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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002164-MR

CAROL WILLIAMS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CI-00805

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN;
AND KENTUCKY PERSONNEL BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND McANULTY, JUDGES; AND JOHN W. POTTER, SPECIAL JUDGE[1].

DYCHE, JUDGE: Carol Williams appeals from a judgment of the Franklin Circuit Court, affirming a decision of the Kentucky Personnel Board (the "Board") which adopted a hearing officer's Findings of Fact, Conclusions of Law and Recommended Order. The hearing officer upheld a two-day suspension without pay issued by the Cabinet for Families and Children (the "Cabinet") against

[1] Senior Status Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Williams for violating policy during a sexual harassment investigation. We affirm.

In June 1997, Williams, employed by the Cabinet as a Child Support Office Manager Senior, learned that one of her subordinates, Jason Cole, was being sexually harassed by Cabinet employee Greg Stone. Cole informed Williams that Stone made inappropriate sexual comments about him to other employees. Cole complained only to Williams. Upon receiving this complaint, Williams investigated Stone's conduct.

During her investigation, Williams sent twelve messages over the interoffice e-mail system, commonly known as HOBOS, to five Cabinet employees concerning Cole's complaint. These messages recited the specific offensive remarks made by Stone about Cole and solicited responses concerning knowledge of this incident. After drafting her requests and receiving responses from questioned employees, Williams printed the messages using a printer accessible to approximately twenty-six employees. It is unknown who obtained knowledge of this complaint via HOBOS.

Meanwhile, Stone learned Williams was investigating his conduct and confronted Williams about her investigation. During this confrontation, Stone physically assaulted Williams. The confrontation between Williams and Stone was the first time that the Cabinet's Office of Program Support ("OPS"), the office designated by the Cabinet to investigate allegations of sexual harassment, learned of this investigation.

On September 8, 1997, the Cabinet suspended Williams from duty and pay for two working days for poor work performance,

pursuant to KRS 18A.095(2) and (9), and 101 KAR 1:345, Section 4. Specifically, Williams was suspended for failing to immediately report Cole's sexual harassment complaint to OPS, as mandated by the Cabinet's sexual harassment policy. Further, Williams was disciplined for placing confidential information concerning Cole's complaint over HOBOS. Williams appealed to the Board.

An administrative hearing was held on December 19, 1997. During this hearing, the Cabinet's sexual harassment policy was discussed. According to the policy created in 1992, Cabinet employees were required to immediately notify OPS of any allegations of sexual harassment involving an employee. The policy further required OPS's Executive Director to investigate the complaint. Under this policy, no other employee was permitted to investigate sexual harassment complaints. This policy was revised in 1995 and 1997, but left intact the requirement that OPS must initiate the investigation.

Williams and the Cabinet both called several witnesses to testify at the hearing. Wayne Woolums and Cari Carter, Williams's co-workers at the time of this incident, Williams's supervisor Wanda Kinnard, and Steve Veno, the Cabinet's Director of Child Support Enforcement, all testified that the sexual harassment policy was in effect at the time of Williams's investigation. Carter, Kinnard, and Veno also stated that Williams knew of the sexual harassment policy because it was discussed at various meetings Williams attended, was distributed to all supervisors, including Williams, and was provided to Williams in her personnel handbook. Williams testified that she

was not aware that the sexual harassment policies cited by the Cabinet were in effect at the time of her investigation. Williams also claims that she never received a copy of the policies cited by the Cabinet, claiming that the policies were lost in the interoffice mail system. Additionally, Williams claimed that the sexual harassment policy she knew stated that area managers and supervisors could conduct investigations concerning sexual harassment complaints.

Concerning Williams's usage of HOBOS to conduct her investigation, Woolums and Veno both testified that HOBOS does not keep messages confidential. These witnesses explained that messages sent via HOBOS could be forwarded to other employees or printed at a central printer accessible by at least twenty-six employees. Woolums also provided an example supporting his assertion that HOBOS communications were not confidential. According to Woolums, while obtaining printed HOBOS messages from the central printer, Cabinet employees would deliberately obtain and read printed HOBOS material belonging to other employees. In fact, Woolums testified that, by reading one of Williams's printed messages, he learned that Williams had improperly denied him a promotion. After Woolums forwarded Williams's HOBOS message to a high ranking official within the Cabinet, Veno ordered Kinnard to prohibit Williams from using HOBOS to convey confidential information. Kinnard telephoned Williams to transmit Veno's directive. During her testimony, Williams admitted to using the HOBOS system to conduct her investigation,

but denied receiving any directives from Veno or Kinnard concerning her use of HOBOS.

On June 18, 1998, the hearing officer found that Williams was aware of the Cabinet's sexual harassment policy and violated it by conducting her own investigation of Cole's complaint. Additionally, the hearing officer found that Williams used HOBOS to convey confidential information concerning Cole's complaint to other employees. The hearing officer upheld the two-day suspension. The Board adopted the hearing officer's findings of fact, conclusions of law and recommended order on June 12, 2000. The Franklin Circuit Court affirmed the Board's decision. This appeal followed.

In reviewing an administrative agency's decision, a reviewing court is "bound by the administrative decision if it is supported by substantial evidence." Commonwealth Transportation Cabinet v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990). If any substantial evidence to support the action of the agency exists, the decision cannot be found to be arbitrary and must be sustained. Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970). Substantial evidence is defined as evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994). When determining whether an agency's decision is supported by substantial evidence, the reviewing court must defer to the principle that the trier of fact "is afforded great latitude in

its evaluation of the evidence heard and the credibility of witnesses appearing before it." Id. at 410. An agency's decision may be supported by substantial evidence even though a reviewing court reached a different conclusion. Id. Further, if an agency's findings are supported by substantial evidence, "the findings will be upheld, even though there may be conflicting evidence in the record." Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981). Simply put, "the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes." Cornell, 796 S.W.2d at 594.

If an agency's decision is supported by substantial evidence, the reviewing court must then determine whether the agency applied the correct rule of law to its factual findings. Bowling, 891 S.W.2d at 410. "If the court finds the correct rule of law was applied to the facts supported by substantial evidence, the final order of the agency must be affirmed." Id.

In this matter before us, Williams argues that the Board's decision to uphold her suspension is not supported by substantial evidence and that the Board failed to apply the correct rules of law to its findings. We disagree.

First, substantial evidence supports the fact that Williams was aware of the Cabinet's policy that sexual harassment investigations must be conducted by OPS. After January 24, 1997, the Cabinet, through Kinnard, distributed the latest version of the sexual harassment policy to all area managers, including Williams. The revised 1997 policy clearly states that the

official taking a complaint must immediately notify OPS. OPS was then required to initiate the investigation and conduct it appropriately. Similar to the 1992 and 1995 policies that Kinnard had previously forwarded to Williams, the 1997 policy does not direct an area manager to conduct an investigation.

The revised 1997 policy was also distributed to Carter at a workshop held in April 1997. Thereafter, Carter informed Williams of this revised policy, but Williams stated that she had a copy of the revised policy and was aware of its contents. The revised policy is also contained in Section 4.3 of the Cabinet for Human Resources Personnel Manual, which Williams received at a workshop from Kinnard's personal assistant, Margaret Hankins. During the workshop, Williams was directed to read the manual as a part of her normal job duties. Based upon these facts, it is apparent that the Cabinet has, since 1992, enforced a consistent policy that a supervisor must immediately report allegations of sexual harassment to OPS for investigation and resolution. Under these facts, the hearing officer correctly dismissed Williams's claims that she never received copies of the policy, and therefore lacked knowledge of it, as not credible.

Substantial evidence also exists showing that Williams did convey confidential information via HOBOS, despite being warned against using HOBOS in such a manner. After the incident wherein Woolums read Williams's printed HOBOS messages concerning his chances at a promotion, Kinnard, acting under Veno's direction, ordered Williams not to send confidential information over HOBOS. The exhibits admitted at the hearing, however,

clearly show that Williams requested information concerning Cole's complaint from Woolums and Carter. After obtaining information from Woolums, Williams forwarded HOBOS messages to other employees containing various aspects of the investigation. Thus, the hearing officer's findings were proper.

We also find no merit in Williams's argument that the Board's decision was not supported by law. In support of her argument, Williams asserts that, pursuant to the Kentucky State Government Affirmative Action Plan, Policy Statement on Sexual Harassment, she was "protected from intimidation, retaliation, interference, or discrimination for filing a complaint or assisting an investigation." Williams, however, was not suspended for assisting in the investigation of Cole's sexual harassment complaint. Rather, Williams was disciplined for her flagrant violations of Cabinet policy committed during an investigation. The state's policy statement would never, in any event, protect an employee from violating the Cabinet's rules and regulations. Therefore, we believe that the Cabinet did not improperly discipline Williams for assisting in the investigation of a sexual harassment complaint.

Williams also argues that the Board's decision is not supported by law because the Cabinet's sexual harassment policy is inconsistent with the state's policy statement. Specifically, the state's policy requires reporting sexual harassment incidents to an EEO coordinator or a supervisor. The state plan requires management to investigate the matter and resolve it internally. Williams submits that she followed the state's plan by accepting

Cole's complaint, reported it to EEO coordinators Carter and Woolums and properly investigated the complaint. Under Williams's logic, the Cabinet's assertion that OPS must conduct the investigation is inconsistent with the state's general policy. We reject Williams's logic.

KRS 18A.138(2) and (4)(a) require each state agency to develop internal policies consistent with the state's general policies. These restrictions do not prevent the Cabinet from formulating internal procedures to expedite the resolution of sexual harassment complaints. In fact, the Cabinet's sexual harassment policies mirror the state's plan by requiring reports of misconduct be made to EEO coordinators or supervisors, with the investigation conducted internally by management. The Cabinet's policies are more specific because OPS is designated as the investigating office. Even if we accept Williams's argument in this regard, it appears that she violated the state's plan by not notifying appropriate personnel of this complaint. Williams never reported Cole's complaint to EEO coordinators Carter and Woolums or to OPS. Rather, Williams used HOBOS to obtain facts concerning Cole's complaint from the EEO Coordinators. Finally, Williams offers no defense to ignoring a directive concerning her use of HOBOS. Thus, the Board's decision was supported by law.

Additionally, Williams alleges that the Board's order was procured by misconduct based upon her failure to receive redacted information from the Cabinet. Williams argues that, pursuant to an open records request, she requested information from the Cabinet proving that employees were unaware of or failed

to follow policies concerning sexual harassment and HOBOS usage. In reviewing the record, we discovered that, after the Attorney General ordered the Cabinet to comply with Williams's request for documents, the parties entered into an agreed order concerning the disclosure of information redacted from those documents. Under the agreed order, if, after reviewing the documents, Williams claimed entitlement to the redacted information, she could either file a motion with the trial court or reach an agreement with the Cabinet to obtain said information.

The Cabinet produced the redacted documents to Williams on December 29, 1999. From that time until April 10, 2000, the trial court's deadline to file any motions concerning this issue, the record contains no evidence that Williams attempted to obtain the disputed information by agreement. Williams untimely filed her motion to obtain this information on April 11, 2000[2]. After the trial court rejected Williams's motion, the Board reviewed all submitted documents and issued its judgment. Thus, Williams cannot now argue that she was unable to offer evidence necessary to prove her case to the agency below when she received ample opportunity to obtain such evidence but failed to timely act.

Finally, Williams argues that she was disciplined based upon the content of her speech and for her association with other employees. We reject this argument.

In Connick v. Meyers, 461 U.S. 138, (1983), the United States Supreme Court held that when a public employee speaks not

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[2] Williams argues that she filed her motion with the trial court via facsimile transmission on April 10, 2000. No evidence of any such transmission is contained in the record.

as a citizen upon matters of public interest, but instead as an employee upon matters only of personal interest, the courts should not review the wisdom of the personnel decision taken by a public agency allegedly in reaction to the employee's behavior. The content, form, and context of the statements, as revealed by the entire record, determine whether the public employee's speech addresses a matter of public concern so as to shield the employee from discipline. Id.

In this matter, the record clearly reveals that Williams's speech did not address a matter of public concern. Williams was not disciplined for assisting Cole. In fact, the Cabinet only disciplined Williams for the manner in which she assisted him. Further, Williams did not seek to bring to public scrutiny wrongdoing committed by the Cabinet. On the contrary, Williams is fighting a personnel action taken against her for her own failure to abide by Cabinet policies. Indeed, if Williams actually informed the public concerning the facts herein, these facts convey no information other than to show that a single employee is upset with being disciplined for failing to comply with established rules and regulations. Clearly, Williams is speaking only about matters of personal, not public, concerns.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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