RENDERED: JULY 5, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001267-MR

PHYLLIS CAYWOOD; DEBBIE CRUMP;
SHERRY ELLIOTT; JANIE KEITH; AND
JAMES WELCH — APPELLANTS

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 98-CI-90045

MONTGOMERY COUNTY BOARD OF EDUCATION;
RICHARD HUGHES, INDIVIDUALLY, AND IN HIS
OFFICIAL CAPACITY AS SUPERINTENDENT OF THE
MONTGOMERY COUNTY SCHOOLS; AND
DANIEL FREEMAN, IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF THE MONTGOMERY COUNTY SCHOOLS — APPELLEES

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

BEFORE: BARBER, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Phyllis Caywood, Debbie Crump, Sherry Elliott, Janie Keith and James Welch (appellants) have appealed from an order of the Montgomery Circuit Court, which granted summary judgment in favor of the Montgomery County Board of Education, Richard Hughes, and Daniel Freeman (collectively, the school

board). Having concluded that a genuine issue as to a material fact exists as to the claims of Caywood, but not for the other four employees, we affirm in part, reverse in part and remand.

The appellants are five former, classified employees of the Montgomery County School System.[1] Specifically, Elliott and Caywood were employed as instructional assistants; Crump was employed as a pre-school aide and classroom assistant; Keith was employed as a school bus driver; and Welch was employed as a school custodian. The unifying characteristic of all five employees is that they were active members in the Kentucky Education Support Personnel Association (KESPA), a labor union representing non-certified school employees.

As non-certified employees, the appellants were employed on a year-to-year contractual basis. Prior to June 30 of each year, the employees were notified as to whether their contracts would be renewed for the following year. In the late spring and early summer of 1996, all five appellants were notified that their contracts would not be renewed for the upcoming year, though the reasons for non-renewal varied among them.

The appellants allege that their closely-timed dismissals were not merely coincidental. The 1995-1996 school year was the year in which the Montgomery County chapter of KESPA was organized. During that year, all five appellants claim to

[1]See Kentucky Revised Statutes (KRS) 161.011 for the definition of "classified" employee.

have been active, to varying degrees, in KESPA-related activities. According to the appellants, the Montgomery County Board of Education, and its superintendent Hughes, were strongly opposed to the union's existence in Montgomery County. In fact, Welch stated in his deposition that members of the Board of Education were openly hostile toward Dwight Blake, a KESPA field representative, during the board's meeting held on June 24, 1996.

On June 23, 1997, the appellants jointly filed suit in United States District Court for the Eastern District of Kentucky. Their lawsuit sought relief under 42 U.S.C.[2] § 1983. In response, the school board filed a motion to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(6), alleging that the appellants' suit was time-barred by the one-year statute of limitations applicable to 42 U.S.C. § 1983 actions. The District Court agreed and granted the school board's motion to dismiss. However, the District Court noted that it declined to exercise supplemental jurisdiction over the appellants' independent, state causes of action and dismissed those claims without prejudice.

On April 1, 1998, the appellants filed in the Montgomery Circuit Court the complaint which is the subject of this appeal. The appellants sought relief pursuant to Sections 1 and 2 of the Kentucky Constitution, as well as KRS 161.011 and KRS 161.164. Essentially, the appellants' complaint alleged that they were dismissed, and/or passed over for reemployment, due to

[2]United States Code.

their KESPA-related activities, activities which the appellants assert are protected under the Kentucky Constitution.

On June 22, 2000, the school board filed a motion for summary judgment. The motion argued two grounds for dismissal. It first argued that the appellants' claims were barred by the doctrine res judicata because of the prior federal lawsuit. In the alternative, the motion argued that no genuine issue as to any material fact existed because the appellants had failed to present any evidence of a causal connection between their KESPA activities and their dismissals.

The Montgomery Circuit Court entered an order on January 4, 2001, granting the school board's motion for summary judgment. In its opinion, the trial court declined to address the school board's arguments pertaining to the doctrine of res judicata. Instead, the trial court ruled that there was no genuine issue as to any material fact related to the appellants' claims, and that the school board was entitled to a judgment as a matter of law. Essentially, the trial court found that the appellants had failed to produce any evidence of a causal connection between their union involvement and their subsequent dismissals. This appeal followed.

The standard of review on appeal of a summary judgment is whether the trial court was correct in ruling that there was no genuine issue as to any material fact and that the moving

party was entitled to a judgment as a matter of law.[3] In reviewing a summary judgment, there is no requirement that the appellate court defer to the trial court since factual findings are not at issue.[4] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[5] Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances."[6] Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor...."[7]

In order for the appellants to prevail on their claims that their dismissals from their employment were for exercising their Section 1 rights of free speech and association, they must prove three elements: (1) that they engaged in protected conduct; (2) that an adverse action was taken against them that would have deterred a person of ordinary firmness from continuing to engage in that conduct; and (3) that there was a causal connection

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[3]Kentucky Rules of Civil Procedure (CR) 56.03.

[4]Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992); Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[5]Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[6]Id. (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

[7]Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992)(citing Steelvest, supra).

between the first and second elements.[8] In sum, the test is essentially whether the employment action was motivated in substantial part by the plaintiff's constitutionally-protected activity.[9] We will now review each of the appellants' cases, in turn, to determine whether the trial court correctly found that there was no genuine issue as to any material fact and that the school board was entitled to a judgment as a matter of law.

In support of her claim, appellant Caywood alleges that she was treated disparately from other instructional assistants at Mt. Sterling Elementary School. Caywood was dismissed in the spring of 1996, after 8 years of service, due to a reduction in force. In the summer of 1996 her position was renewed and listed as vacant. Despite the fact that several of her dismissed colleagues were rehired, Caywood's application for rehire was denied. In her deposition, Mt. Sterling Elementary School principal Andrea McNeal admitted that Caywood's supervising teacher, Alice Norris, "would have been comfortable having [Caywood] back. . . ." Despite this endorsement, the school board hired a candidate with far less experience in her place.

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[8]Sowards v. Loudon County, Tennessee, 203 F.3d 426, 431 (6th Cir. 2000)(citing Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999)).

[9]Id.; Willoughby v. Gencorp, Inc., Ky.App., 809 S.W.2d 858, 861 (1990). At this juncture it is worth noting that the state constitutional rights urged by the appellants enjoy essentially the same scope of protection as those under the Federal Constitution. Thus, tests enumerated by the Sixth Circuit Court of Appeals in this context are appropriately applied in the instant case. See Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947, 953 (1995).

The reason given by the school board for denying Caywood's application was that the selection committee did not approve Caywood based upon her low score on a set of qualifications criteria newly introduced during the 1996 hiring process. Experience and past job performance were apparently not criteria.

At the time of her dismissal, Caywood was an officer in KESPA and very active in recruitment and advocacy activities. According to Caywood, she was given several indications that Superintendent Hughes was strongly opposed to KESPA. Hughes had publicly voiced opposition to KESPA's goal of attaining longer contracts for school employees. Caywood claims Hughes told her directly that although he believed in employee associations generally, he could not support KESPA. Further, Caywood believes that her 30 subsequent applications for a full-time instructional assistant position have been denied because of her filing of a grievance, through KESPA, after her 1996 dismissal. Caywood was never given a grievance hearing by her supervisors, and subsequent attempts by KESPA official Dwight Blake to address the grievance issue at Montgomery County School Board meetings were treated with scorn.

While the school board purported to rely upon legitimate reasons for dismissing and refusing to rehire Caywood, its claimed justification does not preclude a jury from determining that the purported reasons were a pretext and that the employer was motivated by impermissible reasons in

discharging Caywood.[10] Accordingly, we hold that Caywood has presented a genuine issue of material fact regarding the school board's true motivation for terminating her employment. The summary judgment against Caywood is reversed and this matter is remanded for trial.

We now turn to the claims of appellant Crump. Like Caywood, Crump was an instructional assistant at Mt. Sterling Elementary School. For the 1996-1997 school year, Crump requested permission to change her status from full-time to part-time so that she could attend college courses in pursuit of her bachelor's degree. One year earlier, one of Crump's colleagues, Jeanie Rogers, was given permission to follow a revised schedule so that she could attend college courses. Nevertheless, Crump's request was denied by Principal McNeal on the grounds that the situation with Rogers had been problematic. In rebuttal of this explanation, Crump has introduced the deposition testimony of Rogers that school supervisors never informed Rogers that her revised work schedule was a problem.

Crump also asserts that the school board failed to follow ordinary procedure in processing her request for a schedule change. In support of her contention, Crump has introduced the deposition testimony of her supervising teacher, Glenna Whitaker, who stated that she was never consulted about the proposed change in Crump's schedule. According to Crump, the normal procedure to be followed in processing schedule requests

[10]Willoughby, supra at 861.

is to consult with the supervising teacher. Based on this evidence, Crump argues that it is reasonable to infer that her schedule change was not approved because she was active in KESPA activities.

Unlike Caywood, however, Crump has failed to present any evidence that her supervisors were aware of her KESPA activities prior to the filing of her KESPA-supported grievance. Without this crucial piece of evidence, Crump has failed to present any evidence of a causal nexus between her denied application and her KESPA activities. Accordingly, we hold that the trial court properly found that there was no genuine issue as to any material fact concerning the school board's true motivation for terminating Crump's employment. The summary judgment against Crump is correct as a matter of law and thus is affirmed.

Like Caywood and Crump, appellant Elliott bases her claim for relief on the treatment that she received as compared to the treatment of the other instructional assistants in the PACE program. Elliott was dismissed at the end of the 1995-1996 school year as a result of a reduction in force. She contends that some of her similarly-situated colleagues have since been rehired. Elliott also notes the general approval of her work by her supervising teacher, Glenna Whitaker, as proof that she was treated unfairly. The school board counters that Elliott's score on its objective criteria list was very low.

We believe that Elliott's claim contains the same fundamental flaw as Crump's claim. While Caywood has alleged that she was directly told by Superintendent Hughes that he did not approve of her KESPA activities, Elliott has failed to present any evidence that any of her supervisors were aware of her KESPA activities prior to her dismissal. Accordingly, we hold that the trial court properly ruled that there was no genuine issue as to any material fact concerning the school board's true motivation for terminating Elliott's employment. The summary judgment against Elliott is correct as a matter of law and thus is affirmed.

Appellant Keith was employed as a school bus driver for the Montgomery County Public School System. Prior to 1996, Keith had received above-average evaluations on her performance. However, in 1996 she was given a poor evaluation and dismissed. The evaluation stated that supervisors had observed Keith failing to conduct mandatory pre-trip inspections and driving too fast. Keith believes these allegations were "cooked up" as a result of her KESPA membership. However, like Crump and Elliott, Keith has failed to present any evidence that her supervisors were aware of her KESPA membership prior to her dismissal. Accordingly, we hold that the trial court properly found that there was no genuine issue as to any material fact concerning the school board's true motivation for terminating Keith's employment. The summary judgment against Keith is correct as a matter of law and thus is affirmed.

Appellant Welch was employed as a custodian for the Montgomery County Public School System. Under three different principals, prior to 1996, Welch had received satisfactory evaluations for his performance. However, in 1996 he was informed by Principal Tim Moore that his contract would not be renewed due to deficient job performance. During the 1995-1996 school year, Welch was a KESPA member and had actively recruited two fellow custodians for KESPA membership. However, like Crump, Elliott, and Keith, Welch has failed to present any evidence that his supervisors were aware of his active KESPA membership prior to his dismissal. Accordingly, we hold that the trial court properly found that there was no genuine issue as to any material fact concerning the school board's true motivation for terminating Welch's employment. The summary judgment against Welch is correct as a matter of law and thus is affirmed.

We now turn to the issue of whether the doctrine of res judicata bars the appellants' state constitutional claims. "[T]he doctrine of res judicata applies only to a final judgment which is rendered 'upon the merits' of the underlying action."[11] The appellants' primary claims in the initial federal action alleged a violation of their civil rights under 42 U.S.C. § 1983. Their state constitutional claims and contract claims were supplemental, or pendant, to their federal claims. While their federal claims were dismissed because they were filed outside the

[11]Davis v. Powell's Valley Water District, Ky.App., 920 S.W.2d 75, 77 (1995)(citing Dennis v. Fiscal Court of Bullitt County, Ky.App., 784 S.W.2d 608, 609 (1990)).

limitations period, the District Court specifically declined to exercise jurisdiction over the Appellants' state law claims and dismissed them without prejudice. A ruling which declines to exercise jurisdiction over a claim and dismisses it without prejudice hardly constitutes a final adjudication on the merits.[12] Thus, the doctrine of res judicata cannot be invoked to defeat these state claims.

For the foregoing reasons, we reverse appellant Caywood's case and remand this matter for further proceedings consistent with this Opinion. In regard to the other four appellants, Crump, Eliott, Keith and Welch, we affirm the summary judgments of the Montgomery Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

JoEllen S. McComb
Carrie C. Mullins
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Carrie C. Mullins
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BRIEF FOR APPELLEES:

William H. Fogle
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Patricia T. Bausch
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[12]See Hertz Commercial Leasing Corp. v. Joseph, Ky.App., 641 S.W.2d 753, 755-56 (1982)(holding that the doctrine of res judicata is inapplicable to a case which had been dismissed for want of prosecution, which the court found constituted a dismissal without prejudice).