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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000765-MR

HOUSING AUTHORITY OF MIDDLESBOROUGH — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER H. HELTON, JUDGE
ACTION NO. 98-CI-00027

JACK STANDIFER;
CHARLES SMITH; AND
EDDIE HARRELL — APPELLEES

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; KNOPF AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal by the Housing Authority of Middlesborough (the Housing Authority) from an order of the Bell Circuit Court granting summary judgment to appellees Jack Standifer, Charles Smith, and Eddie Harrell. In the suit, the appellees sought backpay for time that they were allegedly "on call" maintenance employees during the period of January 1991 through May 1997. The Housing Authority also appeals the trial court's order awarding damages for backpay.

The Housing Authority is a public housing authority which operates various public housing projects in the City of Middlesborough, Kentucky. Standifer was employed by the Housing Authority as a maintenance worker from September of 1992, until May of 1997; Smith began as a maintenance worker in 1989, and was still an employee at the time of the circuit court proceedings; Harrell worked as a maintenance worker from October 16, 1984, until June 13, 1996.

The record, viewed in the light most favorable to the Housing Authority, discloses the facts to be as follows. On January 17, 1991, the Housing Authority amended its personnel policy to add Section 6 d. Section 6 d. created an off-duty classification referred to as "subject to call" employees. Following the amendment, Housing Authority Executive Director June Rowlett held a meeting with the maintenance employees and informed them that, in the future, in their off-duty hours, maintenance employees would no longer be classified as "on call" employees but, rather, would be classified as "subject to call employees." The "subject to call" category was added to the personnel policy upon the advice of the United States Department for Housing and Urban Development. Following the adoption of Section 6 d., the Housing Authority placed no restrictions or requirements on the appellees during their off-hours. They were free to come and go as they pleased, were not required to stay at home to take maintenance calls, were not required to carry a pager, and were not disciplined if they were not available to take a call. Following the adoption of the policy, the appellees

did not object to being classified as "subject to call" employees, and the only restriction was that, if a maintenance employee was going to be out of town, he had to get another maintenance employee to "cover" for him.

Whether the appellees were "on call" employees or "subject to call" employees from January 1991, through May 1997, is the gravamen of this case. Pursuant to the relevant Housing Authority's personnel policy, "on call" employees were entitled to compensation for the restrictions on their time, whereas "subject to call" employees were not. Consistent with the new policy announced following the adoption of Section 6 d., maintenance employees, including the appellees, who did not live in a Housing Authority dwelling unit did not thereafter receive "on call" compensation. However, maintenance employees who lived in a Housing Authority dwelling unit continued to receive a discount in their rent, apparently for the sole reason that they were "on call." The reason for this disparate treatment is not clear from the record.

On January 20, 1998, the appellees filed a complaint in Bell Circuit Court alleging that the Housing Authority owed them backpay for time that they were "on call" during their employment at the Housing Authority during the period beginning September 17, 1991, and ending May 28, 1997. In support of their claim, the appellees relied on Section 6 of the personnel policy in effect during this period, which provided, in relevant part, as follows:

> c. "ON CALL" EMPLOYEES. An "On Call" employee is an employee working for the

> Housing Authority on a regular shift and is then required to be available to meet work requirements which arise outside the employee's normal duty hours.
>
> "On Call" maintenance employees who are provided a dwelling unit at reduced rent for restriction of time, shall be paid one and one-half times their basic hourly rate for all hours worked in excess of eight.
>
> Maintenance employees who are not furnished a dwelling unit at reduced rents, and are required to be available after their normal duty hours, shall be paid for their restriction of time and the equivalent of one hour at one and one-half times the basic hourly rate for each day they are required to be "On Call." In addition, these employees shall be paid at the rate of one and one-half times their basic hourly rate for all hours worked in excess of eight.
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> d. "Subject to Call" Employees. "Subject to Call" employee is an employee who may be called by the Public Housing Authority (PHA). The employee is not required to be available to the PHA. All maintenance employees not "On Call" are considered "Subject to Call." These employees shall be paid at the rate of one and one-half times their basic hourly rate for hours actually worked in excess of 40 hours per week. (Part-time employees may, at the option of the PHA, be paid one and one-half times their basic hourly rate for hours actually worked in excess of their normal work week.)[1]

The Housing Authority filed its answer, denying liability; discovery followed. Both sides eventually filed motions for summary judgment. On December 4, 1998, the trial court entered an order granting the appellees motion for summary

[1]While the record is not entirely clear on this point, apparently, prior to the addition of Section 6 d. all maintenance employees were categorized as "on call" employees and received "on call" compensation pursuant to Section 6 c.

judgment as to the issue of the Housing Authority's liability for backpay. The trial court concluded that the terms of the parties' employment was governed by the personnel policy; that the appellees were "on call" employees as defined in the policy; and that the appellees were entitled to backpay equal to one and one-half times the basic hourly rate for each day they were required to be "on call." The issue of damages was reserved to be resolved at trial. On the issue of damages, on March 19, 1999, the trial court entered an order awarding Standifer $23,956.42; Smith $28,665.70; and Harrell $11,308.26. The trial court also required that additional payments be made into the appellees' respective retirement funds to reflect the additional earnings. In calculating damages, the trial court determined that each appellee was "on call" each day he was an employee for the Housing Authority during the period of September 17, 1991, through May 28, 1997, including sick days, vacation days, and weekends.

In order to qualify for summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service

Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used when, as matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant." Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

The Housing Authority contends that the trial court erred in granting summary judgment as to the issue of whether, following the adoption of Section 6 d., the appellees were "on call" employees. More specifically, the Housing Authority argues that the appellees were not "on call" because, after the adoption of Section 6 d., there were no restrictions on the appellees off-duty time, they were free to engage in personal activities after they had completed their shifts, and the appellees were specifically advised that they were no longer "on call" employees but, rather, in the future would be classified as "subject to call" employees. The Housing Authority also contends that summary judgment was improper because, by their silence, the Appellees agreed to the new policy, and because the Kentucky Labor Cabinet investigated the appellees allegation and determined that the Housing Authority was not in violation of any overtime requirements.

In summary, it is the position of the Housing Authority that maintenance employees "were not required to be available to meet work requirements which arise outside the employee's normal duty hours," and, consequently, were not "on call" employees.

Upon viewing the record, as we must, in the light most favorable to the Housing Authority, we are persuaded that the trial court erred in granting summary judgment to the appellees because there is a genuine issue of material fact as to whether the appellees were "on call" employees or "subject to call" employees. Whether the employees were "on call" or "subject to call" is an issue of fact to be decided by the fact-finder, and not a matter of law to be decided by the trial court. See Spellman v. Fiscal Court of Jefferson County, Ky. App., 574 S.W.2d 342 (1978).

The Housing Authority's position is supported, primarily, by the sworn deposition testimony of June Rowlett, who served as the executive director of the Housing Authority during most of the period at issue. Rowlett's unequivocal testimony is that the appellees were not "on call" employees, and that there were no restrictions placed upon their off-duty hours. Considering Rowlett's deposition testimony, we are not persuaded that it would be impossible for the Housing Authority to produce evidence at trial warranting a judgment in its favor. A jury may choose to accept Rowlett's testimony that there were no restrictions on the appellees' time, and that the appellees were not, therefore, "on call" employees but, rather, were "subject to call" employees.[2]

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[2]The relevance and weight to be given to the fact that maintenance employees who lived in Housing Authority dwelling unit continued to receive discounted rent is likewise an issue for the jury. If there were otherwise no differences in the off-duty obligations of on-site and off-site maintenance employees, the jury may well decide that, contrary to the Housing

(continued...)

We vacate the trial court's order granting summary judgment to the appellees. The trial court's March 19, 1999 order awarding damages was based upon the summary judgment order, and we likewise vacate that order. In this appeal, the Housing Authority contends that the trial court's decision to award the appellees backpay for each day of employment between September 16, 1991, and May 28, 1997, was erroneous. Because, upon remand, the Housing Authority may again be found liable for backpay, we will address the damages issues raised by the Housing Authority in this appeal.

For purposes of determining damages, the parties agreed to a bench trial. In its calculation of damages, the trial court credited each appellee as being "on call" each and every day during the period at issue, including those days when the appellees were either sick or on vacation leave. The three appellees testified at the damages hearing that regardless of whether they were sick or on vacation, they were "on call" and could be called to go out on a maintenance job. They further testified that they had actually gone out and performed jobs on days that they were absent from work because of vacation leave or sick leave. In short, there was testimony to support the decision of the trial court to award damages for sick days and vacation days, and if, upon remand, the Housing Authority is again found liable for backpay, if the testimony is the same regarding vacation days and sick days, backpay may be awarded for

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[2](...continued)
Authority's position, this fact proves that the appellees were "on call."

those days. However, the testimony also disclosed that each of the appellees, on occasion, was out of town and, it follows, not available to take maintenance calls. We are persuaded that the personnel policy cannot be interpreted to entitle the appellees to compensation under Section 6 for those days that they were out of town and unable to take maintenance calls. On remand, if damages are again awarded, no damages should be awarded to an appellee for those days that the appellee was out of town and therefore unable to make a maintenance call.

For the foregoing reasons, the December 4, 1998, and the March 19, 1999 orders of the Bell Circuit Court are vacated, and the case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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