Circuit Court for Howard County
Case No. C-13-19-000122

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2073

September Term, 2019

SENATE ALEXANDER

v.

COLUMBIA ACADEMY, LLC, ET AL.

Berger,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Shaw Geter, J.

Filed: February 18, 2021

This appeal arises from a decision of the Circuit Court for Howard County granting summary judgment against Senate Alexander, appellant, and in favor of Columbia Academy, LLC ("Columbia Academy"), Patricia Kincaid, and Thomas Kincaid, appellees. Appellant filed a complaint, and later an amended and a second amended complaint, against appellees asserting claims for breach of contract; violation of § 3-501 *et seq*. of the Labor and Employment Article of the Maryland Code, known as the Maryland Wage Payment and Collection Law ("MWPCL"); violation of the Howard County Code on Human Rights; and wrongful discharge. Appellees filed a motion for summary judgment and appellant did not file a response or a request for a hearing. The circuit court, in a written memorandum opinion entered on November 18, 2019, granted appellees' motion.

This timely appeal followed. We note, preliminarily, that in appellant's Civil Information Report, appellant clarified that he is appealing only the circuit court's rulings with regard to Counts One and Three of the second amended complaint, which alleged breach of contract and discrimination on the basis of race. As such, the sole issue presented for our consideration is:

Whether the circuit court erred in granting summary judgment in favor of appellees?

Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The material facts of this case are not in dispute. Columbia Academy is a Maryland corporation that owns and operates child care and early education centers in Howard County. It is owned and managed by Patricia Kincaid and Thomas Kincaid. By letter dated March 30, 2018, Columbia Academy offered appellant employment as the regional

director of the school's pre-school division. Appellant accepted the position and began working in April 2018.

The letter offering appellant employment provided that his starting pay would be "$81,000 annually." The first paragraph of the letter stated: "[t]his offer and your employment with Columbia Academy are conditional on the terms and conditions contained in this letter, and any other written documents provided to you in connection with your employment by Columbia Academy." Various benefits were specified as follows:

> As a full-time employee, you are eligible to enroll in our company's benefits programs effective the first of the month following 60 days from your hire date. These include health, dental, vision, life and other supplemental insurance programs. In addition, you will be automatically enrolled in the company 401(k) retirement plan at 4% contribution following 90 days of employment. Columbia Academy matches employee contributions up to 4% per plan year. Employees are also eligible to receive discounted tuition for their children attending Columbia Academy Schools. You will receive additional information about these and other benefit plans and eligibility requirements.

Although there was no mention of a bonus in the employment contract, and no other written agreement, appellant maintains that Columbia Academy agreed to pay him quarterly bonuses up to $8,100 per year. Appellant's assertion that he was entitled to a bonus was based on negotiations he had with Chris Schuster, Columbia Academy's former Chief Operating Officer, regarding his employment. On March 29, 2018, Schuster sent an email to appellant stating, in part:

> Normally[,] I would call[,] but I know you are finishing out your day and I wanted to make sure I got this to you today.

> We would like to extend an offer to join our team as a Regional Director. The salary would be $80,000.00 with our executive management benefits. Also [sic] would include a bonus plan of up to 10% of salary that you and I would develop together based on performance benchmarks of your locations.
>
> All of this would be articulated in a formal offer letter[,] but I wanted to see if you were interested.

Appellant and Schuster exchanged emails discussing the proposed salary. On March 30, 2018, appellant received an email from Schuster, who wrote:

> I think you're [sic] evaluation of range is fair, but I'm trying to keep things within certain budget levels. I can get you into your proposed range but not exactly at your counter. I can go up to $81,000.00 with a projected start date of 4/23. Please keep in mind that we will be developing an incentive compensation plan that will provide up to $8,100 (10% of base pay) in additional pay per year. It will be obtainable as you and I will develop it together. Frankly there's no point having incentive compensation that you cannot actually earn. If that's the case, it's not really an incentive.

Notwithstanding Schuster's comments about a bonus, the letter offering appellant employment did not include any reference to a bonus. Appellant signed and accepted the letter offering him employment, and worked for Columbia Academy until January 18, 2019, when his employment was terminated.

Shortly thereafter, he filed a complaint in the Circuit Court for Howard County and ultimately a second amended complaint that gave rise to this appeal. Appellant alleged that while he was employed by Columbia Academy he was "subjected to repeated harassment from upper leadership (being interrogated multiple times for 1–2 hours per session), isolation, including but not limited to: having his emails ignored, his phone calls evaded, and his requests for meetings dashed, and exposure to repeated instances of racial degradation." He asserted that the adverse treatment towards him "drastically worsened"

after Schuster's departure from Columbia Academy and after he "asked for his agreed upon bonus[.]" Appellant alleged that Thomas Kincaid made a "derogatory racial slur" when he stated, "[w]e cannot have the inmates running the prison[.]" According to appellant, that comment referred "to disgruntled lower level staff at a particular preschool, who were nearly all minority status employees."

Appellant claimed he "repeatedly informed corporate personnel of Columbia Academy's licensing violations, repeated failures to adhere to a State Issued [sic] Compliance Agreement, and improper supervision of children." On January 8, 2019, he "requested a formal meeting to discuss the payment of his bonus and the grievances he had with the organization regarding organizational practices and unfair treatment toward himself in relation to other staff," as well as Thomas and Patti Kincaid's handling of an incident involving the assault of an employee. Appellant never received a meeting, email, or phone call in response to the grievances he raised. Appellant sent an email to the Kincaids and the new Chief Operating Officer, Don DeVries, that contained "an extensive investigative report about the assault that took place" at one of the preschools, and informed DeVries that "he planned on writing an additional report of incidents at Columbia Academy[.]" One week after sending that email, appellant's employment was terminated.

Appellant claimed that he was wrongfully terminated "because of his race and gender, his concerns regarding [Columbia Academy's] licensing duties and adherence failures, and his asking for his agreed upon bonus." He alleged that he was terminated under the pretense of "ineffective communication, ineffective staff relationship building, and inadequate decision-making."

The second amended complaint set forth four counts. The first count, for breach of contract, was based on the alleged failure of Columbia Academy to pay appellant the bonus for the second, third, and fourth quarter of 2018. Appellant asserted that after he made inquiries pertaining to the bonus, he "was systematically prevented from doing his job fully[,]" and "unknowingly removed from emails, meetings, and general discussions about the pre-school division[.]" He claimed Ms. Kincaid failed to respond to his emails and telephone calls and refused to meet with him. In addition, appellant alleged his termination was in retaliation for an investigation and report he completed about a December 31, 2018 incident involving an assault by one employee against another and conversations he had with DeVries about his intention to write a report documenting the Academy's licensing, health, and safety violations. Count Two set forth a claim for retaliation in violation of the MWPCL. Appellant asserted he was terminated after he complained to his supervisor and the owners of Columbia Academy that he had not received a bonus.

Count Three set forth a claim for discrimination based on race and gender in violation of the Howard County Human Rights Code. Appellant, an African American man, alleged that he was interrogated by DeVries on two occasions, for one and two hours, about Schuster, who, according to Thomas and Patti Kincaid, left Columbia Academy "for alleged misconduct." During the interrogations, it was "insinuated" that appellant "knew about and was somehow involved in the alleged misconduct of Mr. Schuster." Appellant asserted that no one else at Columbia Academy was similarly interrogated and that he was interrogated and subject to discrimination and intimidation because "he is an African American Male who have historically been subject to criminal stereotyping, and racial

profiling." According to appellant, other employees who had been the subject of disciplinary proceedings were "afforded progressive disciplinary action to alert staff of their wrongdoings and provide guidance to assist with improvements." He asserted that Columbia Academy had not terminated other employees who had engaged in a variety of wrongful behavior. Count Four set forth a claim for wrongful discharge based on appellant's January 16, 2019, statement to DeVries that he "was in the process of writing a full report to the state licensing board on all of the licensing issues that transpired at Columbia Academy since April 2018." In a joint pretrial statement filed by the parties, appellant indicated that he would not pursue "his claim for wrongful termination as set forth in Count Four of his Amended Complaint[,]" and would not pursue "his claim for wrongful termination based on gender as set forth in Count Three[.]"

On September 23, 2019, appellees filed a motion for summary judgment asserting that "no incentive compensation plan was ever developed or finalized or put into writing[;]" that appellant's inquiry "about his bonus played no role in the decision to terminate his employment[;]" that in early December 2018, DeVries asked employees who reported to appellant to provide feedback concerning his performance; that "race played absolutely no role in the decision to terminate [appellant's] employment[;]" that appellant "was terminated due to poor work performance[;]" and that appellant was not meeting expectations at the time of his termination "as reflected by the Employee Documentation Termination Form," which set forth in detail the areas where he was failing to meet expectations and was presented to him at the time of his termination. Appellees also asserted that appellant failed to file a complaint with the Howard County Office of Human

Rights, he filed only a pre-complaint questionnaire, and he failed to exhaust administrative remedies. In addition, appellees argued the MWPCL does not include non-retaliation provisions that provide for a private right of action.

Appellant did not file an opposition to the motion for summary judgment and no hearing was held. In a written memorandum and order entered on November 18, 2019, the circuit court found there was no genuine dispute of material fact and appellees were entitled to judgment as a matter of law. With respect to the breach of contract claim, the court found that appellees did not breach the employment contract because the offer letter did not provide for payment of a bonus and no other conversation or memorandum between the parties constituted a contractual agreement to pay a bonus to appellant.

The court agreed with appellees that the MWPCL did not provide for a private right of action for retaliation claims, and found that appellant "should have sued under the Maryland Wage and Hour Law (MWHL)," § 3-428(b)(1)(iii)(1) of the Labor and Employment Article of the Maryland Code, which prohibits employers from "'taking adverse action against an employee because the employee makes a complaint that the employee has not been paid in accordance with the subtitle.'" Notwithstanding, the court determined appellant did not present evidence sufficient to support a claim of retaliation because the evidence established that appellees "did not hastily draft their disciplinary letter in retaliation for [appellant's] constant reminders of a bonus—they terminated him after observing and receiving feedback about his performance in the organization."

The court determined it did not need to reach the merits of appellant's claim that he was unlawfully terminated on the basis of race, or that he was subjected to unlawful racial

harassment under the Howard County Human Rights Law, because appellant failed to exhaust administrative remedies as required by § 20-1202 of the State Government Article. According to the court, even if appellant had complied with the exhaustion requirements, he failed "to make a *prima facie* showing that his termination was due to his race" and failed to produce evidence "to rebut [appellees'] stated reason for his termination." The court also rejected appellant's claim of a racially hostile work environment on the ground that he failed to produce sufficient evidence to support that claim.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and . . . the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). When reviewing the trial court's grant of a motion for summary judgment, the standard of review is *de novo*. *Beka Indus., Inc. v. Worcester County Bd. of Educ.*, 419 Md. 194, 227 (2011) (citing *Dashiell v. Meeks*, 396 Md. 149, 163 (2006)). We independently review the record "'to determine whether the parties properly generated a dispute of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law.'" *Bank of New York Mellon v. Georg*, 456 Md. 616, 651 (2017) (quoting *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017)). "'We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party.'" *Kennedy Krieger Inst., Inc. v. Partlow*, 460 Md. 607, 632 (2018) (quoting *Chateau Foghorn LP*, 455 Md. at 482). "So long as the record reveals no genuine dispute of any material fact 'necessary to resolve the controversy as a matter of law, and it is shown that the movant is entitled to

judgment, the entry of summary judgment is proper.'" *Appiah v. Hall*, 416 Md. 533, 547 (2010) (quoting *O'Connor v. Baltimore County*, 382 Md. 102, 111 (2004)).

DISCUSSION

A. Breach of Contract

It is undisputed that there was a written employment agreement between appellant and Columbia Academy, and a plain reading of that document makes clear that there was no provision for a bonus. Appellant, nevertheless, challenges the trial court's determination that neither the pre-employment nor post-employment conversations between the parties gave rise to an agreement regarding a bonus.

"'[A]n essential prerequisite to the creation or formation of a contract' is 'a manifestation of mutual assent.'" *Advance Telecom Process, LLC v. DSFederal, Inc.*, 224 Md. App. 164, 177 (2015) (quoting *Cochran v. Norkunas*, 398 Md. 1, 14 (2007)). "[T]he validity of a contract depends upon the 'two prerequisites of mutual assent . . . namely, an offer and an acceptance.'" *County Comm'rs for Carroll County v. Forty West Builders, Inc.*, 178 Md. App. 328, 377 (2008) (quoting 3 Eric M. Holmes, Holmes's Appleman on Insurance 2d, § 11.1 at 93 (1998)). Manifestation of mutual assent includes both an intent to be bound and definiteness of terms. *Advance Telecom Process, LLC*, 224 Md. App. at 177.

The record before us reveals there was no mutual assent to enter into an agreement to pay appellant a bonus. The letter offering appellant employment included an annual salary and information about other benefits, but made no mention of a bonus. The offer letter clearly provided that the offer of employment was based "on the terms and conditions

contained in this letter, and any other written documents provided to you in connection with your employment with Columbia Academy." The terms of the contract are clear and unambiguous; and, as a result, parole or extrinsic evidence of what the parties meant or what occurred during their negotiations was inadmissible to vary or contradict the clear written terms. *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985) (citing *Board of Trustees of the State Colleges of Maryland v. Sherman*, 280 Md. 373, 380 (1977)). The terms of the agreement "'will not give away to what the parties thought that the agreement meant or intended it to mean.'" *Spacesaver Sys., Inc. v. Adam*, 440 Md. 1, 8 (2014) (quoting *Gen. Motors Acceptance Corp.*, 303 Md. at 261). Accordingly, the trial court acted properly in granting summary judgment in favor of appellees on the breach of contract claim.

B. Discrimination on the Basis of Race

Appellant next contends the trial court erred in granting summary judgment in favor of appellees with respect to his claim of discrimination. In Count Three of his second amended complaint, appellant claimed he was terminated based on his race and he was subjected to unlawful harassment based on his race in violation of the Howard County Human Rights Law, codified in the Howard County Code, § 12-200 *et seq.*, which, among other things, prohibits such discrimination. *See* Howard County Code, § 12-208. In our view, appellant failed to exhaust his administrative remedies and thus, the trial court properly granted judgment in favor of appellees.

Section 20-1202 of the State Government Article of the Maryland Code provides:

> (a) **Scope of section.** — This section applies only in Howard County, Montgomery County, and Prince George's County.
>
> (b) **Civil action authorized.** — In accordance with this section, a person that is subjected to a discriminatory act prohibited by the county code may bring and maintain a civil action against the person that committed the alleged discriminatory act for damages, injunctive relief, or other civil relief.
>
> (c) **Time for filing; venue**. — (1) An action under subsection (b) of this section shall be commenced in the circuit court for the county in which the alleged discriminatory act occurred within 2 years after the occurrence of the alleged discriminatory act.
>
> (2)(i) Subject to paragraph (1) of this subsection, an action under subsection (b) of this section alleging discrimination in employment or public accommodations may not be commenced sooner than 45 days after the aggrieved person files a complaint with the county unit responsible for handling violations of the county discrimination laws.
>
> (ii) Subject to paragraph (1) of this subsection, an action under subsection (b) of this section alleging discrimination in real estate may be commenced at any time.
>
> (d) **Fees and costs.** — In a civil action under this section, the court may award the prevailing party reasonable attorney's fees, expert witness fees, and costs.

It is undisputed that appellant filed a pre-complaint questionnaire with the Howard County Office of Human Rights and that he failed to file an administrative complaint. The questionnaire filed by appellant was titled, "Howard County Office of Human Rights Pre-Complaint Questionnaire," and provided that "[t]here is no guarantee that the information submitted will constitute a [basis] for filing a formal complaint."

In addition, appellant admittedly failed to wait forty-five days after filing an administrative complaint before filing an action in the circuit court as required by § 20-1202 of the State Government Article. Appellant has provided no legal authority, and we

are unaware of any, in support of his contention that the pre-complaint questionnaire should be treated as an administrative complaint. Moreover, his argument that he should not be penalized for failing to abide by the required forty-five day waiting period because he was proceeding in proper person is unavailing because the rules of procedure in Maryland apply to all parties, whether they are represented by counsel or not. *Tretick v. Layman*, 95 Md. App. 62, 68 (1993). "No different standards apply when parties appear *pro se*." *Id.* at 86.

Even assuming that appellant's failure to exhaust administrative remedies could somehow be excused, he would fare no better because he failed to establish a *prima facie* case of either racial discrimination or severe or pervasive race-based harassment. Maryland courts analyze claims of race and gender discrimination applying the burden-shifting analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–02 (1973).[1] *Nerenberg v. RICA of Southern Maryland*, 131 Md. App. 646, 661–62 (2000). Although the *McDonnell Douglas* case concerned an unlawful refusal to hire, the framework of proof adopted in that case has since been applied to other employment discrimination claims, including those alleging discriminatory terminations. *Id.* at 661. Pursuant to *McDonnell Douglas*, in order to establish a *prima facie* case of discrimination, a plaintiff must prove: 1) that he or she was in a protected class; 2) that he or she was discharged; 3) at the time of the discharge, he or she was performing his or her job at a level that met the employer's legitimate expectations; and 4) the discharge occurred under circumstances that raise a reasonable inference of discrimination. *See McDonnell*

[1] Maryland courts have a "history of consulting federal precedent in the equal employment area." *Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 652 (2011).

Douglas, 411 U.S. at 802–06; *Nerenberg*, 131 Md. App. at 663 (quoting *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995)).

If the plaintiff succeeds in establishing a *prima facie* case, the burden of production "shifts to the defendant to articulate some legitimate, non-discriminatory explanation which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Ennis*, 53 F.3d at 58. "When the employer does so, the [plaintiff] then must prove, by a preponderance of the evidence, that the employer's stated reason for the termination was a pretext." *State Comm'n on Human Relations v. Kaydon Ring & Seal, Inc.*, 149 Md. App. 666, 676–77 (2003).

Viewing the evidence in the light most favorable to appellant, the evidence adduced with respect to the third and fourth prongs of the *McDonnell Douglas* test does not support an inference that the decision to terminate appellant's employment was based on illegal discriminatory criteria. Appellees produced ample evidence that appellant was terminated from employment because of his poor work performance and failure to meet legitimate expectations. The evidence produced by appellant, including that he was the only African American man, and one of four men among seventeen employees in leadership positions, and a comment by Thomas Kincaid that "we cannot have the inmates running the prison," was insufficient to overcome the evidence of appellant's performance issues and demonstrate that racial discrimination was the cause for his termination. Appellant acknowledged in his deposition that he did not know the racial makeup of the people who applied for leadership positions or their qualifications. He also acknowledged he never heard Don DeVries or Pattie Kincaid, the two people along with Thomas Kincaid who

made the decision to terminate his employment, make any derogatory or racial comments. This testimony combined with the statement that "we cannot have the inmates running the prison," which appellant acknowledged was racially neutral on its face, was insufficient to overcome Columbia Academy's evidence that showed he was terminated from employment because of his poor performance.

In his pre-complaint questionnaire and in his deposition, appellant identified other staff members whom he alleged were similarly situated, but who did not receive "the same treatment" as him, "namely harassment and termination." Although neither party produced the applicable pages of appellant's deposition, our review of the record revealed that the white female employees identified by appellant reported to him and were under his leadership. In addition, some of the alleged actions occurred before appellant was employed by Columbia Academy and he lacked firsthand knowledge of them. Appellant's allegations and deposition testimony were insufficient to rebut Columbia Academy's nondiscriminatory justification for the termination of his employment. There was no evidence to establish that appellant performed his work at a level sufficient to meet Columbia Academy's legitimate expectations, and appellant failed to produce sufficient evidence to establish that appellees' reason for terminating his employment was a pretext.

The trial court also did not err in granting summary judgment in favor of appellees with respect to appellant's claim of a racially hostile work environment. In order to establish a hostile work environment claim, a plaintiff must show that the challenged conduct was (1) unwelcome; (2) based on race, gender, or protected activity; (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive

atmosphere; and (4) imputable on some factual basis to the employer. *Magee v. DanSources Tech. Servs.*, 137 Md. App. 527, 550 (2001). In order to form a basis for a hostile work environment claim, the harassing conduct must be sufficiently extreme as "'to amount to a change in the terms and conditions of employment.'" *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

Our review of the record reveals that appellant failed to present sufficient evidence to support his hostile work environment claim. Appellant points to Thomas Kincaid's comment that "we cannot have the inmates running the prison," and alleged "interrogations" by DeVries. However, without more, that evidence is insufficient to establish pervasive conduct that amounts to a racially hostile work environment. As we have already noted, appellant conceded that the statement attributed to Thomas Kincaid is not racial on its face and it does not rise to the level of creating a racially hostile work environment. There was no other evidence of any racially derogatory comments by Thomas Kincaid. Moreover, the alleged "interrogations" by DeVries involved work-related matters pertaining to the termination of Schuster's employment. Accordingly, even if appellant's failure to exhaust administrative remedies could somehow be excused, we would hold that the entry of summary judgment in favor of appellees was appropriate because appellant failed to establish a *prima facie* case of either racial discrimination or severe or pervasive race-based harassment.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.