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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001547-MR

CHARLES L. WILSON, JR. APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 03-CI-00469

CITY OF CENTRAL CITY, KENTUCKY, AND
HUGH W. SWEATT, MAYOR APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

KELLER, JUDGE: Charles L. Wilson, Jr., appeals from the trial court's dismissal of his case by summary judgment. In his appeal, Wilson argues that there are questions of fact regarding the termination of his employment from the City of

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Central City, Kentucky (Central City), Water Works Department (the Water Works), and that summary judgment was not appropriate. Specifically, Wilson argues that he was not an "at-will" employee; that he was not given any warning that his job performance was deficient; that he was dismissed for reasons that were inadequate to support his termination; and that his discharge was in retaliation for his "whistleblower" activities. Having reviewed the record, we affirm.

FACTS

Wilson began working for Central City in 1982 as an operator at the Water Works. In 1985, Wilson was promoted to head operator, a position he held until his termination in June 2003. Wilson's termination is at the root of this litigation; therefore, we will focus our summary on the facts surrounding that event.

In 1983 or '84, the Water Works purchased a computer for use in monitoring water and chemical levels. Through the years, the Water Works and/or Central City bought successive replacement computers. Sometime in the 1990's, access to the internet became available on the computer at the Water Works. Initially, and during the times relevant herein, access to the internet was through a dial-up account. For most of the time Wilson worked for Central City there was only one telephone line at the Water Works. Therefore, when someone was using the computer at the Water Works to access the internet, no incoming calls could be received. It is unclear when, but at some time before Central City discharged

Wilson, the Water Works got a second telephone line, making it possible to use the telephone while also accessing the internet.

In 2000, Wilson noticed that the computer at the Water Works was "losing data." Wilson conducted an investigation and, with the assistance of a computer technician, determined that one of the Water Works employees, Chris Pentecost, was using the computer to download and play games. According to Wilson, Pentecost was also using an internet "scrubber" in an attempt to hide his activities. Wilson testified that, because of Pentecost's activities, the Water Works and/or Central City incurred unnecessary expenses making repairs to the computer. In January 2001, Wilson fired Pentecost because of Pentecost's unauthorized use of the computer as well as for other infractions, including failure to perform work duties. Wilson testified that, prior to discharging Pentecost, he had "written him up" and warned Pentecost that he could be discharged for violating Water Works rules and regulations. James Brown, superintendent of the Water Works, testified that, after Pentecost was discharged, he told Wilson that no one was permitted to use the computer at the Water Works for personal business.

In October 2002, Wilson and his wife began dissolution proceedings. The dissolution apparently was not amicable as the parties had mutual restraining orders. After the dissolution proceedings began, co-workers testified that Wilson became somewhat obsessed with issues related to the dissolution, particularly those related to custody of his son. Tony Daniel, assistant superintendent of the Water Works, testified that he heard complaints from at least one Water Works employee

that Wilson talked of little else. Wesley Morgan, chief operator at the Water Works after Wilson's discharge, testified that Wilson would come to the Water Works at night and use the computer for four to five hours at a time to research issues related to the dissolution. Brown testified that employees at the Water Works complained to him that Wilson wasted work time discussing his marital problems and using the computer for personal reasons.

In addition to the preceding, employees at the Water Works also complained that Wilson would hunt for arrowheads during working hours; that Wilson would go to lunch with the other day-shift employees, leaving the Water Works unattended; and that mismanagement by Wilson resulted in employees working unnecessary overtime. Brown testified that employee morale under Wilson was an issue and Hugh Sweatt, mayor of Central City, testified that a number of employees stated that they did not believe they could continue working for Wilson.

On June 17, 2003, Sweatt wrote a letter to Brown advising Brown that "serious personnel allegations [had] been made against Water Company employee Chuck Wilson." The allegations included "misuse of the city computer, falsifying payroll time slips, and general mismanagement of the Water Plant." Sweatt advised Brown to conduct an investigation and, pending the outcome of that investigation, to suspend Wilson. Brown notified Wilson of his suspension and conducted an investigation. Based on the results of that investigation, Sweatt sent correspondence to Wilson on June 30, 2003, stating that Wilson's employment had

been terminated. Sweatt stated that Wilson was being discharged because of "[g]ross unauthorized use of a City computer located at the water plant [and] [n]eglect of duties, mismanagement of the water plant, and abuse of authority." Sweatt noted that Wilson's use of the computer for his personal benefit interfered with Wilson's ability to perform his job duties, including the management and supervision of employees. Sweatt concluded that these actions "constitute[d] unsatisfactory performance of [Wilson's] duties," hindered "the performance of City functions," and formed the "grounds for dismissal." In that correspondence, Sweatt also advised Wilson that he could request a grievance hearing. Although the record does not contain any documentation to that effect, it appears that Wilson did request a grievance hearing and the hearing body or officer confirmed the mayor's decision to terminate Wilson's employment.

In his defense, Wilson testified that Brown never explicitly told him not to use the computer at the Water Works for personal business. Because he knew that other Central City employees, including Brown, used Central City computers for personal business, Wilson believed he could do so as well.

With regard to the alleged "whistleblower" activities, Wilson testified that he had made a number of complaints to Brown regarding potential hazardous conditions at the Water Works. Those complaints included faulty wiring, problems associated with working in confined spaces, inadequate lighting, and the absence of a telephone at the intake. It appears that these issues, with the exception of those associated with working in confined spaces, were addressed, although not

necessarily to Wilson's satisfaction. It is not clear from the record when Wilson voiced these complaints; however, it appears that it was a significant period of time before his dismissal.

Wilson also testified that he complained at various times to Jim Sproles at the Division of Water for the Commonwealth about Brown's handling of leaks and boil water advisories, the way tanks and lines were disinfected, and about problems with handling of hazardous chemicals. We note that the complaints were made either after Wilson's suspension or more than a year before he was suspended.

Based on the preceding evidence, the trial court granted Central City's motion for summary judgment. In doing so, the court found that Wilson was an at-will employee. Furthermore, the court found that Wilson was not entitled to protection under the "whistleblower" statute because the problems he reported had to do with "methods of management" not violations of statutes or regulations and any such complaints were made after his suspension or "more than a year prior to the suspension."

It is from the court's summary judgment that Wilson appeals. As noted above, Wilson argues on appeal that he was not an "at-will" employee; that he was not given any warning that his job performance was deemed deficient; that he was dismissed for reasons that were inadequate to support his termination; and that his discharge was in retaliation for his whistleblower activities.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. In *Steelvest* the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS

We will first address the nature of the employment relationship between Wilson and Central City, and then we will address whether Wilson's actions were protected under Kentucky Revised Statutes (KRS) 61.101, *et. seq.* (the Act).

1. Whether Wilson was an At-Will Employee

Wilson argues that, because Central City had an employment manual, he was not an at-will employee and could not be discharged without adequate cause. In support of his position, Wilson relies primarily on *Parts Depot, Inc. v.*

Beiswenger, 170 S.W.3d 353 (Ky. 2005). The trial court found that Wilson's reliance on *Parts Depot* was misplaced. We agree.

In *Parts Depot,* employees of the Housing Department of Middlesborough argued that the Housing Department had paid them at the incorrect rate. In support of their argument, the employees pointed to language in the Housing Departments' employment manual that provided for different rates of pay based on employee classification. The Housing Department argued that the employment manual was merely a guide and did not create a contract.

In addressing this issue, the Supreme Court of Kentucky first noted that an employment manual may, under certain circumstances, create a contract of employment. However, the Supreme Court favorably cited an earlier Court of Appeals opinion (*Nork v. Fetter Printing Co.*, 738 S.W.2d 824 (Ky. App. 1987)) holding that an employment manual that contains mere precatory language does not create a contract of employment and neither does an employment manual that contains a specific disclaimer. The Court held that the language in the Housing Department's employment manual was not merely precatory and that it did not contain a disclaimer. Therefore, the Court determined that the manual created an employment contract.

The "City of Central City Personnel Rules and Regulations" relied on by Wilson, states in the first paragraph that:

> [t]he following rules, regulations and other administrative provisions for personnel administration (herein after called the "Rules") are established for the information

> and guidance of all concerned. The rules DO NOT constitute an employment contract, or any other type of contract, either express or implied. All employment with the City of Central City is "Employment at will", unless express separate written contract is entered into.

(Emphasis in original.)

Even a cursory reading of this paragraph reveals that it contains both precatory language - "for the information and guidance of all concerned" - and a disclaimer - "The rules DO NOT constitute an employment contract." As set forth in both *Nork* and *Parts Depot*, the City of Central City Personnel Rules and Regulations may set forth policy statements that Central City should strive to follow; however, it does not create "an expression of a contractual agreement." *Nork* at 825. Therefore, the personnel rules and regulations did not alter Wilson's status as an at-will employee.

Wilson also argues that, by setting forth reasons for his discharge and providing him with the right to request a grievance hearing, Sweatt somehow altered Wilson's status as an at-will employee. In Kentucky, an employer may ordinarily "discharge an at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." *Wymer v. JH Properties, Inc.,* 50 S.W.3d 195, 198 (Ky. 2001). Wilson failed to cite any law that contradicts the preceding or that states that the provision of cause or a review process alters the employment relationship. Therefore, we hold that the listing of reasons for Wilson's termination and the provision of a grievance hearing did not act to create an employment contract.

It follows that, because Wilson was an at-will employee, Central City was not required to provide him with any notice of job performance deficiencies prior to discharging him. Furthermore, because Central City was not required to give Wilson any reason for his termination, the adequacy of the reasons given is irrelevant.

2. Application of the Act

At the outset, we note Central City's argument that it is not an employer for purposes of the Act. In support of its argument, Central City points to two federal district court cases interpreting KRS 61.101(2). Although we are not bound to follow those cases as binding precedent, we find them to be persuasive.

In *Baker v. McDaniel*, 2008 WL 215241 (E.D. Ky. 2008), a firefighter raised a number of complaints regarding the safety and reliability of equipment used by the Stanford Fire Department. When the complaints were not addressed to his satisfaction, the firefighter attempted to bring them before City Council. The City Council did not address the complaints and the firefighter was ultimately fired. He brought an action against the City of Stanford for wrongful termination, claiming protection under the Act. The City of Stanford filed a motion to dismiss arguing that it was not an employer as defined by the Act.

The district court granted the City's motion, noting that "KRS 61.101(2) only applies to the Commonwealth of Kentucky and its 'political subdivisions' and not to private entities." *Id.* at *3. In support of its findings, the

district court noted that cities, unlike counties, are not entitled to sovereign immunity. *Id.* (*citing to Haney v. City of Lexington,* 386 S.W.2d 738, 742 (Ky. 1964); *Gas Service Co., Inc. v. City of London,* 687 S.W.2d 144 (Ky. 1985); *Bolden v. City of Covington,* 803 S.W.2d 577, 579 (Ky. 1991)). The district court found this distinction to be "important because the omission of municipalities from the definition of 'employer' in KRS 61.101(2) must be presumed to be intentional under ordinary rules of statutory construction." *Id.* Furthermore, the district court noted that:

> [t]he language of the statute is certainly not plain or explicit with regard to municipalities. In contrast, the defendants point to numerous other Kentucky statutes which plainly include municipalities when defining the scope of a statutory scheme. In drafting these statutes, the General Assembly considered it necessary to list political subdivisions separately from municipalities. Moreover, the failure to exclude municipalities from the scope of a statute does not necessarily mean they should be included. Rather, the enumeration of a particular thing, in the [sic] case 'political subdivision,' demonstrates that the omission of another thing, municipalities, is an intentional exclusion.

Id. (*citing to Louisville Water Co. v. Wells*, 664 S.W.2d 525, 526 (Ky. App. 1984)). In its opinion, the district court did not list the statutes referred to by the City of Stanford. However, we have reviewed the City of Stanford's brief in *Baker* and note that it cited the following as examples of the legislature designating municipalities as separate from either the Commonwealth or its political subdivisions: Section 177 of the Kentucky Constitution, KRS 18A.160(2), KRS

56.460, KRS 61.900(7), KRS 76.269, KRS 187.610, KRS 224.60-115(14), KRS 235.410(3), KRS 318.010(9), and KRS 341.055(4).

In *Kindle v. City of Jeffersontown,* 2009 WL 69231 (W.D. Ky. 2009), two police officers complained that their superior had created a hostile work environment. Ultimately, the officers were discharged. The district court, in addressing whether the officers' actions were protected by the Act, stated as follows:

> There is little in the plain language of KRS 61.101 et seq. [sic] to guide the court in determining whether municipalities are political subdivisions of the Commonwealth of Kentucky under the statute. Application of the traditional textual canons provides little assistance. Statutes in pari materia [sic] reveal that state lawmakers have used the terms "political subdivisions" and "municipalities" both conjunctively and disjunctively across the whole spectrum of the Kentucky Revised Statutes. However, because the Whistleblower Act defines "employer" as "the Commonwealth of Kentucky, or any of its political subdivisions" to the exclusion of "municipalities," which are distinct from counties in nature and from agencies and counties based on sovereign immunity, the court finds that municipalities are not political subdivisions under the statute. Therefore, Jeffersontown is not an employer under the Kentucky Whistleblower Act.

Id. at *6.

As did the federal district courts, we believe that the separate listing of "the Commonwealth and its political subdivisions" from "municipalities" shows an intent by the legislature to treat those entities differently. This conclusion is further supported by opinions of the Supreme Court holding that municipalities are

not entitled to the sovereign immunity extended to the Commonwealth and its political subdivisions. *See Haney v. City of Lexington,* 386 S.W.2d 738, 742 (Ky. 1964); *Gas Service Co., Inc. v. City of London,* 687 S.W.2d 144 (Ky. 1985); *Bolden v. City of Covington,* 803 S.W.2d 577, 579 (Ky. 1991).

We agree with the federal district courts that the exclusion of municipalities from the definition of employer in KRS 61.101(2) must be deemed intentional. Applying the district courts' conclusions to the case at hand, we hold that Central City, a municipality, is not an employer under KRS 61.101(2). Therefore, although it did so for different reasons, the trial court properly granted summary judgment.

Although we need not do so, we will address Wilson's argument that the trial court improperly interpreted KRS 61.103(1)(b) as mandating dismissal of his claim of protection under the Act. In support of his argument that he was wrongfully discharged, Wilson cites to complaints that he made to the Division of Water between 1999 and 2003 and to the Occupational Safety & Health Administration after he was suspended. We note that Wilson testified that several of his complaints to the Division of Water were made after his suspension. Furthermore, he testified that complaints that he made to the Division of Water before his suspension, were made more than a year earlier.

KRS 61.102(1) provides that no employer may retaliate against any employee who in good faith reports or discloses

> any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or 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.

An employee alleging a violation of KRS 61.102 may bring a civil action. KRS 61.103(2). An employee, who files a civil action under KRS 61.102, bears the burden of establishing by a preponderance of the evidence that his disclosure was "a contributing factor to the personnel action." KRS 61.102(3). A contributing factor is one that "tends to affect in any way the outcome of a decision." It is presumed that a contributing factor existed "if the official taking action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action." KRS 61.103(1)(b).

The trial court found that Wilson's whistleblower activities occurred either after his suspension or more than a year before his suspension. Central City argues and the trial court found that, as a matter of law, none of Wilson's activities could have been contributing factors to his discharge. We agree that no reasonable person could conclude that activities that occurred after Wilson's suspension could have contributed to that suspension.

However, we believe that Central City and the trial court "over read" KRS 61.103(1)(b). KRS 61.103(1)(b) states that an employee is entitled to a

presumption that a disclosure was a contributing factor to a personnel action if the two occur within a limited time frame. It does not state that, absent that temporal juxtaposition, an employee is foreclosed from proving that a disclosure was a contributing factor in the personnel action. We cannot say, as the trial court did and as Central City argues, that a disclosure made more than a year before a personnel action is, as a matter of law, too distant in time to be a contributing factor. Therefore, the trial court's finding on that issue was erroneous, although of no consequence herein.

CONCLUSION

Because Wilson was an at-will employee and because Central City is not an employer within KRS 61.101(2), the trial court properly granted Central City's motion for summary judgment. Therefore, although for different reasons, we affirm the trial court.

ALL CONCUR.

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