

RENDERED: NOVEMBER 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001621-MR

STEPHON QUILTON CARTER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CI-03627

UNIVERSITY OF KENTUCKY;
DR. LEE TODD, PRESIDENT;
DR. KUMBLE SUBBASWANY, PROVOST;
JAMES F. HARDYMON, CHAIRMAN
BOARD OF TRUSTEES; SARA NIKIRK,
INTERIM DIRECTOR OF AUXILLARY
SERVICES; KIMBERLY WILSON,
ASSOCIATE VICE PRESIDENT;
DIRECTOR OF HUMAN RESOURCES;
SGT. ROBERT MCPHERSON,
UNIVERSITY OF KENTUCKY POLICE;
UNIVERSITY OF KENTUCKY, DIVISION
OF POLICE; AND ANY UNKNOWN AND
UN-NAMED ADMINISTRATIVE PERSONNEL

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Stephon Carter appeals from an order granting summary judgment in favor of Appellees. The Appellees argue summary judgment was proper. We find that summary judgment should not have been granted on two issues. We therefore affirm in part, reverse in part, and remand.

Carter, an African-American, began his employment at the University of Kentucky as a STORES worker in 1980. STORES' primary function is to purchase, stock, and deliver products that are used by the University on a daily basis. Carter worked as a STORES' employee and then a Senior STORES worker until 1987 when he was promoted to the job of supervisor. In 1996, Carter became the STORES Warehouse Manager. In 2000, Carter was again promoted to STORES Central Assistant Manager. In December of 2006, Carter was terminated. This litigation arises out of that termination.

In May of 2006, Mark Renfro, the Director of STORES and Carter's supervisor, was temporarily reassigned to a special project. In his absence, the University filled Renfro's position with an interim director, Donna Back, a Caucasian female. The University did not post the opening because it was temporary and Renfro was expected to retake his position at the end of the special project. Back's appointment was a shock to Carter because he had been told by Renfro that he was being groomed to be the next Director of STORES. Also, when Back began her new assignment at STORES, Carter was enlisted to train her because her prior experience was mainly limited to computer technology.

In August of 2006, the University received an anonymous call reporting theft in STORES. The university conducted an investigation and discovered Renfro had taken items from STORES for his personal use. In September of 2006, Renfro met with members of human resources to discuss the theft. He was terminated during this meeting. Also during the meeting, he stepped out to call Carter. Supposedly during this conversation, he told Carter he had been fired. Evidence does show that Renfro told Carter to throw away his calendar because a purchase order in it needed to “go away.” Renfro also told Carter to alter another purchase order on the computer system. Carter did alter the purchase order, but decided not to save the changes.

Sarah Nikirk, Interim Director of Auxiliary Services, became aware of the conversation between Carter and Renfro. Accompanied by some University police officers, she went to STORES to question Carter. Carter was later taken to another building for questioning. Carter was asked about Renfro’s theft. Carter responded he took no part. Carter was also questioned about the phone call. Carter explained about the calendar and the purchase order on the computer system. Carter was then suspended on September 26, 2006, pending an investigation. Normally, according to University regulations, suspension would only last three days, but because this was a lengthy investigation, his suspension lasted until December 6, 2006, at which time he was terminated from his employment.

During his suspension, Carter made various attempts to file a grievance with the University concerning his treatment. There is a three-stage protocol for doing

so. Carter successfully filed a Stage 1 grievance, but it was dismissed. The next step is to appeal the grievance to Stage 2. If the Stage 2 grievance is also dismissed, there is a final appeal to Stage 3. Carter sent a certified letter to the University to begin the Stage 2 process. The letter was received by the University post office, but never retrieved from there. It was eventually returned to the federal post office and ended up in the dead letter office.

Also during this period, the University Division of Police determined there was probable cause to charge Carter with tampering with evidence. A Fayette County grand jury indicted Carter and he was arrested. The criminal charge was subsequently dismissed by the Commonwealth Attorney.

Carter eventually initiated this action against the Appellees. There are seven counts in all. Count 1 alleged discrimination arising from his failure to be promoted to the position of Interim Director of STORES. Count 2 is irrelevant because Carter stipulated it should be dismissed. Count 3 alleged breach of contract and the covenant of good faith and fair dealing arising from the University's failure to adhere to its personnel policies and procedures. Count 4 alleged false imprisonment when Nikirk and the University police questioned Carter on his involvement in the theft. Count 5 alleged malicious prosecution arising from the University's decision to press charges against Carter and have him arrested. Count 6 alleged defamation arising from the University allegedly giving the theft story to the news media and painting Carter in a bad light. Count 7

alleged discrimination by disparate treatment arising from Carter being punished more harshly than similarly situated white employees.

After the completion of discovery, the Appellees moved for summary judgment. The trial court granted the motion and dismissed the action in its entirety. This appeal followed.

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. Kentucky Rules of Civil Procedure (CR) 56.03 “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steevest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steevest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor” *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

Carter’s first argument revolves around counts 3 through 6. The trial court dismissed these counts because it found that Carter had not sued the Appellees in their individual capacities, only their representative capacities. The trial court therefore held that the Appellees were entitled to full governmental or official immunity and could not be held liable. Carter claims that he did sue the Appellees in both their representative and individual capacities. We agree. The heading of

Carter's complaint states that he is suing the parties in both their representative and individual capacities.

The Appellees all but admit that the trial judge was incorrect in this holding. They also argue that we should still affirm the holding, albeit on other grounds. The Appellees argue that counts 3 through 6 should still be dismissed because the individual Appellees are entitled to qualified official immunity.

[W]hen sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.

Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001) (internal citations omitted).

We agree, in part, with the Appellees. We find that the individual Appellees are entitled to qualified official immunity for counts 4, 5, and 6. Carter cannot show that any actions in these counts were conducted in bad faith.

[I]n the context of qualified official immunity, "bad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.

Id. at 523.

Count 4 alleges false imprisonment.

Kentucky cases define false imprisonment as being any deprivation of the liberty of one person by another or detention for however short a time without such person's consent and against his will, whether done by actual violence, threats or otherwise. Furthermore, false imprisonment requires that the restraint be wrongful, improper, or without a claim of reasonable justification, authority or privilege.

Banks v. Fritsch, 39 S.W.3d 474, 479 (Ky. App. 2001). Carter claims that he was falsely imprisoned when Nikirk and campus police officers kept him in his office and then took him to another building in order to question him about Renfro's theft and the phone call. However, Carter admits that he went willingly with the University officials and never asked to leave. Not only can Carter not prove bad faith on the part of the Appellees, he cannot prove false imprisonment.

Count 5 alleges malicious prosecution.

Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action. They are: (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981). Carter claims Sgt. Robert McPherson and the University police maliciously prosecuted him when they swore out a warrant for his arrest claiming tampering with physical evidence. The evidence in this instance was the computerized purchase order and the purchase

order that was hidden in Renfro's calendar. Again, Carter cannot prove malice or bad faith. Carter admits that he threw away the calendar and attempted to change the computerized purchase order.

Count 6 alleges defamation. In order to prove defamation, Carter must show that defamatory language was published about him and that it caused injury to his reputation. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004). "Defamatory language" is broadly construed as language that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* Here, Carter claims the Appellees falsely accused him of theft and caused the allegations to be published in the community via print, television, and radio. Carter cannot prove bad faith yet again. A review of the record indicates that any information published to the public concerned his tampering with evidence. There was probable cause to accuse Carter of this and truth is an absolute defense to defamation. *Id.* at 795.

While summary judgment was appropriate for the already addressed counts, we do find that it was inappropriate for Count 3. Count 3 alleges breach of contract and failure to deal in good faith. Carter alleges that the personnel policies and procedures constituted an employment contract and that the University breached the contract when it failed to follow its procedure.

The specific policies Carter alleges were not followed were Human Resources Policy (HRP) 7.0, 12.0, and 62.0. HRP 7.0 deals with the three-stage

grievance procedure. He argues that the Appellees breached this policy by not accepting his certified Stage 2 grievance letter. HRP 12.0 concerns the disciplining and termination of employees. Carter argues that during the investigation it came to light that other employees had taken items from STORES for their personal use and altered purchase orders, yet he was the only one fired. Finally, HRP 62.0 requires progressive disciplinary action and only limits suspension to three days, yet he was suspended for approximately three months.

As to this issue, there are material questions of fact concerning the application of these policies in the instant case. Carter has provided evidence to show that the University may have violated its own policies. He has also provided evidence to show that these violations could have been done in bad faith, enough to circumvent qualified official immunity. Summary judgment was not appropriate for this issue. We therefore reverse and remand this issue to the trial court.

Carter also argues that summary judgment was inappropriate as to Count 1. Count 1 alleges that Carter was discriminated against when he was not promoted to Interim Director of STORES. He claims a less-qualified, white female, Back, was promoted instead of him because of his race. We find summary judgment was appropriate for this claim.

In order to prove discrimination in this instance, Carter must first establish a *prima facie* case by showing:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he

was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). As the trial court stated in its opinion, Carter cannot meet the second prong of this analysis. The position in question was Interim Director of Central STORES. This position was only temporary; therefore, there was no application process.

Carter's final argument is that the court erred in dismissing Count 7, discrimination due to disparate treatment. Carter claims that he was disciplined more severely than two white employees, Clay Sturgeon and Carol Hilton. In order to prove discrimination due to disparate treatment, Carter must show "(1) that he was a member of a protected class and (2) that for the same or similar conduct he was treated differently than similarly-situated non-minority employees." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

[T]o be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Id.

The trial court dismissed this cause of action because it found Carter, Sturgeon, and Hilton were not similarly-situated in all respects. Specifically, the trial court stated that Carter violated University policy after Renfro had been fired

while the other two employees violated policy before Renfro was fired. The trial court also stated that the issue was “almost too close to call.” We think the issue is too close to call and therefore should not have been dismissed via summary judgment. There are still questions of material fact that need to be considered. Had Renfro been fired when he asked Carter to remove and change purchase orders? If he had been fired, did Carter know?

Also, it appears Carter, Sturgeon, and Hilton had all committed the terminable offense of falsifying or altering purchase orders. Carter was suspended and then terminated. Sturgeon was suspended, but allowed to return to work approximately five weeks later. Hilton was not even placed on suspension. This issue was not ripe for summary judgment. We therefore reverse and remand this issue to the trial court.

We will note that our holdings as to the issues we reversed and remanded only apply to Sarah Nikirk and Kimberly Wilson. Sgt. Robert McPherson was sued in relation to Count 5, which alleged malicious prosecution. He played no part in the personnel issues that are the foundation of the issues we remand here. The rest of the individual Appellees were previously dismissed from the case by the trial court because Carter presented no facts which indicated they participated in the alleged events. Carter did not appeal the dismissal of these parties from the case.

Based on the above we reverse and remand this case to the trial court for further proceedings in accordance with this opinion.

ALL CONCUR.

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