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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001647-MR

DEAN CVITKOVIC
AND CHAD CARR — APPELLANTS

APPEAL FROM MONTGOMERY CIRCUIT COURT
v. HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 07-CI-90057

DANIEL FREEMAN, IN HIS
INDIVIDUAL CAPACITY AND
HIS OFFICIAL CAPACITY
AS SUPERINTENDENT OF
MONTGOMERY COUNTY
SCHOOLS; RICK MATTOX, IN HIS
INDIVIDUAL CAPACITY AND IN HIS
OFFICIAL CAPACITY AS ASSISTANT
SUPERINTENDENT OF MONTGOMERY
COUNTY SCHOOLS; MONTGOMERY
COUNTY PUBLIC SCHOOLS; AND
THE BOARD OF EDUCATION OF
MONTGOMERY COUNTY, KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER AND MOORE, JUDGES.

TAYLOR, CHIEF JUDGE: Dean Cvitkovic and Chad Carr bring this appeal from a July 30, 2008, summary judgment of the Montgomery Circuit Court dismissing their complaint against Daniel Freeman, in his individual capacity and his official capacity as Superintendent of Montgomery County Schools, Rick Mattox, in his individual capacity and in his official capacity as Assistant Superintendent of Montgomery County Schools, Montgomery County Public Schools, and the Board of Education of Montgomery County, Kentucky (collectively referred to as appellees). We affirm.

Cvitkovic and Carr were principal and assistant principal, respectively, of the McNabb Middle School in Montgomery County. Daniel Freeman was superintendent of the Montgomery County School System. Freeman suspended Cvitkovic with pay from his position as principal of the middle school and reassigned him to a teaching position at Hillcrest Hall Treatment Center pending an investigation into the charges of insubordination under Kentucky Revised Statutes (KRS) 161.790(1)(a), immoral character or conduct unbecoming a teacher under KRS 161.790(1)(b), and inefficiency, incompetence, or neglect of duty under KRS 161.790(1)(d).

Shortly thereafter, Freeman also suspended Carr from his position as assistant principal of the middle school pending an investigation. The charges leveled against Carr were insubordination under KRS 161.790(1)(a), and immoral character or conduct unbecoming a teacher under KRS 161.790(1)(b), "specifically

as related to moral turpitude involving a student(s) and possibly, employees." Unlike Cvitkovic, Carr was initially suspended without pay and, thus, was not reassigned to another position within the school system.[1]

Both Cvitkovic and Carr were suspended with the following caveat: "[a]fter this investigation, charges will be delivered to you or you will be reinstated to your former position." However, Cvitkovic and Carr each voluntarily resigned from their positions as principal and assistant principal while the investigations were still in progress and before any final determination by Freeman.

Subsequently, Cvitkovic and Carr filed a complaint in the Montgomery Circuit Court against appellees. Therein, Cvitkovic and Carr alleged that appellees violated KRS 61.102 by improperly retaliating against them, violated KRS 344.040 by creating a hostile work environment, violated the Kentucky Constitution § 1-3, and committed the torts of outrage, abuse of process, and defamation. All parties filed motions for summary judgment. By order entered July 30, 2008, the circuit court granted appellees' motion for summary judgment and dismissed Cvitkovic and Carr's complaint in its entirety. This appeal follows.

In its order granting summary judgment, the circuit court provided no basis for its decision but merely stated that appellees "Motion for Summary Judgment is granted, and the . . . complaint against them is hereby dismissed with prejudice." It is, of course, not strictly incumbent upon the circuit court to make

[1] It appears that Chad Carr was subsequently reassigned to Hillcrest Hall Treatment Center pending the formal investigation.

findings of fact and conclusions of law when rendering summary judgment. *See Allen v. Martin*, 735 S.W.2d 332 (Ky. App. 1987). However, in this case, its failure to do so has left this Court to merely speculate as to the reasoning that supported summary judgment upon the myriad claims presented in the complaint.

This appeal presents numerous contentions of error advanced by Cvitkovic and Carr; the large number of contentions partly due to the utter lack of any basis in the circuit court's order granting summary judgment. All the contentions of error allege that for sundry reasons summary judgment was improper and the circuit court erred by rendering same. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). And, all facts are viewed in a light most favorable to the nonmoving party. *Id.*

Cvitkovic and Carr allege that the circuit court erred by rendering summary judgment dismissing their claims for hostile work environment under KRS 344.040. Specifically, Cvitkovic and Carr claim they were constructively discharged (and, thus, suffered adverse employment actions) because of "sexually charged allegations" made by Freeman. In particular, they argue:

> As the direct supervisor of Cvitkovic and ultimate supervisor of Carr, Dr. Freeman is the individual who drafted the disciplinary charges against each and incorporated sexually-charged allegations that were false against each. The sexual charges against each man became the cornerstone of the Defendants' disciplinary charges and were designed to humiliate and

> constructively discharge Cvitkovic and Carr. The sexually-charged allegations were severe and persuasive due to the fact that they became the topic of numerous investigations, including those involving Carr that were reported to the Kentucky State Police and the Cabinet for Families and Children. The Court in *Brooks* held that: "[c]onstructive discharge presents a question of fact that, in jury trials, should be decided by the jury and not the trial court." In addition, whether an environment is hostile or abusive can be determined only by looking at all the circumstances surrounding the matter. Because it was not impossible for Cvitkovic and Carr to produce evidence of their hostile work environment claims, it was error for the judge to grant summary judgment on this count.

Cvitkovic and Carr Brief at 12-13. (Footnotes omitted.) We view Cvitkovic and Carr's allegations to be without merit because Cvitkovic and Carr were not constructively discharged from their respective positions.

A constructive discharge occurs when "based upon objective criteria, the conditions created by the employer's actions are so intolerable that a reasonable person would feel compelled to resign." *Brooks v. Lexington-Fayette Urban County*, 132 S.W.3d 790, 807 (Ky. 2004). Viewing the facts most favorable to Cvitkovic and Carr, their suspensions pending an investigation into alleged misconduct simply do not amount to conditions so intolerable that a reasonable person would feel compelled to resign. As noted, both were advised they would be reinstated to their former positions after the investigation was completed, assuming no charges were filed. Yet both voluntarily resigned their positions. Moreover, Cvitkovic and Carr fail to specifically identify how these "sexually-charged allegations" created a hostile work environment compelling their resignations. In

short, Cvitkovic and Carr have not cited this Court to specific facts in the record supporting their argument of constructive discharge. As such, we believe that Cvitkovic and Carr failed to demonstrate that they were constructively discharged. Thus, their claim under KRS 344.040 for hostile work environment was properly dismissed by summary judgment.

Additionally, the basis for Cvitkovic and Carr's hostile work environment claims were Freeman's "sexually-charged allegations." Cvitkovic and Carr argued that "the sexual charges against each man became the cornerstone of the . . . [appellees'] disciplinary charges and were designed to humiliate and constructively discharge" them. The allegation Cvitkovic and Carr have asserted is not a claim for relief under KRS 344.040 for hostile work environment. KRS 344.040 prohibits adverse employment actions against an employee upon the bases of "race, color, religion, national origin, sex, age forty (40) and over, . . . disability, or because . . . [the employee] is a smoker or nonsmoker." The alleged "sexually charged allegations" are simply not within the ambit of KRS 344.040. As a result, we also believe Cvitkovic and Carr have failed to set forth a *prima facie* claim for relief under KRS 344.040.

Cvitkovic and Carr also contend that the circuit court erred by rendering summary judgment dismissing their defamation claims. These claims arise from communications by Freeman to the Educational Professional Standards Board (Board). Specifically, Cvitkovic and Carr's argument is very brief and is as follows:

> Defamatory language is "published" when it is intentionally or negligently communicated to someone other than the party defamed. In fact, Kentucky courts rely upon the *Restatement (Second) of Torts*, § 577 (1977), in determining when a publication has occurred. The *Restatement* says:
>
> It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication.
>
> . . . .
>
> 6. A writes a defamatory letter to B and sends it to him through the mails in a sealed envelope. A knows that B is frequently absent and that in his absence his secretary opens and reads his mail. B is absent from his office and his secretary reads the letter. A has published a libel. (Citation omitted.)
>
> The defamatory publications of disciplinary charges authored by the Defendants were published to the Educational Professional Standards Board by the Defendants.

Cvitkovic and Carr Brief at 23-24.

To prevail upon a claim of defamation, it is incumbent that the plaintiff demonstrates: "(1) a defamatory statement; (2) about the plaintiff; (3) which is published; and (4) which causes injury to the reputation." *Hawkins v. Miller*, 301 S.W.3d 507, 509 (Ky. App. 2009). In their brief, Cvitkovic and Carr failed to identify any facts supporting the elements required to prove a defamation claim or otherwise demonstrate that a material issue of fact exists upon these

elements. In the absence thereof, we view Cvitkovic and Carr's argument that their defamation claim was improperly dismissed to be without merit. We also note that KRS 161.120(3)(a) places an affirmative duty on the superintendent to report any actions or conduct of Cvitkovic and Carr to the Board that might warrant action under their teaching certificates.[2]

Carr argues that the circuit court erred by granting summary judgment dismissing his claim under KRS 161.164. Subsection (4) of KRS 161.164 prohibits discrimination because of "political or religious opinions or affiliations or ethnic origin or race or color or sex or age or disability condition." Specifically, Carr's entire argument on this issue consists of four sentences and is as follows:

> The Defendants admit that Cvitkovic hired Carr and that Carr served as his right-hand man. The political affiliation addressed by KRS 161.164 addresses the close personal relationships that are formed in the school setting. For example, in a Pike County case, a plaintiff filed suit under KRS 161.164, arguing that "her demotion and reassignment were in retaliation for the exercise of her constitutional rights to political expression and association." [*Justice v. Pike Co. Bd. of Educ.*, 384 F.3d 554, 558 (6th Cir. 2003).] Certainly, it was not coincidence that Cvitkovic and Carr received their disciplinary charges on the exact same day.

Cvitkovic and Carr Brief at 24. Carr's entire four-sentence argument is extremely broad and somewhat vague. Our review of the record does not support any claim regarding job actions based upon political affiliations, opinions or activity. It was incumbent upon Carr to demonstrate to this Court that a material issue of fact

[2] We do not reach the merits of appellees' position that any communications to the Educational Professional Standards Board were privileged or otherwise protected by immunity.

exists upon this issue precluding summary judgment. *See Neal v. Welker*, 426 S.W.2d 476 (Ky. 1968). Carr has failed to do so; thus, we view this allegation to be without merit.

As we have determined that Cvitkovic and Carr voluntarily resigned and were not constructively discharged, the remaining contentions surrounding their suspension or discharge are rendered moot.

In sum, we conclude that the circuit court properly rendered summary judgment dismissing Cvitkovic and Carr's complaint.

For the foregoing reasons, the summary judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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