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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000514-MR

JOHN W. (JACK) ARNOLD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 07-CI-003365

DR. RONALD HOLMES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: John Arnold filed this action against Dr. Ronald Holmes alleging that Holmes violated Kentucky's Whistleblower Act, KRS 61.101, *et seq*.[1]

[1] Holmes does not contend that under KRS 61.101 he cannot be individually liable. However, we are aware of the decision in *Cabinet for Families and Children v. Cummings*, 635 S.W.3d 425, 434 (Ky. 2005), where the Court held that "the language of KRS 61.101(2) does not impose individual civil liability under Kentucky's Whistleblower Act for reprisal against public employees of the Commonwealth and its political subdivisions." Because the application of that holding is not presented by Holmes, we decline to address the issue and affirm the trial court for the reasons expressed herein.

Arnold was hired as a deputy coroner by the Jefferson County Coroner in 2002. After Holmes was elected coroner in 2003, Arnold remained as a deputy coroner. Although Arnold and Holmes were once friends, their relationship began to deteriorate and, in early 2006, the two had a disagreement over Holmes's decision to bring his dog to the workplace. Arnold viewed the dog in the workplace as unprofessional and complained that he was allergic to dogs. Nevertheless, Holmes continued to bring his dog to work.

Later in 2006, Arnold suspected that Holmes was engaged in unlawful conduct and began a private investigation. Specifically, he believed that Holmes was misappropriating funds donated for the "Be a Memory Maker" program, which provided grave markers for indigent individuals. Arnold also believed that Holmes was taking prescription drugs collected from deceased citizens' homes and keeping them for his own use. Finally, he believed that Holmes violated state election laws when he coerced his employees to donate to his election campaign.

In December 2006, Arnold confronted Holmes regarding his suspicions and threatened to inform public authorities if his behavior did not cease. Believing that Holmes continued to engage in illegal and improper conduct, Arnold reported his allegations to the Louisville Metro Police Public Integrity Unit in 2007.

After his disclosure of his beliefs to Holmes and the Louisville Metro Police, Arnold filed the present action alleging he suffered reprisal by Holmes. However, Arnold testified that he continues in the same employment with the

Jefferson County Corner's Office as deputy coroner, that his work schedule has not changed since he reported Holmes's alleged illegal and improper conduct, that his rate of pay has increased since the report, and that he has not been reprimanded at work. The circuit court granted Holmes's motion for summary judgment on the basis that Arnold was unable to establish an adverse personnel action as contemplated by the Whistleblower Act. We are guided in our review by the standard applicable to a summary judgment.

The standard of review on appeal of a summary judgment is whether the trial court correctly found "that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). The record must be viewed in the light most favorable to the party opposing the motion. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because factual findings are not at issue, we do not need to defer to the trial court. *Id*. Using the appropriate standard of review, we discuss the merits of Arnold's claim.

The purpose of the Kentucky Whistleblower Act "is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Davidson v. Commonwealth, Dept. of Military Affairs,* 152 S.W.3d 247, 255 (Ky.App. 2004), quoting *Meuwissen v. Dep't of Interior,* 234 F.3d 9, 13 (Fed.Cir. 2000). To effectuate that purpose, KRS 61.102 provides as follows:

> (1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, 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. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.
>
> (2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section.

KRS 61.103(3) requires that the employee prove by a preponderance of evidence that the disclosure was a contributing factor in the personnel action. "Once a prima facie case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." *Id.*

In *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998), the Court held that to establish a violation of KRS 61.102, an employee must prove four elements: (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure. However, the Court did not elaborate as to the meaning of the term "personnel action" as used in KRS 61.103(3).

Both parties cite as controlling the analysis applicable to actions filed pursuant to the Kentucky Civil Rights Act which makes it unlawful for one or more persons "[t]o retaliate or discriminate in any manner against a person ... because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter...." KRS 344.280(1). Both Acts are remedial in nature and both prohibit retaliation against a person because a charge or complaint was filed. Because the Kentucky Civil Rights Act and the Kentucky Whistleblower Act have similar purposes, we conclude that a similar analysis is applicable to both.

In *Brooks v. Lexington-Fayette Urban County Housing Authority,* 132 S.W.3d 790 (Ky. 2004), our Supreme Court addressed the question of what level of retaliatory acts by an employer that a plaintiff must show to establish a *prima facie* retaliation claim under the Kentucky Civil Rights Act. The Court held that

although KRS 344.280(1) expressly precludes retaliation "in any manner" against a person and is to be liberally interpreted, a plaintiff must establish "a materially adverse change in the terms and conditions of his employment" in order to state a valid claim for retaliation. *Id.* at 802, quoting *Hollins v. Atlantic Co., Inc.,* 188 F.3d 652, 662 (6th Cir. 1999) (applying this standard to Title VII cases). The Court explained:

> A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Id., quoting *Hollins,* 188 F.3d at 662. Consistent with *Brooks*, we hold that in order to state a valid claim for retaliation under the Whistleblower Act, a plaintiff must establish a materially adverse change in the terms and conditions of his employment. However, any act of alleged retaliation must be viewed based on the particular circumstances of the case. We now turn to the facts as most favorable to Arnold.

Arnold alleges that during a December 6, 2006, meeting Holmes attempted to discourage Arnold from disclosing his information to proper authorities. Although Arnold testified that the meeting was taped, he did not introduce the tape into evidence. Nevertheless, he described the conversation in his deposition which is summarized in his brief.

Arnold informed Holmes that he had certain incriminating evidence against him and Holmes allegedly inquired whether Arnold and he could "work something out." After Arnold requested that the conduct cease, Holmes assured him that he would cease engaging in the illegal and improper conduct but according to Arnold, thereafter only attempted to cover up the activity. Arnold alleges that the offer to "work something out" was an act intended to discourage Arnold from disclosing the violations.

We are confused by his interpretation of the words spoken. Even if Arnold's recollection of the meeting is accurate, there was no evidence of a direct threat to Arnold's employment circumstances and the suggestion that "something" be worked out is not, in its common everyday use, a phrase indicative of a threat. We are equally not persuaded by Arnold's remaining allegations.

Following the December meeting and subsequent report to Louisville Metro Police, Arnold alleges that he suffered punishment accompanied by threats of violence. He characterizes as "punishment" the relocation of his desk to an area occupied by lower-ranking employees. However, there was testimony from co-workers that Arnold voluntarily moved his desk to avoid Holmes's dog and no direct testimony that the move was made in retaliation. Moreover, the mere placement of a desk in an area with lower-ranked co-workers is not a materially adverse change in the terms and condition of employment. As emphasized in *Brooks*, reprisal "must be more disruptive than a mere inconvenience." *Id*.

To further support his claim, Arnold alleges that after he reported his suspicions, Holmes discussed terminating Arnold with office staff and threatened Arnold with violence. His accusations are based on information allegedly obtained from a co-worker, Buddy Dumeyer. As did the circuit court, we have reviewed Dumeyer's testimony. Although he testified that in November 2006, Holmes indicated that he may terminate Arnold, the conversation was well before Holmes was aware of Arnold's suspicions and as indicated by Dumeyer's testimony was the result of the dispute between the parties over Holmes's dog. Moreover, according to Arnold's testimony, prior to Arnold's disclosure, Holmes repeatedly threatened his staff with termination and was generally unpleasant prior to and after the disclosure. There is simply no affirmative evidence that the statement was made in response to Arnold's accusations against Holmes.

As an additional basis for his whistleblower claim, Arnold alleges that Holmes told Dumeyer that he wanted to kill Arnold. Dumeyer testified that Holmes did not specifically name Arnold but stated that he would "kill that (expletive)" who he assumed referred to Arnold. However, Arnold testified that Holmes never directly threatened him with physical violence and he did not file a criminal complaint against Arnold. Although Holmes purchased a handgun after Arnold made a report to the Louisville Metro Police and attended a firearms training course, there was no evidence that the purchase was made in anticipation of murdering Arnold and Arnold was never threatened with the gun. Indeed, the evidence revealed that several employees of the coroner's office participated in the

firearms training course and carried their guns with them while working. Moreover, the alleged isolated threat was made to a third-party. Under the circumstances, it was not a material adverse change in the terms and conditions of his employment.

Arnold suggests that Holmes's inquiries when he failed to report to work as scheduled or expected are evidence of retaliatory conduct. However, he admits that he has never been reprimanded for tardiness or absences from work. It was within Holmes's employment duties to question the whereabouts of his staff and any suggestion to the contrary is rejected.

Finally, we are not convinced that the failure to provide Arnold with a GPS was a material adverse personnel action. Although perhaps an inconvenience, it is not the type of action encompassed within the Whistleblower Act.

We agree with the trial court's statement that it is not necessary for the employee to be terminated or suffer financial retaliation to state a claim under the Kentucky Whistleblowers Act. However, the facts as alleged by Arnold, even if true, are not sufficient to demonstrate a material adverse change in the terms and conditions of his employment.

Based on the foregoing, the summary judgment is affirmed.

ALL CONCUR.

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