

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001283-MR

RITA HOWELL

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 00-CI-00384

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF CORRECTIONS,
JUSTICE CABINET

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Rita Howell ("Howell") appeals from a summary judgment of the Shelby Circuit Court dismissing her workplace harassment and constructive discharge action against the Kentucky Department of Corrections. We affirm.

Howell was a registered nurse who began employment with the Kentucky Correctional Institute for Women ("KCIW") in

1996. KCIW is situated in Shelby County, Kentucky. Howell's primary duties centered on providing nursing care to KCIW inmates. She was also responsible for, among other things, screening new inmates and distributing medication.

Howell's immediate superior at KCIW was Pat Horsey ("Horsey"). Howell would later maintain, both to higher-ups at KCIW and to the trial court, that Horsey's administration of the nursing duties at KCIW was at various times negligent, harmful, and/or dangerous. Howell set forth a litany of incidents in which she alleged that Horsey's conduct was improper. They include, among numerous allegations, Horsey's denial of assistance to Howell when Howell was lifting patients; her refusal to obey doctor's orders as to patient medication; refusal to provide wheelchairs to elderly or sick inmates; and, the failure to allow for the proper care of patients with infection. Several other claims regarding Horsey's alleged misfeasance or malfeasance are contained in the record and do not need to be addressed herein.

Howell's claims of improper work-related conduct were not confined to Horsey. After Horsey circulated a memo to the entire staff on June 9, 2000, which changed the manner in which medication would be dispensed, Howell complained that the memo was directed at her. Three days later, on June 12, 2000, Howell filed an "occurrence report" alleging that another nurse, Sherry

Hammond ("Hammond") had improperly taken a medical device home for personal use. She also complained in the report as to Horsey's general behavior toward the inmates. The deputy warden, Tom Dailey ("Dailey") investigated the matter, and after interviewing the relevant parties issued a report to the warden.

Shortly thereafter, Howell continued to make complaints of Horsey's alleged inappropriate behavior. She also maintained that Horsey was harassing her. Howell resigned on August 22, 2000. After Howell quit, Horsey was suspended for one day without pay for allowing Hammond to take the medical device home for her own use.

Howell filed the instant action on October 4, 2000, against the Department of Corrections. She claimed in relevant part that KCIW violated Kentucky's so-called Whistleblower's Act, KRS 61.102, et al., by constructively discharging her in response to her complaints of waste, fraud, abuse of authority and practices dangerous to inmates occurring at KCIW. She sought compensatory and punitive damages pursuant to KRS 61.103(2).

After the matter proceeded in Shelby Circuit Court for approximately 18 months, the Department of Corrections filed a motion for summary judgment. It argued therein that Howell failed to state a claim under which relief could be granted because the alleged reprisals did not occur within the period

specified by KRS 61.103, or that the reprisals were not actionable. Upon considering the matter, the trial court rendered an order on May 29, 2002, granting the motion and dismissing Howell's claims. This appeal followed.

Howell now argues that the trial court erred in granting the Department of Corrections' motion for summary judgment. She maintains that her claims are not barred by the statute of limitations set forth in KRS 61.102; that she has proven the existence of reprisals and adverse action under the statute; that the Department of Corrections cannot claim a lack of culpability under the statute on the argument that the alleged harassment was inflicted by co-workers rather than superiors; and, that the Department of Corrections' argument that Howell did not make her claims in good faith is a matter for the jury. In sum, she seeks to have the summary judgment reversed and the matter remanded for trial.

We have closely examined Howell's arguments and find no error in the entry of summary judgment. Howell's claim was brought pursuant to KRS 61.102, which states in relevant part as follows:

(1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges . .

. to any . . . appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate. . . or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.

KRS 61.103(2) goes on to provide that " . . . employees alleging a violation of KRS 61.102(1) . . . may bring a civil action for appropriate injunctive relief or punitive damages, or both, within ninety (90) days after the occurrence of the alleged violation."

As the parties are well-aware, Howell's complaint was filed on October 5, 2000. Pursuant to KRS 61.103(2), her cause of action must be limited to claims of retaliation under the Act occurring within 90 days prior to the complaint, i.e., those occurring after July 5, 2000.

The sole alleged retaliatory act occurring during this time frame by a superior is what the parties refer to as the floor-stripping incident. Howell claimed therein that Horsey directed other employees to strip wax on the facility's floor commencing at the beginning of Howell's shift. She maintained that this caused her great inconvenience, resulted in damage to her clothing, and was an attempt to harass her. She argued below and herein that it constituted a retaliatory act actionable under the statute.

The dispositive question, then, is whether the floor-stripping incident, taken alone, is sufficient to overcome the Department of Corrections' motion for summary judgment. Stated differently, we may ask whether there is any possibility that the incident constituted a retaliatory act against Howell sufficient to support a claim under KRS 61.102.

A moving party is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, 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." Kentucky Rules of Civil Procedure (CR) 56.03. In Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), the Supreme Court stated as follows:

[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.

. . . [A summary] judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. . . .

...

[T]he rule [CR 56.03] is to be cautiously applied. 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. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.

Viewing the evidence in a light most favorable to Howell, and resolving all doubts in her favor, we cannot conclude that the floor-stripping incident, taken alone, may sustain a cause of action under KRS 61.102. In Woodward v. Commonwealth, Ky., 984 S.W.2d 477 (1998), the Kentucky Supreme Court addressed the elements necessary to prevail on a KRS 61.102 claim. It stated that a plaintiff must show that 1) the employer is a state entity, 2) the employee is a state employee, 3) the employee must make a good faith report of a statutory or regulatory violation, and 4) the defendant must be shown to act to punish the employee for making the report or to act in such a manner so as to discourage the making of this report. Id. at 480.

We must conclude that it would be impossible for Howell to produce evidence at trial warranting a judgment in her favor. Steelvest, supra. Pursuant to KRS 61.102 and Woodward, supra, Howell would be required to show that the Department of Corrections, through Horsey, acted to punish her for registering her complaint with the Department (the fourth element set forth in Woodward). Arguendo, if the floor-stripping incident was intended as punishment or retribution, we cannot conclude that

it was the type of retribution the Legislature sought to guard against in enacting KRS 61.102. In Woodward, for example, the plaintiff was threatened with dismissal and later was demoted for revealing that a county judge executive ordered road repairs on a non-county road. While demotion was properly characterized as punishment under KRS 61.102, we cannot go so far as to conclude that the incident of which Howell complains should be so characterized. This is a question of law properly reserved for the trial court. We have no basis for finding error in the trial court's tacit conclusion that the floor-stripping incident was not punishment or retribution of the type which KRS 61.102 protects against. As such, we find no error. Given that the trial court properly concluded that Howell could not prevail on this issue, her remaining arguments are moot.

For the foregoing reasons, we affirm the summary judgment of the Shelby Circuit Court.

ALL CONCUR.

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