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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002097-MR AND
NO. 1998-CA-002162-MR

KENTUCKY STATE POLICE — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 95-CI-00036

ELMER RAY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING AND
REMANDING IN PART
** ** ** ** **

BEFORE: DYCHE, EMBERTON, AND HUDDLESTON, JUDGES.

DYCHE, JUDGE: Elmer Ray filed suit against the Kentucky State Police (KSP) under Kentucky Revised Statutes (KRS) 61.101-61.103 (the "Whistleblower" statute) alleging that adverse employment action had been taken against him in retaliation for a letter he sent to a state senator describing what he claimed was waste and mismanagement in KSP. After a jury verdict in Ray's favor, KSP brings this appeal, and Ray brings a cross-appeal. For the reasons stated herein, we affirm in part, reverse in part and remand.

Both parties are well-versed in the facts of this case, and they will be repeated in this opinion only to the extent necessary to discuss the issues involved. KSP first claims that the trial court erred in denying KSP's motion to amend its answer to include the defense of unconstitutionality of KRS 61.102 and 61.103. The complaint was filed by Ray on March 24, 1995. KSP's initial answer was filed on April 17, 1995. It filed an amended answer to an amended complaint on March 22, 1996. KSP did not attempt to amend its answer to include the defense of unconstitutionality until October 7, 1997 - one day after the first trial of this action had begun. The first trial ended in a mistrial, and KSP filed a renewed motion to amend its answer on December 17, 1997. The trial court entered an order on January 26, 1998, denying the motion to amend.

Kentucky Rules of Civil Procedure [CR] 15.01 states:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

(Emphasis added.)

The trial court issued only one order presumably denying both of KSP's motions to amend. The court properly denied the motion when it was first offered. To have granted the motion during the first trial would have resulted in substantial prejudice to the plaintiff, and the trial court appropriately

exercised its discretion at that time. Cheshire v. Barbour, Ky., 481 S.W.2d 274 (1972).

However, we see no reason why KSP should not have been permitted to amend its answer after the mistrial. KSP claims that it did not become aware of the claimed defect in the statutes until the parties began preparing jury instructions. The trial court's discretion in refusing amendments is reviewed under the "clear error" standard. Ashland Oil & Refining Co., Inc. v. Phillips, Ky., 404 S.W.2d 449 (1966). Where there is no showing that the opposing party's position has been worsened by the delay in offering the amendment, where there is a color of excuse for the delay, and where there is no suggestion of bad faith on the part of the party offering the amendment, the trial court should allow the amendment. Id. at 450-51.

Here, Ray would not have been prejudiced by allowing the amendment after the mistrial. He had ample time to prepare his case with the knowledge that KSP was challenging the constitutionality of the statute. Although the amendment was not offered for two and one-half years after the answer was filed, there is a "color of excuse" for the delay given that the alleged defect was not evident until the parties disagreed about the shifting burden of proof in the jury instructions. Finally, we discern no bad faith on KSP's behalf in offering the amendment. The trial court erred in denying the motion to amend.

We are remanding this issue to the trial court so that it can conduct a full hearing into the constitutionality of the statute. Since this is solely a question of law, it is not

necessary to remand for a new trial. If the trial court determines that the statute is constitutional, the judgment will stand. Although the constitutional challenge was fully briefed before the trial court and before this Court by KSP, it was not addressed on its merits by the trial court because the motion to amend was denied, thus precluding an argument on the substance of the claim. This Court lacks authority to review issues not decided by the trial court. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225 (1989). As such, we do not reach the constitutional challenge in this opinion.

KSP also argues that the trial court improperly denied its motions for JNOV, to vacate, or to grant a new trial. The standard of review for motions for JNOV is the same as that for a directed verdict, and is set out in Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459 (1990), as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing

> to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

Id. at 461-62 (internal citations omitted).

While we might not have reached the same conclusion had we been on the jury, we may not weigh the evidence anew. Upon review of the evidence presented in this case, we can not say that the verdict rendered was "palpably or flagrantly" against the evidence. Drawing all reasonable inferences from the evidence in favor of Ray, the trial court did not err in denying KSP's motions for JNOV, to vacate the judgment, or to grant a new trial.

KSP first filed its motion for change of venue on May 30, 1997, more than two years after the complaint was filed. KSP claims that Ray became a prominent figure in the community due to his leadership efforts following a devastating flood in Pendleton County in March, 1997. Ray's efforts in the assistance project allegedly allowed him to wield undue influence in the community and created a climate in which KSP was unable to receive a fair trial, "tipp[ing] the scales of justice." We cannot agree.

A motion for change of venue should be timely made. Miller v. Watts, Ky., 436 S.W.2d 515 (1969). Although the request here came more than two years after the filing of the complaint, it timely followed the flood that triggered the motion. The trial court has broad discretion in determining whether a motion for change of venue should be granted and its decision will not be disturbed on appeal absent an abuse of that discretion. Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997). The trial court's decision is afforded great weight because it is

present in the county and better suited than an appellate court to assess the environment. Id. KSP presented no evidence of prejudice or bias in favor of Ray, but merely expressed its opinion that there was a "substantial community feeling in favor of" Ray. This falls far short of showing actual prejudice or prejudice that could have been clearly implied. Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734 (1996). The trial court correctly denied the motion for change of venue.

KSP also claims that Captain John Barton was "required to interpret" KRS 61.102 on cross examination, and that the trial court erred in permitting a non-legal witness to express an opinion about a legal issue. After Ray did not get the transfer he had requested, he sent a letter dated November 9, 1994, to then state Sen. Joseph Meyer detailing what he felt was an inefficient use of state resources by KSP because of the time and distance required for Ray to travel from his home to the region to which he was assigned. On January 27, 1995, Barton ordered Ray not to testify about state police business without first notifying Barton that Ray was going to testify. The testimony to which KSP objected concerned the application of the Whistleblower statute, and was as follows:

> Q: No. Just tell me what the highlighted part of that statute says.
> A: ". . .No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence. . . ." That's all that's highlighted. There's quite a bit more on this page.
> Q: You can read all of it if you want, Captain, but that's exactly what you did, isn't it? You required him to give notice prior to making such a report, disclosure, or divulgence.

> A: At the time that I gave him that direct order, it was in compliance with Kentucky State Police Policy. I was not aware, I had not read the statute.

KSP claims that this testimony required Captain Barton to state a legal opinion about the statute. After reviewing the record, we disagree. Captain Barton was asked to read a portion of the statute, but then testified that his conduct conformed to KSP policy. He did not express a legal opinion about the statute, and testified that he was not even aware of the statute. We find no error in this testimony.

KSP's final argument on appeal is that the trial court erred in imposing CR 11 sanctions in response to Ray's motion to strike certain defenses in KSP's answer. A trial court should not impose CR 11 sanctions without a hearing and without rendering findings of fact. Clark Equipment Co. v. Bowman, Ky. App., 762 S.W.2d 417, 421 (1988). When sanctions are imposed, appellate review applies a clearly erroneous standard to the trial court's findings of fact, *de novo* review of the legal conclusion that a violation occurred, and an abuse of discretion standard on the sanctions imposed. Id. Ray's motion to strike defenses was granted by the trial court, which held the motion for sanctions in abeyance until final judgment had been rendered. After the trial, Ray renewed his motion for sanctions, which was granted by the trial court. However, the record is devoid of any findings of fact by the trial court in regard to the sanctions. We must therefore set aside the order awarding sanctions and remand the issue to the trial court for findings of fact.

Following the trial, Ray filed a motion to amend the judgment and order that he be reinstated to his position with KSP, that he be awarded benefits and back pay, that he be awarded attorney's fees, and that he be awarded interest on the judgment. The trial court denied his motion and Ray filed his cross-appeal addressing these issues.

In denying Ray's motion for reinstatement, benefits, and back pay, the trial court found that Ray had received some benefit from KSP's decision to transfer him to the Dry Ridge post, which was closer to his home than his previous work station. Using language associated with claims of constructive discharge, the court also found that the "transfer would not be intolerable to a reasonable person" and concluded that Ray's retirement from KSP was indeed voluntary. We believe that this finding is consistent with Ray's deposition and trial testimony. We further agree that although Ray was not being transferred to the exact position he had requested, a transfer to a post located closer to his home did confer some benefit upon him. We acknowledge the difficulty in resolving this conclusion with the jury's verdict, but under the appropriate standards of review, this finding is not inconsistent with the verdict. The trial court correctly denied Ray's motion for reinstatement and for benefits and back pay.

The trial court denied the motion for attorney's fees because it had been advised that Ray's attorney's fees had been paid by a third party. "The trial judge is generally in the best position to consider all relevant factors and require proof of

reasonableness from parties moving for allowance of attorney fees." Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287, 293 (1991). The underlying public policy for awarding attorney's fees is to insure effective access to the judicial process. Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 826 (1992). Ray's access to the judicial process has apparently not been hindered by legal costs, because those costs have been borne by a third party which is not a party to this action. Allowing him to recover fees which he has not expended does not serve the purpose behind the policy. The trial court did not abuse its discretion by denying this motion.

Finally, Ray claims that he should have been awarded interest on the judgment. "It is a well-settled principle that neither a state nor public agency is liable for interest on public debts unless there is statutory authority or a contractual provision authorizing the payment of interest." Powell v. Board of Education of Harrodsburg, Ky. App., 829 S.W.2d 940, 941 (1991). We find that this "well-settled principle" is applicable when awards of punitive damages, as well as compensatory damages, are assessed against a state agency.

In sum, we hold that the trial court should have allowed KSP to amend its answer to include the defense of unconstitutionality; thus, we remand this case to the trial court for a hearing and determination on the constitutionality of the statute. We affirm the trial court's denial of KSP's motion for JNOV, to vacate, or for a new trial. We also affirm the trial court's denial of a change of venue and its ruling permitting the

testimony of Captain Barton, but set aside its imposition of CR 11 sanctions and remand for entry of findings of fact. We affirm on cross-appeal in all respects.

ALL CONCUR.

BRIEF FOR APPELLANT/ CROSS-APPELLEE:	BRIEF FOR APPELLEE/ CROSS-APPELLANT:
Roger N. Braden Cincinnati, Ohio	Stephen D. Wolnitzek Covington, Kentucky