

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001103-MR

JOE MCDUGAL

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 96-CI-00932

JACKSON PURCHASE ELECTRIC
COOPERATIVE CORPORATION

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, and TACKETT, Judges.

McANULTY, JUDGE: Joe McDougal appeals from an order of the McCracken Circuit Court that granted partial summary judgment to the Jackson Purchase Electric Cooperative Corporation and dismissed McDougal's claim of wrongful termination based on breach of contract. After reviewing the record and the arguments of counsel, we affirm.

Jackson Purchase Electric Cooperative Corporation
(hereinafter Jackson Electric) is a nonprofit electric

distribution cooperative serving six counties in Western Kentucky. After having been employed by Jackson Electric for 24 years, McDougal was informed in August 1996 at a meeting with the interim General Manager and the President of the Board of Directors that he was being terminated from his job. At the time, McDougal was 55 years of age and the manager of the Department of Finance and Administration overseeing 28 employees. His responsibilities included overseeing the general accounting requirements of the company, maintaining financial statements, and overseeing the billing department. At the meeting in which he was notified of his dismissal, the President of the Board of Directors suggested the action was based on dissatisfaction with appellant's management style. He was replaced by a 30-year-old female, who had been a supervisor of general accounting in the Finance Department.

In October 1996, McDougal filed suit against his former employer alleging wrongful termination, age discrimination in violation of KRS 344.040, and violation of the company's corporate charter based on the action of the Board of Directors.¹ He sought compensatory and punitive damages for lost past and future wages and benefits, emotional distress, attorneys fees, and incidental expenses.

¹Appellant later filed an amended complaint to include an additional cause of action for conspiracy to violate civil rights pursuant to KRS 344.280 and KRS 446.070. Jackson Electric subsequently filed a motion for summary judgment on this claim that was granted by the trial court. McDougal has not appealed that decision.

Following some preliminary discovery, Jackson Electric filed a motion in February 1999, seeking partial summary judgment under CR 56.03 on McDougal's claims of breach of contract and violation of business charter. It alleged that McDougal was an "at will" employee and that Kentucky law does not recognize a cause of action for violation of business charter. McDougal filed a response to the motion. On March 26, 1999, the trial court entered an order granting Jackson Electric's motion for partial summary judgment.² On April 7, 1999, McDougal filed a motion asking the court to reconsider and vacate its order granting Jackson Electric partial summary judgment. Meanwhile, between April 12-15, 1999, the circuit court conducted a jury trial limited to appellant's age discrimination cause of action. After the jury informed the court that it was hopelessly deadlocked, the trial court declared a mistrial on that claim. Shortly thereafter, McDougal filed a motion pursuant to CR 54.02 requesting the trial court to enter a final and appealable order on his motion to reconsider/vacate its prior summary judgment order. Jackson Electric filed a response opposing appellant's motion for a final order. On May 6, 1999, the trial court entered an order denying McDougal's motion to reconsider/vacate its prior order granting Jackson Electric summary judgment on appellant's claim of wrongful termination based on breach of

²McDougal has not challenged the trial court's grant of summary judgment to the appellee on his claim of violation of business charter. Therefore, we will not address that issue in this appeal.

contract. Consistent with CR 54.02 the order states it is a final and appealable order. This appeal followed.

First, we briefly discuss the procedural issue of whether this case is properly before this Court. Although the appellee initially opposed designating the order granting the partial summary judgment final and appealable, it has not challenged the trial court's action on this point in its appellate brief. We agree with appellant that the trial court had the authority to designate its order final and appealable under CR 54.02.

Although the mere recitation of finality language by the court in its order is not determinative, Preferred Risk Mutual Ins. Co. v. Kentucky Farm Bureau Mutual Ins. Co., Ky., 872 S.W.2d 469 (1994), the trial court has broad discretion in deciding whether to certify a judgment as final and appealable on a claim in an action involving multiple claims. Christie v. First American Bank, Ky. App., 908 S.W.2d 679 (1995). The test for whether an order is appealable is whether it "grants or denies the ultimate relief sought in the action or requires further steps to be taken in order that parties' rights may be finally determined." The Lexington Herald-Leader Co. v. Beard, Ky., 690 S.W.2d 374, 376 (1984) (quoting Evans Elkhorn Coal Co. v. Ousley, Ky., 388 S.W.2d 130, 130-31 (1965)). An order disposing of a claim may be appealable even though there are further proceedings pending between the parties. See, e.g., Preferred Risk Mutual, supra; Christie v. First American Bank, supra. In the current case, the circuit court's summary judgment order

fully adjudicated McDougal's contract claim. It is final and appealable despite the fact that McDougal's age discrimination claim is still pending.

McDougal argues on appeal that the trial court acted prematurely in granting summary judgment and dismissing his claim of wrongful termination based on breach of contract. The standard of review on appeal when a trial court grants a motion for 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." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996); Palmer v. International Ass'n of Machinists, Ky., 882 S.W.2d 117, 120 (1994); CR 56.03. The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480-82 (1991); Leslie v. Cincinnati Sub-Zero Products, Inc., Ky. App., 961 S.W.2d 799, 804 (1998). The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, 807 S.W.2d at 482. See also Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992). Because specific factual findings are not involved, an appellate court need not defer to the trial court's decision and

will conduct a de novo review using the same standards as the trial court. See Scifres, 916 S.W.2d at 781; Wheeler v. Veal Realtors and Auctioneers, Inc., Ky., App., 997 S.W.2d 497, 498 (1999); Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997).

McDougal's breach of implied contract claim is based on the company's employment manual. He points to several provisions that he alleges modified the traditional "at will" employment status and limited Jackson Electric's discretion in terminating employees to situations involving good cause. He further posits that Jackson Electric had no justifiable reason for terminating him and this factual issue should be presented to a jury. On the other hand, Jackson Electric contends that McDougal was an "at will" employee that could be dismissed even without justification. Therefore, the dispositive issue is whether the employment manual created an employment contract restricting the employer's ability to terminate McDougal only for good cause.

McDougal first points to a provision under Chapter I - General Information, Terminations, which states: "Employees hired for regular work may be discharged without cause or notice during the first six months' probationary period. A notice of discharge will be filed with the Personnel Department by the affected department's manager." The Terminations Section also states that violation of any of 18 listed rules or policies could provide grounds for immediate dismissal. Another section entitled Disciplinary Procedures under Chapter II - Rules and Regulations states: "An employee may be disciplined for violation of work

rules, safety rules, Cooperative policy and procedure, or for any behavior deemed by management not to be in the best interest of the Cooperative." It then sets out a system of progressive discipline with four separate steps involving a verbal warning, a written reprimand, suspension, and termination.

McDougal argues that the manual limited the employer's authority to discharge or terminate regular employees without cause to the probationary period and that immediate dismissal was restricted to the 18 specified grounds in the Termination Section. For all other disciplinary actions, the employer was required to follow the progressive system. McDougal maintains that the manual's policies were not followed because he was not treated under the progressive system, but rather was immediately discharged for proffered reasons not within the 18 specified grounds for immediate dismissal.

He also presents testimony from several former and current officers of Jackson Electric indicating that the purpose of the employment manual was to promote retention of qualified employees by establishing a written policy that treated employees fairly and consistently. He asserts that these officers testified that the manual represented a commitment by the company to its employees to treat them fairly in accordance with the procedures in the employment handbook.

Jackson Electric disputes McDougal's interpretation of the employment manual. It relies primarily on a provision in the Disciplinary Procedures Section which states under the subsection related to termination: "The Cooperative reserves the right to

terminate any employee at any time for any reason." Jackson Electric also points to the fact that in 1987, in connection with the distribution of a prior employment manual, McDougal signed a Disclaimer that stated, "The language used in this handbook is not intended to create nor is it to be construed to constitute a contract of employment between JPECC and any one or all of its employees." The Disclaimer also included an admission that the signee did "expressly recognize and acknowledge that my employment and compensation can be terminated 'at will' at any time by either JPECC or myself as provided through Commonwealth of Kentucky Law." Jackson Electric also asserts that the 1996 employment manuals were not generally distributed to employees, but were kept by management officials who were obligated to consult with and assist employees regarding the policies embodied in the handbook.

Generally, employment in Kentucky is considered "at will" unless the parties otherwise agree. See generally Grzyb v. Evans, Ky., 700 S.W.2d 399 (1985); Firestone Textile Co. Div. v. Meadows, Ky., 666 S.W.2d 730 (1983). In Shah v. American Synthetic Rubber Corp., Ky., 655 S.W.2d 489, 492 (1983), the Kentucky Supreme Court held that parties may enter into an employment contract terminable only for cause "by clearly stating their intention to do so"

In Nork v. Fetter Printing Co., Ky. App., 738 S.W.2d 824 (1987), the court reviewed three situations dealing with the creation of implied employment contracts based on employment manuals. In the first situation involving Fetter Printing

Company, the court held that the company's handbook contained policy statements which the employer strove to follow, but it did not contain contractual language. In the second situation involving Cooke Pontiac, the manual contained a disclaimer provision stating it was not a contract of employment and that the employee understood that his/her employment was terminable at will. The disclaimer also stated that the employer reserved the right to revise the policies or procedures in the manual at any time without notice. The court held that the disclaimer rebutted any claim that the manual created an implied contract modifying Cooke Pontiac's employees' at will employment status. In the third situation involving Wal-Mart Stores, the manual stated that continued employment was conditioned on following the guidelines in the handbook and successful performance of all work assignments. The court held that the manual did not create an implied employment contract modifying Wal-Mart's employees' at will employment status. Although somewhat oblique, the court's citation to Shah suggests it did not feel the provisions in the policy manual were sufficiently clear statements of an intention to create a for cause employment status. The court concluded as follows:

Policy and procedure manuals are to be commended. They can, when followed, remove an element of arbitrariness from employment relationships and thereby improve the entire atmosphere of the workplace. A contract they do not necessarily make, and in these three cases did not make. These were "at will" employees.

738 S.W.2d at 827.

In the current case, we agree with the trial court that Jackson Electric's employment manual did not create an implied employment contract. The disclaimer signed by McDougal in 1987³ explicitly states that the then current employment handbook was not intended to create a contract and that the employee knew that his employment was terminable "at will". It also states that Jackson Electric reserved the right to modify any of its policies or procedures at any time without notice. Although the disclaimer was associated with an earlier version of the employment manual, it unambiguously demonstrates the general purpose of the employment manuals. Jackson Electric did not intend its employment manuals to create an implied employment contract. It also placed McDougal on notice of this fact and the fact that his employment at that time was terminable at will. Although he argues that the disclaimer is irrelevant because it was executed in connection with a prior handbook, he has not shown that the revised handbook in existence in 1996 when he was discharged was substantively different from the earlier handbook in that it contained different provisions clearly showing an intent to create an implied employment contract.

In addition, McDougal's interpretation of the manual is based on negative inferences. His conclusion that the provisions in the Termination Section stating that employees "may be discharged without cause or notice during the six months' probationary period" restricts all terminations outside that time

³The record indicates that McDougal did not return the disclaimer to the personnel department until 1991. The reason for this time lapse is not explained.

period is unconvincing. Also, his assertion that immediate dismissal is limited to the 18 specified grounds in the Termination Section is erroneous because this section also states that “[i]nfractions of certain basic rules, including but not necessarily limited to the following, may be grounds for immediate dismissal.” As the court indicated in Nork involving the Baker situation, negative inferences generally are insufficient to create a contract.

More importantly, the manual contains a reservation clause in the Disciplinary Procedures Section that states, “The Cooperative reserves the right to terminate any employee at any time for any reason.” Again, McDougal’s attempt to nullify this provision by arguing it merely represents the final step in a system of progressive discipline and conflicts with the language in the Termination Section is unconvincing. This provision is an unambiguous expression of the company’s desire to retain an “at will” employment status. Furthermore, the testimony of several Jackson Electric officials that the employment manual represented a commitment to employees to treat them fairly and was intended to help attract and retain qualified personnel does not demonstrate an intent to create an absolute contractual obligation. As the court noted in Nork, employment manuals can be beneficial in eliminating some arbitrariness, but that does not necessarily create an implied contractual relationship.

In conclusion, Jackson Electric has established that the employment manual does not contain a sufficiently clear statement of intention to modify McDougal’s “at will” employment

status by creating an implied contract to terminate him only for cause. Based on the record, we believe that there is no genuine issue of material fact and Jackson Electric was entitled to summary judgment as a matter of law on McDougal's wrongful termination breach of contract claim. Consequently, the trial court did not err in granting appellee's motion for partial summary judgment.

For the foregoing reasons, we affirm the order of the McCracken Circuit Court.

ALL CONCUR.

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