

RENDERED: December 11, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002052-MR

PATRICIA K. ROLLINGS

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN MINTON, JR., JUDGE  
ACTION NO. 92-CI-00833

BARREN RIVER DISTRICT  
HEALTH DEPARTMENT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE; ABRAMSON<sup>1</sup> AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Patricia Rollings (Rollings) has appealed from the judgment of the Warren Circuit Court entered on June 6, 1997, which summarily dismissed her claims against her former employer, the Barren River District Health Department (the Health Department). We affirm.

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<sup>1</sup> Judge Abramson concurred in this Opinion prior to her departure from this Court. Release of this Opinion was delayed through normal administrative handling.

Rollings was employed as a clerk/typist for the Health Department from 1983 until she was discharged in May 1991. Rollings appealed her dismissal to the Merit System Council for Local Health Departments (the Council), which was administered by the Cabinet for Human Resources. See Kentucky Revised Statutes 211.1755. After a hearing in February 1992, the Council determined that Rollings' dismissal was predicated "upon a mistaken fact" and that she had never "abandoned" her job. It ordered that she be reinstated to her former position and that she be awarded back pay and all fringe benefits lost during the period she was unemployed. The Health Department did not appeal the final order of the Council.

During the many months Rollings was not employed by the Health Department, she applied for more than 30 jobs but was not offered a position. After the Council's decision became final, she returned to her job at the Health Department. There is no question that she was given the back pay and other benefits to which she was entitled. However, she alleges that after her return to work she began experiencing adverse working conditions.

On September 16, 1992, Rollings filed a complaint in the Warren Circuit Court in which she alleged (1) that the Health Department, "by its agents, servants or employees, when contacted for a reference regarding [her] wrongfully, intentionally, maliciously or with reckless disregard for the truth of the matter, gave [her] such a bad recommendation that she was then

and is now non-competitive in the local job market"; and (2), that when she was returned to work by the Council, she was not reinstated to her previous position but "was assigned new and different duties from those of her previous position without training or guidance in the performance of what amounted to a myriad of demeaning tasks." She also alleged that "[a]n atmosphere of vengeful hostility was created in the work place by [her] superiors that was intended to make [her] life at work a misery for the purpose of inducing [her] to voluntarily quit her job." She further alleged that the pressure placed on her had "exceeded her ability to tolerate" and had made her physically ill. She sought damages for the "tortious misconduct in falsely reporting [her] work history and work habits to prospective employers" and for the "loss of her ability to earn money in her present position." Although Rollings was employed by the Health Department at the time she filed her complaint, she soon ceased working for the appellee, allegedly because of the treatment she received by her supervisors and co-workers.

On October 7, 1992, the Health Department filed a motion to dismiss pursuant to CR 12.02(f). It argued that Rollings had received the back pay she was awarded and was reinstated to the position of clerk/typist, and that her complaints constituted new grievances which she was required to pursue through the Council. The trial court denied the motion to dismiss on October 5, 1993, and stated as follows:

If the Court accepted the reasoning and arguments of the [Health Department], [Rollings] would remain forever in a circular pattern of grievances, orders, and alleged noncompliance with the orders, resulting in another grievance, etc. The Court is of the opinion that [Rollings] properly brought this action in Circuit Court and is entitled to pursue the action.

A year later, the Health Department learned that Rollings had filed a claim for workers' compensation benefits for an alleged work-related stress syndrome which, according to her Form 101, was caused by "people not being nice to her" and the stress of answering the telephone. The Health Department moved to amend its answer to assert the exclusivity provisions of the Kentucky Workers' Compensation Act as an affirmative defense and moved for summary judgment based on that defense. On October 19, 1994, the Warren Circuit Court dismissed Rollings' complaint without prejudice. Its order provided that Rollings had leave to re-file the case without further payment of a filing fee if her claims were rejected by the Department of Workers' Claims.

Rollings' claim for workers' compensation was rejected by the Administrative Law Judge. Thus, in December 1996, the Warren Circuit Court granted Rollings' request that her case be restored to the court's active docket. A trial was scheduled to commence on June 10, 1997. In April 1997, the Health Department again moved for summary judgment. Although Rollings asked for and was granted an extension of time to respond to the motion, she did not file a response.

On June 6, 1997, the trial court entered its order dismissing Rollings' claims. The trial court determined that Rollings had not exhausted her administrative remedies and was required to return to the Council "for a determination as to whether the [Health Department] ha[s] satisfied the August 18, 1992 administrative order by restoring Rollings to her employment status." The trial court also granted the Health Department's motion for summary judgment on the defamation claim and stated as follows:

As indicated above, counsel for Rollings has failed to respond to the defendants' motion, has failed to file a pretrial compliance, and has failed to place any direct evidence in the record that would support Rollings' slander claim. As a result, the Court concludes that there is no genuine issue of material fact supporting Rollings' slander claim. The Court determines that i[t] would be impossible for Rollings to [ ] produce [any] evidence at trial that would warrant a judgment in her favor.

In this appeal, Rollings argues that the Warren Circuit Court erred in its determination that she had not exhausted her administrative remedies. She requests that we reverse and instruct the circuit court to enforce the order of the Council. However, Rollings is no longer employed by the Health Department, and does not desire to return to work there. Thus, whether the Health Department complied with the final order of the Council, vis-a-vis her job assignments upon reinstatement, is a moot issue.

The gravamen of Rollings' claim is that, as a result of the egregious treatment she received from her supervisors and co-workers after being reinstated to her job, she became ill and was forced to quit her job. It is apparent to this Court that this is not an action to enforce the Council's order, but constitutes additional grievances for conduct occurring after the Council's order, over which the Council has jurisdiction. See Kidd v. Montgomery, Ky.App., 583 S.W.2d 87 (1979). Rollings has not cited a single case in which a merit employee was permitted to assert a claim in circuit court for constructive discharge and we know of no such authority. Accordingly, it is our belief that the trial court was correct in its determination that jurisdiction over Rollings' claim for retaliatory or constructive discharge lies in the administrative arena. See Commonwealth, Tourism Cabinet v. Stosberg, Ky.App., 948 S.W.2d 425 (1997).

Having reviewed the entire record, we also conclude that the trial court did not err in summarily dismissing Rollings' defamation claim. In her complaint and deposition testimony, Rollings expressed her belief that her inability to find employment in the Bowling Green area was attributable to negative and/or false references made by her supervisor, Elizabeth Stone (Stone) or others employed by the Health Department, to potential employers. However, as is apparent from the following testimony, Rollings could not name a single

individual or entity to whom false or disparaging references were given:

Q. So is it your testimony you have been blacklisted on all--

A. Oh, yes.

Q. --of the doctors' offices here in town?

A. Yes.

Q. How did you come to be blacklisted?

A. I think Elizabeth Stone out at-- now it's the, what are they calling it now, the commission. No, it's not even a commission anymore. It's for children with special needs now. She has given bad references on me in the past.

Q. To whom did she give a bad reference?

A. Well, do I have to cite where she publicly put me down at the Western T. I don't think I need any more than that.

Q. Ms. Rollings, I don't mean to get confrontational.

Mr. Robertson [Rollings' attorney]:  
Just answer the questions. What he is wanting to know is, do you know of any employment where she has torpedoed you by giving you a bad reference, and I think your answer to that question is no.

A. No. I don't know for sure.

Rollings insists that she has sufficient circumstantial evidence to allow a jury to find that she was defamed by agents of the Health Department and that summary judgment was

improvidently granted. The circumstantial evidence relied upon includes proof that before she was fired in 1991, she was an "excellent employee as evidenced by her employee evaluations" and that she "had a quality job history." After she was reinstated, her employer acted "in a malicious fashion to harm [her]," and Stone made "unsolicited slurs about her in public gatherings."<sup>2</sup> Finally, she has proof that she was not able to find "suitable employment in the same job market in which she has spent her entire life."

In order to establish a claim for defamation, a plaintiff must prove the existence of: (1) defamatory language; (2) about the plaintiff; (3) which is published, that is communicated in some manner; and, (4) which causes injury. McCall v. Courier-Journal and Louisville Times Company, Ky., 623 S.W.2d 882 (1981). It is axiomatic that a plaintiff must be able to prove that defamatory statements were communicated to someone other than the plaintiff. It is not sufficient that the plaintiff suspects that someone made disparaging or derogatory comments about her. In the absence of any evidence that any defamatory remarks were published, summary judgment was appropriate. Wyant v. SCM Corporation, Ky.App., 692 S.W.2d 814, 816 (1985).

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<sup>2</sup>The actual substance of these "slurs" is not contained anywhere in the record. See pp 8-9, *infra*.



In addition to Rollings' belief that she was defamed to potential employers by someone at the Health Department, she also argues that there is evidence that Stone defamed her to Joerg Seitz (Seitz). As the trial court set out in its judgment, there is no evidence in the record of what Stone was alleged to have said to Seitz about Rollings. When asked at her deposition about the alleged defamation, Rollings testified that she did not hear the conversation and had no knowledge of what Stone actually communicated to Seitz.

We agree with Rollings' argument that it is not necessary for her to have "independent knowledge of each and every fact of her case." It is obviously not necessary that a plaintiff asserting a claim for defamation to have heard the allegedly slanderous statements first hand. There must be, as noted earlier, some evidence that false remarks were published or communicated to a third person. In the instant case, Rollings contends that Stone made "gratuitous slanderous remarks" and "unsolicited slurs about her" to Seitz, who in turn telephoned Rollings' attorney with the information. However, the record does not contain an affidavit prepared by either Seitz or Rollings' attorney setting forth the actual alleged defamatory matter. Without any evidence of the actual comments made by Stone to Seitz, the trial court could not in the first instance determine whether anything Stone said qualified as defamation. Certainly, not all "slurs" constitute defamation. Peters v.

Barth, 20 Ky.Law.Rep. 1934, 50 S.W. 682 (1899) (words "she is a damned slut," a "damned bitch," and a "damned sow" were not actionable). In any event, Rollings has not asserted a claim against Stone and admits that the allegedly slanderous slurs were made by Stone in a social context, and not within the scope of her employment. Thus, even if Rollings could establish the existence of a defamatory statement to Seitz, she does not explain how the Health Department would be liable.

While a plaintiff is not required to prove her case in response to a motion for summary judgment, it is incumbent upon her to establish that a fact question does exist. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). Rollings did not respond to the motion and the record does not contain evidence that any defamatory statements were ever published to a third person by an agent or employee of the Health Department. Under these circumstances, we hold that the trial court did not err in granting the Health Department's motion for summary judgment.

Accordingly, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Douglas E. Robertson  
Bowling Green, KY

BRIEF FOR APPELLEE:

Hon. Matthew J. Baker  
Bowling Green, KY