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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001814-MR

CITY-COUNTY PLANNING COMMISSION
OF WARREN COUNTY, KENTUCKY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS LEWIS, JUDGE
ACTION NO. 98-CI-00751

JOSEPH KOCH — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, City-County Planning Commission of Warren County, Ky. (hereinafter "the Commission"), seeks review of a judgment of the Warren Circuit Court, awarding Appellee, Joseph Koch ("Koch"), damages for lost wages, emotional distress, damage to reputation and punitive damages under Kentucky's "whistle blower" law.

The facts were in dispute. Koch was hired as a planner by the Commission. He alleged that he was terminated in retaliation for "whistle blowing," having reported that Danny

Whittle ("Whittle"), his supervisor, was using Planning Commission time to conduct his private computer consulting business.

The Commission raises six issues on appeal. The first is whether the trial court erred in denying its motion for a mistrial. The Commission contends that Koch improperly injected the issue of insurance during voir dire. The record reflects that Koch's counsel asked if any jurors were self-employed. A juror raised her hand. Koch's counsel asked what type of self-employment. The juror responded "part of an insurance agency and finance company." Koch's counsel then asked whether the company did any business with the Commission. The juror responded that she thought her husband may have years ago. She did not indicate what type of business. A bench conference took place and the juror was stricken for cause. The judge denied the motion for mistrial. We find no error.

> First we consider the question of whether there was prejudice . . . by reason of the mention of "insurance" as contended by appellant. . . . The juror being interrogated at the time stated he was engaged in the real estate business, and then counsel . . . asked the juror if he was also in the insurance business. . . .
>
> Litigants have a wide latitude in the matter of voir dire examination of prospective jurors. Especially is that true in cities or urban areas where attorneys are not and cannot be acquainted with all the jurors. But insofar as bringing into the picture the fact that some party in litigation has insurance coverage, the attorneys are held to the utmost good faith. Usually this question of good faith, or lack of it, is one for the trial judge to determine in the exercise of sound discretion. [citation omitted].

Insko v. Cummins, Ky., 423 S.W.2d 261, 263 (1968).

The Commission contends that the trial court erred in failing to dismiss the complaint and/or granting a mistrial or continuance, because Koch "withheld evidence." Koch was deposed on December 15, 1998. During questioning, Koch was asked to furnish documentation of the work he had produced while employed by the Commission. The Commission contends that this information (Plaintiff's "Exhibit 9") was not "presented" until Koch took the stand at trial, in June 1999. The trial judge allowed the Commission to review "Exhibit 9" overnight, before cross-examining Koch. The Commission complains that the trial judge erred in admitting the documents, because Koch had an "affirmative duty" to supply what was promised at his deposition. The Commission cites no authority in support of this argument.

As noted by Koch, no written discovery request or motion to compel production of the subject documents were filed following Koch's deposition. Further, Koch's pretrial compliance filed January 14, 1999, reflects that he planned to introduce: "Documents reflecting the work done by Plaintiff during his tenure at the Commission, including his work on various projects and proposals." The trial court's September 22, 1998, and March 1, 1999 orders setting the case for trial and pretrial conference state that the parties are to file a written statement containing: "A list of all documentary evidence and other exhibits which, *if not objected to at the pretrial conference*, *will be admitted in evidence at trial*." (emphasis added). The Commission's argument that the trial court committed reversible error by admitting "Exhibit 9" is without merit.

The Commission contends that the trial court erred in denying its motion in limine to exclude evidence that it removed Danny Whittle from the position of assistant director, several months after Koch was terminated. The Commission attempts to persuade us that evidence of the subsequent disciplinary action should have been excluded under KRE 407, as a subsequent remedial measure. "[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000).

In its reply brief, the Commission quotes the trial court as stating that "it would be reversed" were it to allow evidence of the subsequent disciplinary action against Whittle. That is misleading. The trial court denied the motion in limine following further discussion, because it concluded that the evidence was admissible. We find no error.

KRE 407 provides that:

> When after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures **is not admissible to prove negligence** in connection with the event. **This rule does not require the exclusion of evidence of subsequent measures . . . when offered for another purpose, . . . or impeachment.** (emphasis added).

KRE 407 only bans the evidence if offered to prove **negligence**. The evidence is properly admissible for other purposes. Davenport v. Ephraim McDowell Memorial Hospital, Inc., Ky. App., 769 S.W.2d 56 (1988). Koch argues, and we agree, that evidence of the Commission's subsequent discipline of Whittle

bore directly on the credibility of Koch's whistle blower claim; further, that such evidence was necessary to impeach defense witnesses' claims that Whittle did no wrong. Laura Southard, Executive Director of the Planning Commission ("Southard"), denied having recommended Koch's termination, because of what he had told her about Whittle's outside work. Southard maintained that she had not taken any retaliatory steps against Koch. The Commission, in its statement of facts, asserts that "it was understood by Ms. Southard and the Planning Commission members that Mr. Whittle was still running his private computer software business. Ms. Southard . . . knew about this and . . . she never found Mr. Whittle's side business to infringe on his Planning Commission work." The trial court did not abuse its discretion in denying the motion in limine.

The Commission contends that the trial court erred in giving an improper "whistle blower" instruction. The Commission submits that the jury should have been instructed pursuant to the statutory language found in KRS 61.103(3) which provides, in part, that "[o]nce a prima facie case of reprisal has been established and disclosure determined to be a contributing factor, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." Nevertheless, the offered instruction did not encompass the statutory language of KRS 61.103(3) that the Commission now argues should have been included. As the Commission noted in its motion for a new trial, the instruction it tendered to the trial court was a common law instruction.

CR 51(3) provides:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The issue was not properly preserved for appellate review.

The fifth point upon which the Commission relies on for reversal is stated as follows: "The trial committed reversible error by giving an instruction on reputation damages, when there was absolutely no evidence presented regarding damages to Mr. Koch's reputation." The Commission provides reference to the record where this issue was preserved for review; however, the Commission fails to present any argument or any authority in support of this issue. Thus, there is nothing for us to consider. Milby v. Mears, Ky. App., 580 S.W.2d 724 (1979).

Instead, the Commission proceeds to argue an entirely different issue of law -- that it was error to instruct the jury on reputation damages in the context of the defamation claim, because there was a qualified privilege defense to the defamation claim. The Commission fails to provide any reference to the record where that issue may have been preserved for review, as required by CR 76.12(4)(c)(iv). We therefore decline to consider it. Elwell v. Stone, Ky. App., 799 S.W.2d 46 (1980).

The Commission contends that the trial court erred in instructing the jury on Koch's claim for punitive damages, because: (a) there was no evidence to support such instruction; and (b) Koch did not allege a violation of the correct statutory

provision in his pleadings – citing only KRS 61.103(2), not KRS 61.102.

The Commission argues that the "evidence does not bear out . . . [Koch's] story that he was terminated for making any report of so-called waste, fraud or abuse by Danny Whittle." The Commission attempts to persuade us that there was "no evidence" to support a punitive damages instruction. We cannot agree. Koch's so-called "story" was evidence which the jury was entitled to believe, instead of the Commission's version of the facts. There was also evidence that Koch's allegations against Whittle were not revealed to the personnel committee at the time Koch's termination was under consideration. In addition, there was evidence which cast doubt upon the accuracy of the reasons Southard gave for recommending Koch's termination.

In Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382, 285 (1985), the Supreme Court accepted discretionary review to consider whether evidence was insufficient to justify submitting to the jury the issue of gross negligence and punitive damages:

> The role of the appellate court when deciding negligence issues of this sort is limited to viewing the evidence from a standpoint most favorable to the prevailing party, ... [citation omitted]. In short, an appellate court must not substitute its finding of fact for those of the jury if there is evidence to support them.

The Commission avoids the fact that the evidence was in conflict, instead of presenting any argument or authority regarding the sufficiency of the evidence which was presented. We find no error.

The Commission also contends that the complaint and amended complaint were insufficient "to invoke the statutory relief allowed," because Koch only cited KRS 61.103(2), instead of also citing KRS 61.102. KRS 61.103(2) provides that an employee alleging a violation of KRS 61.102(1) or (2) may bring a civil action for appropriate injunctive relief or punitive damages. The Commission contends that Koch's omission was significant and he should be bound by his pleadings.

Both parties cite Hoke v. Cullinan, Ky., 914 S.W.2d 335, 339 (1995) which explains that "[d]espite the informality with which pleadings are nowadays treated, and despite the freedom with which pleadings may be amended, CR 15.01, the central purpose of pleadings remains notice of claims and defenses." Clearly, the Commission had notice of Koch's claim, because the Commission pled the provisions of KRS 61.102 in its motion to dismiss, separate answer and counterclaim. CR 15.02 provides, in pertinent part, that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew P. Cook
Frank Hampton Moore
W. Currie Milliken
Bowling Green, Ky.

BRIEFS FOR APPELLEE:

Thomas A. Ebendorf
Louisville, Ky.

Steven D. Downey
Bowling Green, Ky.