the record that Johnson outperformed the candidates who were ultimately selected for promotions during the interviews. Nor is there evidence that the panel members or the Division Director knew

Johnson's age at the time of the interviews. As previously stated, Johnson conducted very limited discovery in this matter, and the affidavits he submitted were inapplicable to the requirements necessary for promotions applied for by Johnson at LFUCG. Accordingly, the record is devoid of any facts, absent broad assertions, from which age discrimination could be inferred.

### **III. Retaliation claim**

Johnson was denied two promotions after he filed his grievance with the Department of Human Resources on August 26, 2014. Specifically, Johnson claims that the two positions of Public Service Supervisor, Senior, awarded to John Day and George Cummins on October 10, 2014, were in retaliation for his filing the grievance. John Day is seventeen years younger than Johnson and Caucasian. George Cummins is ten years younger than Johnson and African American. In 2014, both men were also in the protected class with regard to age (*i.e.*, they were both over 40).

The *McDonnell Douglas* scheme is applicable to retaliation claims. A *prima facie* case of retaliation requires a plaintiff to demonstrate “(1) that plaintiff engaged in [protected activity;] (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.” *Brooks v. Lexington-*

*Fayette Urban County Housing Authority*, 132 S.W.3d 790, 803 (Ky. 2004)

(citation and quotation marks omitted). The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the decision. The employee must then show that “but for” the protected activity, the adverse employment action would not have occurred. *Handley*, 827 S.W.2d at 701.

There is no evidence that Johnson was denied promotions on October 10, 2014, because he had filed a grievance (*i.e.*, there is no evidence of a causal connection between the protected activity and LFUCG’s failure to promote Johnson). LFUCG continues to reiterate that Johnson was not promoted due to his poor interview performances. Johnson again failed to refute LFUCG’s legitimate nondiscriminatory reasons for failure to promote him. LFUCG’s Division Director at the time, Tracey Thurman, signed Johnson’s grievance on September 4, 2014, and denied the promotions to Johnson on October 10, 2014. However, temporal proximity of the protected activity to the adverse employment action, standing alone, is insufficient to establish a causal connection for a retaliation claim. *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 321 (6th Cir. 2007).

There were no changes to Johnson’s employment status or job duties after he filed the grievance. He continued to receive standard pay increases in his ongoing position as Equipment Operator, Senior.

There is no evidence of discrimination in LFUCG's failure to promote Johnson for the ten promotions he applied for from July 19, 2010 – September 8, 2014. Nor was there evidence that he was a victim of retaliation when he was rejected for two additional promotions on October 10, 2014. There is no articulable fact in the record from which an inference of retaliation could be drawn.

#### **IV. Claim pursuant to KRS Chapter 67A**

KRS Chapter 67A codifies the formation and operation of urban county governments in the Commonwealth, including hiring practices. The trial court found that Johnson attempted to relitigate the same set of facts under KRS Chapter 344 and KRS Chapter 67A. The trial court reasoned that KRS 344.040 and KRS 344.280 prescribe the exclusive right and remedy for discrimination and related retaliation, respectively, and that KRS Chapter 67A is preempted by KRS Chapter 344 even though both chapters prohibit misconduct in hiring practices. The reason for the preemption, as articulated by the trial court, is that Johnson's common law cause of action brought under KRS Chapter 67A is based on the same law as his discrimination and retaliation claims, for which a statutory remedy is provided in KRS Chapter 344. *See Grzyb v. Evans*, 700 S.W.2d 399, 401-02 (Ky. 1985).

On appeal, Johnson argues that his claim under KRS 67A is not related to discrimination and retaliation, rather, it is that LFUCG failed to follow

the merit system established by KRS 67A.240 and KRS 67A.270. Specifically, Johnson points to KRS 67A.240(2) which requires that the civil service commission shall certify a list of the applicants, “with the one having the highest average ranked first, and all others ranked numerically.” He also points to KRS 67A.270(6), which requires that seniority be given “material consideration” in promotions.

We address Johnson’s assertion, raised for the first time in his brief, that he is entitled for relief under KRS 446.070 for LFUCG’s alleged violations of KRS 67A. CR 76.12(4)(c)(v) requires the brief for appellant to contain “a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” In the hearing conducted by the trial court on October 31, 2017, the court repeatedly questioned whether KRS Chapter 67A provides either a cause of action or a remedy. Johnson did not raise the argument that KRS 446.070, which codifies negligence *per se*,<sup>12</sup> is an appropriate remedy for an alleged violation of KRS Chapter 67A. Careful review of the record shows that Johnson did not argue KRS 446.070 in any pleading. Because Johnson failed to raise this particular argument before the trial court, we consider it waived. An appellant preserves for appellate review only those issues fairly brought to the attention of the trial court. *Richardson v. Commonwealth*, 483

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<sup>12</sup> *Ford v. Faller*, 439 S.W.3d 173, 177 (Ky. App. 2014).

S.W.2d 105, 106 (Ky. 1972). This Court “is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Even if we accept Johnson’s argument that his claims under KRS Chapter 67A are not related to discrimination, KRS Chapter 67A provides for no cause of action in circuit court, nor does it provide a remedy for any alleged violation. Moreover, there is no evidence in the record showing that LFUCG did not follow the procedures set forth in the chapter or that it disregarded seniority, ranking, or military service. The record indicates that applicants for potential promotions, including Johnson, were certified and ranked by LFUCG. This ranking qualified Johnson, and others, for interviews. However, Johnson fails to articulate why his ranking as a qualified applicant, among other qualified applicants, should guarantee that LFUCG promote him. Nothing in KRS Chapter 67A prohibits LFUCG from considering other factors, nor does it state that seniority must be the only material consideration. Regardless, Johnson’s claim under KRS Chapter 67A must fail.

### **CONCLUSION**

For the foregoing reasons, the judgment of the Fayette County Circuit Court summarily dismissing Johnson’s claims is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda B. Sullivan Leahy  
Penacook, New Hampshire

BRIEF FOR APPELLEE:

John L. Bishop  
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