

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000388-MR

STEVEN J. ADDISON

APPELLANT

v. APPEAL FROM OWSLEY CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 97-CI-00074

JAMES E. BICKFORD, and
ROY A. MASSEY

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, and KNOX, JUDGES.

KNOX, JUDGE: Appellant, Steven J. Addison (Addison), appeals the order of the Owsley Circuit Court dismissing his cause of action against appellees, James E. Bickford and Roy A. Massey, for lack of jurisdiction. We affirm.

Addison was employed by the Commonwealth of Kentucky, and assigned to the Natural Resources and Environmental Protection Cabinet (Cabinet) in the capacity of a Chief Environmental Enforcement Specialist within the Division of Forestry. On or about July 3, 1996, appellee, James E. Bickford (Bickford), Secretary of the Natural Resources and Environmental

Protection Cabinet, issued a memorandum which was circulated to employees of the Division of Forestry. The memorandum provided:

It has been brought to my attention that some of our employees may be carrying weapons in state owned vehicles or concealed on their person while on official duty. This practice is not approved by this office or any subordinate element of this Cabinet. It is essential that all be advised that carrying privately owned weapons while on official duty or in state owned vehicles is prohibited. In addition, employees should be advised that carrying a concealed weapon in violation of KRS 527.020 is a Class A misdemeanor. Any Cabinet employee found carrying a privately owned weapon while on official duty or in state owned vehicles will be subject to disciplinary action and may also be subject to criminal prosecution.

This Cabinet is currently reviewing this policy to determine if certain employees should be authorized to carry or transport weapons in the discharge of their official duties. Should this policy be approved (and it has not at this time), weapons would be state owned, and extensive personnel screening, training, and weapons qualifications would have to be completed prior to any authorization to carry or transport weapons. In the meantime, no employee of this Cabinet is to carry a personal weapon while performing official duties, or at any time in state owned vehicles.

Secretary Bickford met with the employees of the Department of Forestry at Addison's field office on July 10, 1996. During this meeting Addison discussed with Bickford not only the weapons issue but also whether the use of flashing blue lights was appropriate in official vehicles. Secretary Bickford specifically directed that while an internal committee was reviewing the issue of weapons, the possession of same was strictly prohibited while on Cabinet duty. Similarly, Secretary

Bickford clearly directed that blue lights were not to be used in Forestry vehicles.

On February 4, 1997, Bickford issued a policy statement on personal weapons which provided:

It is essential that all employees be advised that any practice of carrying privately owned weapons in state owned vehicles or on their person while on official duty is not approved by this office or any subordinate element of this Cabinet and is prohibited.

Any Cabinet employee disregarding this policy will be subject to disciplinary action up to and including dismissal.

Addison received a letter from Bickford on June 5, 1997, notifying Addison that, in accordance with 101 KAR 2:100 § 8(4), he was being placed on special leave with pay, pending an investigation of the following alleged offenses: On June 3 and June 5, 1997, he was observed by Owsley County Sheriff Robert Hensley wearing a gun-belt and gun while in uniform and on official duty in his capacity as Chief Environmental Enforcement Specialist with the Division of Forestry. This violation was in contravention of the above-quoted memo and policy, and as such a violation of Personnel Regulation 101 KAR 1:345 § 1.

Following the investigation, on July 16, 1997, Bickford sent Addison a letter advising him of the Cabinet's intent to dismiss him for the following infractions: (1) On or about April 29, 1997, an Owsley County deputy sheriff observed Addison responding to a motor vehicle accident in a Forestry vehicle operating a flashing blue light on the dashboard;¹ (2) On July 3,

¹ This allegation was subsequently dismissed by the
(continued...)

1997, Sheriff Hensley observed Addison wearing a Forestry uniform, gun-belt and gun while in the sheriff's office; and on July 5, 1997, Sheriff Hensley observed Addison going toward the county attorney's office, again, wearing a Forestry uniform, gun-belt and gun; (3) The Owsley County circuit court clerk, county attorney, county constable, and two (2) deputy sheriffs all report having seen Addison, at various times, wearing a Forestry uniform with a gun-belt and gun; (4) During an interview with a Cabinet Office Legal Services investigator, Addison admitted to openly carrying a weapon while on Cabinet duty, and, while fully aware of the Cabinet policy prohibiting same, stated that he did not believe the policy applied to him as he felt compelled to carry a weapon for his own safety. The notice concluded that such conduct constituted lack of good behavior and unsatisfactory performance of Addison's job duties in violation of 101 KAR 1:345 § 1. The reply and appeal process was then outlined in the remainder of the letter.

Addison proceeded to appeal his dismissal pursuant to the procedures set forth in KRS 18A.095. Having failed to achieve the requested relief, Addison has appealed the final order of the Personnel Board to the Franklin Circuit Court, as directed by KRS 18A.100, where the case is currently pending.

The matter sub judice arises from a separate cause of action Addison asserted in the Owsley Circuit Court, alleging the Cabinet's policy, as promulgated by Bickford, violates the

¹(...continued)
Personnel Board as unsubstantiated.

Kentucky Constitution §§ 1(7) and 2, and that he is afforded relief under sections 14, 54, and 241 of our Constitution, as well as the common law doctrine of "implied cause of action." The sum of Addison's complaint suggests the Cabinet's refusal to permit him from carrying a personal weapon while engaged in his official capacity constituted a "constitutional tort" giving rise to an independent cause of action and an award of damages. The Owsley Circuit Court dismissed the action upon finding that Addison's exclusive remedy was vis à vis KRS 18A.095 and KRS 18A.100. We agree.

On appeal Addison maintains the Cabinet's policy penalized him for asserting his constitutional right to bear arms in defense of himself, and violates KRS 338.031(1)(a) requiring employers to ensure employees "are free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . [.]" First, we note that KRS 338.031 is part of the Kentucky Occupational Safety and Health Act (KOSHA) as set forth in KRS 338.011 through KRS 338.991. Specifically, KRS 338.021(2) precludes independent civil actions based on KOSHA. Childers v. Int'l Harvester Co., Ky. App., 569 S.W.2d 675, 677 (1978). As such, Addison's reliance on this statutory provision is without merit.

Second, there is no dispute that Addison's position was within the "classified service" of the Commonwealth, known as the "merit system," established under KRS 18A.005 through 18A.200. Specifically, KRS 18A.005(7) defines "classified service" as including "all the employment subject to the terms of this

chapter . . . [.]” As detailed above, Addison was dismissed for the intentional and repetitive violation of a Cabinet policy regarding the use and possession of weapons while acting in his official capacity and operating a state vehicle. As such, his avenue of redress, as determined by the circuit court, is found in KRS 18A.095. “KRS 18A.095 vests the board with the exclusive authority, if it finds that the action taken by the appointing agency was excessive, to alter, modify, or rescind the penalty imposed.” Wilson v. Bureau of State Police, Ky. App., 669 S.W.2d 18, 21-22 (1984) (overruled on other grounds). These statutory provisions, and their attendant administrative regulations, provide the forum and procedure by which claims akin to those asserted by Addison are to be addressed.

In the event a party remains aggrieved by the Personnel Board’s final order, the proper avenue of relief is to file a petition with the clerk of the Franklin Circuit Court in accordance with the provisions of KRS Chapter 13B. KRS 18A.100(2). Moreover, “[a] party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.” KRS 13B.140(2).

We are cognizant of the fact that Addison alleges a “constitutional tort” entitling him to damages which are outside the scope of remedy available by the Personnel Board. However, we glean Kidd v. Montgomery, Ky. App., 583 S.W.2d 87 (1979) instructive on this point. In Kidd, a terminated Commonwealth

employee brought suit in circuit court seeking damages and reinstatement. The circuit court entered summary judgment for the Commonwealth on the grounds that Mrs. Kidd had failed to properly exhaust her administrative remedies. On appeal, this Court considered "whether Mrs. Kidd followed the appropriate remedies in challenging her dismissal, and whether certain statutes and regulations pertaining to merit system personnel are unconstitutional as applied to Mrs. Kidd." Id. at 88. The Court recognized "the principle that public employees cannot be dismissed for invoking and refusing to waive their constitutional right[s] However, the statutes and administrative regulations of this Commonwealth have provided a forum and a procedure whereby such arguments are to be raised." Id. at 89.

(Citations omitted). The Court concluded:

We are aware of the rule that direct judicial relief is available without exhaustion of administrative remedies where a statute [, regulation, or policy] is charged to be void on its face, but nowhere in the complaint filed in circuit court did appellant allege that any particular statute or regulation was void on its face. The thrust of the argument in circuit court was a grievance regarding "individuals here involved violating [Mrs. Kidd's] . . . constitutional privilege against self-incrimination."

Id. at 90. (Citation omitted).

As in Kidd, the gist of Addison's circuit court complaint was that "[t]he policy enunciated by the Defendant JAMES E. BICKFORD, in the memorandums [sic] of July 3, 1996, and February 4, 1997, was illegal as a violation of the Kentucky Constitution §§ 1 and 2, and was illegal as pertains to Plaintiff, STEVEN J. ADDISON, pursuant to KRS 338.031." Hence,

as Addison has a remedy in judicial review through the avenue provided by statutes and administrative regulations, the Owsley Circuit Court was without jurisdiction to entertain the matter. As such, in accordance with the above stated authority, the order of the Owsley Circuit Court dismissing the action is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. David Emerson
Lexington, Kentucky

BRIEF FOR APPELLEES:

C. Michael Haines
Frankfort, Kentucky