

RENDERED: APRIL 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000165-MR

RUTH COMBS

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 08-CI-00472

ADMINISTRATIVE OFFICE OF THE COURTS
AND UNKNOWN AGENTS OF THE ADMINISTRATIVE
OFFICE OF THE COURTS WHO PARTICIPATED IN
THE DECISION TO TERMINATE THE PLAINTIFF'S
EMPLOYMENT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

DIXON, JUDGE: Ruth Combs appeals from an order of the Perry Circuit Court,
which dismissed her combined Complaint and Appeal of Administrative Ruling.

Finding no error, we affirm.

Combs was employed by AOC as a pre-trial release officer in Perry County, Kentucky, for more than twenty-three years. In November 2007, Combs was placed on disciplinary probation for unprofessional behavior, and she voluntarily requested a demotion from supervisor to pretrial officer. Thereafter, AOC terminated Combs's employment on January 24, 2008. Combs appealed her termination, and the administrative tribunal recommended reinstatement of Combs's employment. The AOC Director's designee, James Keller, rejected the tribunal's recommendation and upheld Combs's termination in a decision rendered July 22, 2008.

On August 27, 2008, Combs filed a combined appeal of the designee's decision and complaint in Perry Circuit Court alleging wrongful discharge. On November 3, 2008, AOC moved the court to dismiss Combs's appeal as untimely and to dismiss her complaint pursuant to CR 12.02(f). Following a hearing, the court granted AOC's motion on January 22, 2009. This appeal followed.

We first address the timeliness of Combs's administrative appeal. The parties disagree regarding the applicable statute of limitation for judicial review of an AOC personnel action. Combs asserts that AOC's personnel policies do not provide a limitation period for seeking judicial review of an AOC decision. Accordingly, Combs contends KRS 413.120(2) applies to her appeal, which provides a five-year limitation period for bringing "[a]n action upon a liability created by statute, when no other time is fixed by the statute creating the liability."

On the other hand, AOC contends, and the trial court so found, that the thirty-day limitation period of KRS 13B.140(1) applies to AOC decisions, by virtue of comity extended to that statute in *Jones v. Administrative Office of the Courts*, 171 S.W.3d 53 (Ky. 2005). As this issue presents a question of law, our review is *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

KRS Chapter 13B addresses administrative procedure for agencies within the executive branch of state government. *See* KRS 13B.010 *et seq.* KRS 13B.140 establishes the procedure for judicial review of an agency's final order and states in relevant part:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business.

KRS 13B.140(1).

In *Jones v. Administrative Office of the Courts*, 171 S.W.3d 53 (Ky. 2005), the Kentucky Supreme Court addressed the proper venue for appealing an AOC personnel action. The Court concluded that AOC's policies "are silent as to the 'proper court'" for seeking judicial review of a personnel action. *Id.* at 55. To fill this procedural gap, the Court extended comity to KRS 13B.140 and KRS 13B.150. *Id.* at 56-57. The Court noted,

KRS 13B.140 provides for judicial review of agency action and will not subject the AOC to an intrusion by one of the political branches of our government. Circuit court review will not threaten the Supreme Court's authority to exercise control of the Court of Justice, as the review shall be limited, in accordance with the provisions of KRS 13B.150. Additionally, this Court will retain the ultimate authority over AOC personnel actions, as well as the determinations of the circuit courts reviewing such actions, by way of the normal appellate process.

Id. at 56. (internal quotation marks and citations omitted).

Combs contends *Jones, supra*, is distinguishable because the Court addressed the statute's venue provision rather than the limitation provision.

Combs also points out that KRS 13B.020(2)(e) exempts judicial branch hearings from the provisions of Chapter 13B. Pursuant to these theories, Combs urges this Court to find the five-year limitation period of KRS 413.120(2) applicable to her appeal.

We find Combs's arguments unpersuasive, and we believe *Jones, supra*, is dispositive on the issue before us. Combs's assertions ignore the authority of the Supreme Court to grant comity to a statute that is "a 'statutorily acceptable' substitute for current judicially mandated procedures." *Foster v. Overstreet*, 905 S.W.2d 504, 507 (Ky. 1995). "The decision whether to give life through comity to a statute . . . is one of institutional policy reserved for the Supreme Court level." *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 577 (Ky. 1995).

As *Jones, supra*, extends comity to KRS 13B.140, we conclude the thirty-day limitation period of KRS 13B.140(1) applies to AOC personnel actions.

In the case at bar, AOC's final order was mailed to Combs on July 23, 2008, and Combs filed her appeal in Perry Circuit Court thirty-five days later, on August 27, 2008. Accordingly, the trial court properly dismissed Combs's appeal as time-barred pursuant to KRS 13B.140(1).

Alternatively, Combs contends, if KRS 13B.140 applies to her appeal, she was improperly denied the protection afforded by KRS 13B.120(3), which requires the agency's final order to "fully" advise parties of available appellate rights. Combs concedes the trial court did not address this issue in its final order; as a result, we are "without authority to review issues not raised in or decided by the trial court."¹ *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Next, we turn to the dismissal of Combs's complaint pursuant to CR 12.02(f). A motion to dismiss for failure to state a claim should be granted only if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of [her] claim." *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). "In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002).

¹ Without deciding the issue, we note that comity specifically extends to KRS 13B.140 and KRS 13B.150, pursuant to *Jones, supra*. Combs does not cite any legal authority for the proposition that comity extends to KRS 13B.120.

Combs argues her complaint set forth an actionable claim against AOC for wrongful discharge. According to Combs, “unknown officials” at AOC gave preferential treatment to the son of a Kentucky Supreme Court Justice, which resulted in Combs’s ultimate termination.

In *Grzyb v. Evans*, 700 S.W.2d 399, 401-02 (Ky. 1985), the Kentucky Supreme Court set forth the narrow circumstances which give rise to a wrongful discharge cause of action. “The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law[,] [and] [t]hat policy must be evidenced by a constitutional or statutory provision.” *Id.* at 401. Furthermore, the policy underlying the action must be “clearly defined by statute and directed at providing statutory protection to the worker in his employment situation.” *Id.* at 400; *Boykins v. Housing Authority of Louisville*, 842 S.W.2d 527, 530 (Ky. 1992). The *Grzyb* Court also recognized,

. . . that only two situations exist where grounds for discharging an employee are so contrary to public policy as to be actionable absent explicit legislative statements prohibiting the discharge. First, where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment. Second, when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative enactment.

Id. at 402 (internal citation and quotation marks omitted).

In the case at bar, Combs contends her discharge was contrary to public policy. She relies on the Kentucky Code of Judicial Conduct, the Kentucky

Court of Justice Personnel Policies, and KRS 18A.140,² for the proposition that the “Commonwealth of Kentucky has a public policy against showing favoritism to families of elected or public officials.”

After careful review, we agree with the trial court that Combs failed to state a claim for wrongful discharge. Combs has not shown that, by discharging her, AOC violated a statutory or constitutional provision meant to protect Combs in her employment or that AOC terminated her for exercising a right conferred by legislative enactment. Combs’s belief that her discharge was contrary to public policy, premised on judicial canons, personnel policies, and KRS 18A.140, fails to satisfy the strict requirements of *Grzyb, supra*, for a claim of wrongful discharge. Accordingly, we find no error in the trial court’s dismissal of Combs’s complaint.

For the reasons stated herein, the order of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ned Pillersdorf
Prestonsburg, Kentucky

BRIEF FOR APPELLEE
ADMINISTRATIVE OFFICE OF
THE COURTS:

Susan C. Sears
Sadhna G. True
Drew B. Millar
Lexington, Kentucky

² KRS 18A.140(2) applies to state personnel in the executive branch and prohibits the use of official authority to secure an unfair advantage to gain employment in the classified service.