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Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000039-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-01777

DEBRA STEPHENS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, JONES, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal of a decision of the Franklin Circuit Court which reversed and remanded the decision of the Board of Trustees of the Kentucky Retirement Systems (the Board). Based upon the following, we affirm the decision of the Franklin Circuit Court.

BACKGROUND INFORMATION

Appellee, Debra Stephens, was employed by the Cabinet for Health and Family Services (the Cabinet). On May 27, 2008, Stephens started working on an “as needed” basis with a corporation called Communicare. While Communicare is a private business, it is a participating agency in the Kentucky Employees Retirement System (KERS). Due to the number of hours Stephens worked at Communicare, she was not eligible to participate in the KERS as an employee for that agency. She did, however, participate through her job with the Cabinet. On January 1, 2009, she retired from her position with the Cabinet after completing a Form 6120, Certification of Service.

On July 29, 2009, seven months after she retired from the Cabinet, Stephens became a full-time employee with Communicare and completed a Form 2001-Membership Information on which she indicated that she had been employed with Communicare since May of 2008. On June 30, 2010, KERS notified Stephens that her employment with Communicare put her in violation of Kentucky Revised Statutes (KRS) 61.590(5)(c), KRS 61.637 and Kentucky Administrative Regulations 105 KAR 1:390. As a result, she was notified that her retirement benefits would be voided and that she would be required to repay all benefits she had received from KERS, including health insurance premiums from January of 2009 until July of 2010 in the amount of \$55,291.26.

On July 27, 2010, Stephens filed a request for an administrative hearing on the issue. Hearings were held and evidence taken on February 16, 2011

and June 6, 2011. A hearing officer heard the evidence and in its Recommended Decision to the Board, concluded that at the time Stephens applied for retirement from the Cabinet, she was employed both by the Cabinet and Communicare. The hearing officer also determined that, while Stephens's job for Communicare at the time of her retirement was a non-participating position due to her part-time status, she did not have the three month break in participation before starting her full-time, participating position with Communicare as required by statute. While Stephens had argued at the hearing that KERS should be equitably estopped from recovering the amounts paid to her, the hearing officer determined that it was a remedy only available in extraordinary circumstances and this was not such a case.

Both KERS and Stephens filed exceptions to the hearing officer's recommendations. On November 18, 2011, the Board accepted the hearing officer's recommendations and ordered Stephens to repay the amounts she had received in benefits as well as the health insurance premiums paid on her behalf. Stephens then appealed the decision to the Franklin Circuit Court.

In reversing the Board's Final Order, the circuit court held as follows:

The Court finds that the hearing officer's rejection of Ms. Stephens's equitable estoppel argument was unsupported by the substantial evidence of record, and moreover was contrary to the provisions of KRS Chapter 61 and corresponding regulations governing re-employment of retired employees. Furthermore, the Court finds that [KERS] acted arbitrarily in requiring Ms. Stephens to repay a year and a half worth of her retirement benefits when it is uncontested that her re-employment was in a part-time position that was never covered under the

retirement plan that was part of Communicare's participation in the KERS program.

Ms. Stephens was a part-time employee of Communicare, a private company participating in the state's retirement system, which *never* participated in or made contributions to KRS on Ms. Stephen's behalf. She was not even eligible to participate in KERS as a Communicare employee until more than six months after she retired from her full time employment with the Cabinet. This uncontested fact establishes that she more than met the requirement for a three month separation from service prior to re-employment.

KERS then brought this appeal.

STANDARD OF REVIEW

In reviewing the Board's determination below, the circuit court must follow the dictates of KRS 13B.150 (2):

[S]hall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole, or in part, and remand the case for further proceedings if it finds the agency's final order is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Without support of substantial evidence on the whole record;
- (d) Arbitrary, capricious, or characterized by an abuse of discretion;
- (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
- (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040 (2); or
- (g) Deficient as otherwise provided by law.

The circuit court correctly found that its standard regarding the facts was whether the evidence as a whole compelled the agency for a finding in the

Petitioner's favor. We must review the circuit court's decision to determine whether it applied the standard and the law correctly. Issues of law are reviewed *de novo*. *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, L.Ed 2d 911 (1996).

DISCUSSION

In deciding that Stephens was in violation of KERS statutes, the hearing officer found that when she applied for retirement from the Cabinet, she was actually working for both the Cabinet and Communicare. Stephens does not deny this. The hearing officer also found that Stephens's position with Communicare was non-participatory due to her part-time status. The issue on which the hearing officer determined that Stephens was in violation of the statutes revolved around whether there was a break between her retirement from the Cabinet and her full-time position with Communicare.

105 KAR 1:390, §6(1) provides that a retired member who returns to work for a different participating employer in a non-participating position, shall not be required to have a bona fide separation from service if such member becomes employed with a different participating employer than the retired member's employer prior to retirement. The Board argues that while Stephens's employment with Communicare was in a non-participating position due to its part-time status, she was still required to have a three calendar month break in service immediately after her retirement date from the Cabinet and that she failed to have this required break. KERS bases this on 105 KAR 1:390, §6(2) which provides that a retired

member who becomes employed in a non-participating position shall have a three (3) calendar month break in service.

Stephens does not argue that she did not have a three month break between her employment with the Cabinet and her part-time employment with Communicare. In fact, Stephens has never stated nor, it appears, tried to hide the fact that she was employed with Communicare at the time of her retirement from the Cabinet.

The hearing officer determined that Stephens's part-time employment with Communicare at the time of her retirement from the Cabinet constituted disqualifying employment under KRS 61.637(17)(a). That statute provides that:

...employed in a position that is not considered regular full-time with an agency participating in one (1) of the systems administered by Kentucky Retirement Systems within three (3) months following the member's initial retirement date, the member's retirement shall be voided, and the member shall repay to the retirement system all benefits received, including any health insurance benefits.

KERS argues that Stephens failed to have a bona fide separation in service and violated the provisions of KRS 61.637 by not observing a three month break in service before employment with a participating agency on even a part-time basis. It contends that the circuit court misunderstood KRS 61.637 and 105 KAR 1:390 and incorrectly stated that the KERS's interpretation of the statute and regulation would mean that an employee could never return to work for a participating employer in a non-participating position. KERS asserts that retirees cannot have a

pre-arranged agreement to return to work, must have a bona fide break in service and must sit out the required time period under the statute before returning to work.

KERS argues both that Communicare should have counted the part-time hours Stephens worked as participating hours within the retirement system while it agrees with the hearing officer that the part-time position Stephens held at Communicare was in a non-participating position.

The circuit court held that:

If every participating employer in KERS is to be treated as the same participating employer, under the interpretation of the KERS, an employee could *never* “return to work for a different participating employer in a nonparticipating position.” Thus, the interpretation of this administrative regulation advanced by the KERS and adopted by the hearing officer is arbitrary. Moreover, the Court is at a loss to understand why the Kentucky Retirement Systems would have any jurisdiction to enforce such a rule against an employee who is not participating in the retirement system, and whose employment is simply not covered. The KERS has failed to advance any legitimate reason why such a draconian punishment can be imposed on an individual who the uncontested evidence demonstrates was working in a post-retirement part-time job that was not ever eligible for KERS benefits until six months after her retirement from the Cabinet.

The hearing officer did not find that Stephens was aware of the requirement of the three-month break in service. The hearing officer also found that “Communicare failed to abide by its duty to report her employment to [KERS].” While the hearing officer also held there was no concealment of material facts by KERS, the hearing officer did not find that Stephens had concealed either. At

most, the hearing officer concluded that no one was concealing anything, but that because KERS was not concealing, Stephens's retirement must be voided. The circuit court disagreed as do we.

It is apparent from the record below and the Appellant's brief that all parties involved failed to notice Stephens was in violation of Kentucky statutes regarding retirement and re-employment. KERS argues in its brief that Communicare erred by not reporting Stephens as a regular full-time employee even though she was part-time with them based on KRS 61.680(6). Still, Stephens is the one being penalized.

Equitable estoppel may be invoked under "[c]ircumstances that are so exceptional as to allow equitable estoppel against a government agency, we think must include some gross inequity between the parties." *City of Shelbyville, ex rel. Shelbyville Mun. Water and Sewer Commission v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet*, 706 S.W.2d 426, 430 (Ky. App. 1986). Estoppel is a question of fact, *Weiland v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, at 91-92 (Ky. 2000), therefore, the hearing officer must have had substantial evidence in his finding that Stephens was not entitled to the defense.

In determining whether a party is entitled to equitable estoppel, the following elements must be examined:

1. Conduct, including acts, language and silence, amounting to a representation or concealment of material facts;

2. The estopped party is aware of these facts;
3. These facts are unknown to the other party;
4. The estopped party must act with the intention or expectation his conduct will be acted upon; and
5. The other party in fact relied on this conduct to his detriment.

Board of Trustees, Kentucky Retirement Systems v. Grant, 257 S.W.3d 591, 594 (Ky. App. 2008); citing *Gray v. Jackson Purchase Production Credit Ass'n*, 691 S.W.2d 904, 906 (Ky. App. 1985).

In this case, Stephens admits that she met with Lisa Smith, a benefits counselor, prior to retiring from the Cabinet. The hearing officer found that at the time of the meeting, Communicare failed in its duty to report that Stephens was its employee. While the hearing officer stated that he gave greater credibility to Smith regarding the place where the meeting was held, he did not find that Stephens concealed anything from Smith at that meeting. He also did not make specific findings that Smith explained part-time work in a non-participating position with a participating agency to Stephens. Thus, the silence of Smith on this issue was conduct amounting to a representation or concealment of material facts.

The KERS, if anyone is, should be aware of the statutes regarding retirement and reemployment by a participating agency. The hearing officer never found that Stephens was aware of the issue her part-time employment caused. Smith and the KERS provided counseling to the retiree, Stephens, thus, it expected its advice to be relied upon. Stephens relied on the information she received from KERS via Smith, her benefits counselor, to her detriment when she retired believing her work

with Communicare was not an issue. Thus, the hearing officer's determination that equitable estoppel was not a valid defense was in error as it was not supported by substantial evidence. The Board erred in issuing an Order to that effect and the Franklin Circuit Court correctly found that equitable estoppel applies in this case.

For the foregoing reasons we affirm the decision of the Franklin Circuit Court.

JONES, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. The result in this case stems from the conclusion that KERS is equitably estopped from enforcing KRS 61.590(5), 61.637, and 105 KAR 1:390 and voiding Stephens retirement benefits. As noted by the majority opinion, equitable estoppel may apply when six elements exist, including awareness by the party to be estopped of material facts. *Board of Trustees of Kentucky Retirement Systems v. Grant*, 25 S.W.3d 88, 91-92 (Ky. 2000).

In this case, the hearing officer found that neither KERS nor Stephens was aware of her disqualifying employment with Communicare. This finding runs counter from the second element noted above, the estopped party's awareness of material facts. In my view, equitable estoppel does not apply. I would reverse the Franklin Circuit Court's Opinion and Order, and remand to that court with directions to reinstate the Board's decision.

BRIEF FOR APPELLANT:

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