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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000690-MR

TIMOTHY COLLINS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 08-CI-00010

SAPPHIRE COAL COMPANY; and
UNITED COAL COMPANY, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Timothy Collins appeals from a summary judgment by the Letcher Circuit Court which dismissed his wrongful discharge and intentional infliction of emotional distress claims against Sapphire Coal Company and United Coal Company (“Sapphire”). Collins argues that Sapphire wrongfully fired him because he pursued a civil claim and a workers’ compensation claim against it.

However, Sapphire was entitled to discharge Collins for filing the civil claim and he presented no evidence that his discharge was substantially motivated by the filing of his workers' compensation claim. Collins also argues that his supervisor at Sapphire engaged in a pattern of harassment and intimidation which amounted to intentional infliction of emotional distress. We agree with the trial court that Collins failed to establish that the conduct was outrageous in character or that he suffered severe emotional distress as a result. Hence, we affirm the trial court's dismissal of both claims.

Prior to his discharge, Collins had worked in the coal mining industry for over twenty years. In July 2005, he began working for Sapphire as a roof bolter. He was originally assigned to work at the Advantage Mine but was later transferred to the Sandlick Mine. Collins suffered work-related injuries on May 9, 2006, June 28, 2006, August 9, 2006, and September 12, 2006. He filed for workers' compensation benefits, which were awarded. However, a subsequent workers' compensation claim, based on injuries he alleged occurred on October 21, 2006, was denied.

Also in 2006, Sapphire was mining under Collins's residential property and caused damage to a well. The parties engaged in discussions to resolve the matter but were unsuccessful. On October 4, 2006, Collins filed an action against Sapphire to recover for the property damage. Shortly thereafter, on January 15, 2007, Sapphire terminated Collins's employment.

On January 10, 2008, Collins filed this action against Sapphire, alleging that he had been wrongfully terminated because he had filed a workers' compensation claim. He also sought damages for intentional infliction of emotional distress. Sapphire denied that it fired Collins because of the workers' compensation claim, stating that it terminated Collins's employment for being uncooperative in the separate civil litigation, for his inability to work cooperatively with his supervisor, and for his failure to follow proper reporting procedures for workplace injuries.

Following a period of discovery, Sapphire filed a motion for summary judgment, arguing that the denial of Collins's latest workers' compensation claim precluded a finding that he was discharged for filing the claim. Sapphire also argued that it was entitled to discharge Sapphire for pursuing litigation unrelated to his employment and for the other actions of misconduct. Finally, Sapphire argued that Collins had not shown Sapphire's conduct was outrageous or that a causal connection existed between the conduct complained of and the distress suffered. On March 10, 2010, the trial court granted Sapphire's motion and dismissed Collins's claims. This appeal followed.

Collins primarily argues that the trial court erred by granting Sapphire's motion for summary judgment on his claims. In reviewing an order granting summary judgment, we must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916

S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rule(s) of Civil Procedure (“CR”) 56.03. In *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that “the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce 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). Since a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Collins argues that Sapphire wrongfully discharged him in retaliation for filing civil litigation and the workers' compensation claim against it. Ordinarily, an employer may discharge an at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible. *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). However, a discharge of an at-will employee may be unlawful if it violates a constitutionally protected right implicit in a statute. *Id.* at 731.

Sapphire admits that it fired Collins for filing a civil action against it for the damage caused when it undermined his property. As the trial court recognized, an employer has the right to discharge an employee who brings private litigation against the employer seeking damages for an incident not related to his employment unless the discharge is related to a statutory or constitutional provision which explicitly or implicitly creates a public policy exception. *Boykins v. Housing Authority of Louisville*, 842 S.W.2d 527, 530 (Ky. 1992). Collins maintains that the civil action was related to his employment, but he provides no citations to the record showing how it was related to his employment. Thus, we agree with the trial court that Collins may not maintain a claim for wrongful discharge on this basis.

Collins also contends that Sapphire wrongfully discharged him because he filed several workers' compensation claims. Kentucky Revised Statute(s) ("KRS") 342.197(1) prohibits an employer from retaliating against an employee for filing a lawful workers' compensation claim. *See also Firestone, supra*, at 731. To establish a cause of action for retaliatory discharge, "it is incumbent on the employee to show at a minimum that he was engaged in a statutorily protected activity, that he was discharged, and that there was a connection between the 'protected activity' and the discharge." *Bishop v. Manpower, Inc. of Cent. Kentucky*, 211 S.W.3d 71, 76 (Ky. App. 2006), quoting *Willoughby v. GenCorp, Inc.*, 809 S.W.2d 858, 861 (Ky. App. 1990). The employee need not show that retaliation was the sole or even the primary

motivating factor for the discharge, but only that retaliation for filing or pursuing a workers' compensation claim was a substantial motivating factor in causing his discharge. *Bishop, supra*, citing *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 188 (Ky. 1993).

As noted above, Collins filed five workers' compensation claims against Sapphire in 2006 for workplace injuries allegedly occurring on May 9, 2006, June 28, 2006, August 9, 2006, September 12, 2006, and October 21, 2006, respectively. Although the last claim was denied, Collins argues that a fact-finder could reasonably infer that Sapphire fired him in retaliation for filing these claims. Collins further argues that the denial of the October 21, 2006, claim does not preclude a finding that Sapphire retaliated against him for exercising his right to file lawful claims.

We agree with Collins on this latter point. The legislature's purpose in enacting KRS 342.197(1) was to protect persons who are entitled to benefits under the workers' compensation laws and to prevent them from being discharged for taking steps to collect such benefits. *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 130 (Ky. App. 1990). Since the statute protects the employee's right to pursue such benefits, it is not necessary that an employee actually have filed a claim at the time the discharge occurred. *Id.* at 130-31. *See also Bishop, supra*, at 77. (Employer began closely scrutinizing employee's absentee record after employee inquired about workers' compensation benefits). Likewise, we conclude

that the public policy expressed in KRS 342.197(1) protects an employee who has filed a claim for benefits in good faith even if that claim is ultimately denied.

Nevertheless, we agree with the trial court that Collins presented no evidence of a causal relationship between his discharge and his filing of his most recent workers' compensation claim. The record reflects that Collins reported a work-related injury to both knees on October 21, 2006.¹ Other than the temporal proximity between that claim and his discharge, however, Collins does not point to any other facts or circumstances which would support an inference that Sapphire retaliated against Collins based on that claim. Furthermore, in his pleadings before the trial court, Collins did not allege that Sapphire fired him because of his earlier claims. Consequently, he cannot raise this issue for the first time on appeal.

Marksberry v. Chandler, 126 S.W.3d 747, 753 (Ky. App. 2004). In the absence of any evidence supporting his claim of retaliatory discharge, the trial court properly granted summary judgment to Sapphire.

Finally, Collins argues that the trial court erred by dismissing his claim for intentional infliction of emotional distress. In order to recover for intentional infliction of emotional distress, also known as outrage, a plaintiff must prove: (1) the wrongdoer's conduct was intentional or reckless; (2) conduct so outrageous and intolerable in that it offends against the generally accepted

¹ In an opinion and award entered on June 25, 2009, the Workers' Compensation Administrative Law Judge ("ALJ") found that Collins had suffered work-related injuries on August 10, 2006, and September 12, 2006, but that these conditions did not result in any permanent impairment and that Collins had reached maximum medical improvement by October 12, 2006. The ALJ's order did not address the October 21, 2006, injury.

standards of decency and morality; (3) a causal connection between the wrongdoer's conduct and the emotional distress; and (4) that the emotional distress was severe. *Burgess v. Taylor*, 44 S.W.3d 806, 811 (Ky. App. 2001).

In this case, Collins alleges that one of his supervisors, Eddie Estep, engaged in a pattern of harassing conduct which was motivated by personal animosity against him. The trial court concluded that these allegations were insufficient to show that the conduct was outrageous in character. The trial court also noted that Collins presented no evidence that he suffered emotional distress specifically as a result of this conduct. Having reviewed the record, we agree on both points.

On the first point, it is well established that an action for outrage will not lie for “petty insults, unkind words and minor indignities”; the action only lies for conduct which is truly “outrageous and intolerable.” *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 65 (Ky. 1996). Collins alleges that Estep constantly threatened him with firing and falsely accused him of calling state or federal mine inspectors. Collins contends that this harassing conduct was designed to intimidate him into settling his civil claim against Sapphire and to retaliate against him for filing the workers’ compensation claims. But, apart from these general assertions, Collins does not allege specific facts showing an ongoing and severe pattern of harassment designed to cause him mental distress. Thus, his allegations of harassment by Estep are insufficient to meet the threshold for outrageous conduct.

Furthermore, on the second point, we agree with the trial court that Collins failed to show his mental distress was caused by Estep's harassing conduct. Collins admitted that he had a long history of emotional and physical problems that preceded his termination. He did not present any evidence that the harassment or his termination caused him any emotional distress beyond that which he already suffered. Therefore, the trial court properly dismissed this claim.

Accordingly, the summary judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

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