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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001593-MR
AND
NO. 2004-CA-001795-MR

GRIFFIN INDUSTRIES, INC. — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 03-CI-00028

BOBBY J. MULLEN — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING ON APPEAL AND CROSS-APPEAL

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: Griffin Industries, Inc. (Griffin) appeals and Bobby J. Mullen cross-appeals a judgment of the Logan Circuit Court that awarded $120,751.69 to Mullen. Mullen claimed that Griffin had wrongfully discharged him in retaliation for seeking workers' compensation benefits, and a jury agreed. Griffin now argues that it was entitled to a directed verdict. It also contends that the trial court erred in the amount that it awarded to Mullen for his attorney's fee.

In his cross-appeal, Mullen argues that the trial court erred in failing to instruct the jury on the issue of punitive damages. He contends that the court committed additional error by reducing the jury's award for lost wages by the amounts that he received in unemployment compensation benefits. Finding no error, we affirm.

In 1994, Mullen was hired by Griffin to work as a truck driver. Beginning in 2000, he was placed on a grease route, an assignment that entailed removing grease from tanks at various fast food establishments for recycling. On April 16, 2002, he slipped and fell while removing grease from a receptacle at a Kentucky Fried Chicken restaurant; he sprained his wrist. He finished his shift and then sought medical treatment. His wrist was placed in a cast.

Mullen reported the accident, and he and his supervisor completed the necessary forms for review by Griffin's safety committee. The committee determined that Mullen could have prevented the accident if he had cleared the debris around the grease tank before attempting to empty its contents. Wayne Stewart, General Manager at the Russellville plant where Mullen worked, instructed Mullen to come to the plant and watch safety films during his recuperation. One week after the accident, on the day that Mullen became eligible for temporary total disability benefits, Stewart told Mullen that he had been

instructed by someone at the corporate office to terminate his employment with the company.

On January 24, 2003, Mullen filed a lawsuit in which he alleged that he had been discharged in violation of KRS[1] 342.197 for pursuing workers' compensation benefits. He sought damages to compensate him for his past and future lost wages and for emotional distress. He also asserted a claim for punitive damages. The matter was tried before a jury in April 2004.

At the conclusion of the evidence, the trial court denied the parties' respective motions for a directed verdict. It also decided to reserve for later resolution the issues of punitive damages and of damages for Mullen's alleged emotional distress. The court instructed the jury as follows:

> You will find for Bobby Mullen if you are satisfied from the evidence that his filing of a workers' compensation claim against Griffin Industries was a substantial and motivating factor in Griffin Industries[']s decision to discharge him, but for which he would not have been discharged.

During its deliberation, the jury asked for clarification of the "but for" language in the instruction; that is, if a verdict in Mullen's favor required the jury to find that the filing of the workers' compensation claim constituted the **sole** basis for his discharge. After consulting with the attorneys, the trial court read the instruction to the jurors

[1] Kentucky Revised Statutes.

two more times and suggested that they look at the verdict form on the page following the instruction. The judge told the jurors that it was "a mechanical thought process": they either believed or did not believe that the firing would not have occurred but for the filing of the workers' compensation claim.

After further reflection, the jury returned a verdict for Mullen, awarding him lost wages and benefits totalling $106,670. Mullen then voluntarily waived his claim for damages for emotional distress. The court decided not to submit the issue of punitive damages to the jury. It reasoned that although there was sufficient evidence that Mullen's termination was improperly motivated, it believed that there was no evidence of a company-wide policy to discharge its employees under similar circumstances that would justify or necessitate an award of punitive damages as a deterrent.

Griffin's motion for a judgment notwithstanding the verdict (JNOV) was denied. Pursuant to post-judgment motions, the trial court reduced the jury's award by $19,539 (of which $13,299 represented unemployment insurance benefits paid to Mullen) and awarded Mullen $31,625 in attorney's fee. A final judgment in the amount of $120,751.69, was entered on August 4, 2004. This appeal and cross-appeal followed.

Griffin argues that it was entitled to a directed verdict or a JNOV on Mullen's claim that he was the victim of a

retaliatory discharge. Mullen's April 2002 accident was his third in two years. Therefore, Griffin contends that the only reasonable conclusion the jury could reach was that Mullen was discharged pursuant to its "three-strikes-you're out" policy. Relying on Henderson v. Ardco, Inc., 247 F.3d 645 (6th Cir. 2001) and Daniels v. R. E. Michel Co., Inc., 941 F.Supp. 629 (E.D. Ky. 1996), Griffin argues that a termination prompted by a "neutrally applied non-discriminatory company policy" cannot constitute retaliatory discharge as a matter of law. (Appellant's brief at p. 14.)

We apply the same standard of review to a court's ruling on a motion for a directed verdict as to a judgment notwithstanding a verdict. Prichard v. Bank Josephine, 723 S.W.2d 883, 885 (Ky.App. 1987).

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985). The trial court must also "give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence." Id. The court may not enter a directed verdict nor may it grant a JNOV "unless there is a complete absence of proof

on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Id.

In denying Griffin's motions for a directed verdict and for a JNOV, the trial court alluded to inconsistencies in the testimony of Griffin's employees with respect to its safety policies and the absence of any reason other than retaliation for the termination. After reviewing all of the evidence presented at trial, we can find no error in the court's decision to submit the matter to the jury. We agree that there is evidence from which a reasonable jury could believe that Mullen's firing was directly related to his claim for workers' compensation benefits.

The relevant portions of Griffin's published safety program provide as follows:

> The Company strives to provide a safe place to work. Employees are expected to do their part to work safely, wear required safety equipment, observe all safety rules and regulations, and keep their work places in a safe manner. . . .
>
> Any accident or injury, no matter how slight, is to be reported to your supervisor no later than 24 hours after occurrence. . . . An accident report form must be completed by the employee with the supervision of his/her foreman. Generally, the foreman will conduct an investigation of the accident within 24 hours after receiving the employee's report.
>
> The accident report and foreman's accident investigation report must be submitted to the safety committee at the

> local plant within 24 hours. The safety committee is comprised of three workers selected in an election among all plant and fleet employees. . . . The safety committee must render a decision within 72 hours, determining if the accident is due to the negligence of the employee.
>
> . . . .
>
> Employees who are involved in preventable accidents . . . shall be subject to disciplinary action. . . . An employee charged with a preventable accident which has occurred within the last three years is on probation and **may be** subject to termination upon the occurrence of his/her next preventable accident. (Emphasis added.)

In addition to its written policy, Griffin introduced testimony concerning an unwritten policy which it claimed to have been the true basis for Mullen's discharge. According to company witnesses, an employee charged by the safety committee with three preventable accidents was automatically terminated.

As noted earlier, Mullen's accident of April 16, 2002, was his third accident within a two-year period. He previously had had two minor traffic mishaps, which the safety committee had concluded were preventable. However, contrary to Griffin's contention that Mullen's firing was required by its safety policy, Stewart testified that the decision to fire any employee at his plant was a matter within his discretion. Steve Cutter, Vice President of Human Relations, and Wayne Stanberry, Safety and Risk Manager, affirmed that the decision to fire Mullen was

made by Stewart in the exercise of his discretion. Cutter and Stanberry, who both work at the corporate headquarters at Cold Spring, Kentucky, denied that they encouraged or caused Stewart to terminate Mullen.

By its express terms, the written policy does not remove discretion from the general manager in deciding whether to retain or to fire employees who are charged by the safety committee with two or more preventable accidents. Rather than containing a mandate, the policy provides that an employee may be terminated. With respect to the alleged unwritten policy, Cutter, who was in charge of human resources for the entire company, negated the notion that three accidents resulted in an automatic firing.

Stewart, who had the ultimate authority to hire and fire employees at the Russellville plant, acknowledged to the jury that he did not want to terminate Mullen. The evidence established that instead of immediately firing Mullen, he had instructed Mullen to watch safety films. Stewart testified that he hated to lose Mullen, whom he characterized as a dependable worker, and that he discharged him only after discussing the matter with Stanberry, the safety manager. Even though Stewart testified at trial that he was responsible for firing Mullen, reasonable jurors could infer from the totality of his testimony that he was directed by Stanberry (who coincidentally was the

corporate officer in charge of workers' compensation benefits) to terminate Mullen from the company.

The evidence also raised a question as to the neutrality or consistency in enforcement of Griffin's safety program. Although the written policy provides that any and all accidents are to be reported to the committee, the testimony indicated that the actual practice was otherwise. The evidence revealed that if Mullen's fall at the KFC restaurant had not required medical attention (thus entailing workers' compensation medical benefits), it would not have been submitted to the safety committee in the first instance. Thus, the jury was not required to believe that Mullen was fired pursuant to the neutral safety policy that Griffin had claimed to have applied consistently.

Sufficient evidence existed for the jury to believe that Mullen might have been terminated in retaliation for seeking workers' compensation benefits and for it also to conclude that Griffin's safety violation defense might have been a mere pretext. See, Kentucky Department of Corrections v. McCullough, 123 S.W.3d 130 (Ky. 2003). We note the obvious and coincidental closeness in time between the firing and the claim for benefits. Also of significance is Stewart's initial reluctance to fire Mullen until Stanberry directed otherwise.

We find no error in the court's refusal to enter a directed verdict or to grant a JNOV.

Griffin next argues that the trial court erred in its attempt to answer the jury's question about the "but for" language in the instruction. Acknowledging that the court was "well-intentioned," Griffin contends that it nonetheless "actually added to the jury's confusion of what Mullen's burden of proof was in the matter." (Appellant's brief at pp. 21-22.)

We have reviewed the court's response to the jury's inquiry and have not discovered any contemporaneous objection made by Griffin to any statement made by the trial court. Thus, this issue has not been properly preserved for our review. However, regardless of the preservation problem, we find nothing inappropriate in the court's exchange with the jurors. The court essentially read and re-read the instruction to the jury. It invited the jury to read the verdict form on the page following the "but for" instruction. The judge suggested to the jurors that they could either believe or not believe (the two choices outlined on the verdict form) that Griffin's real motive in firing Mullen was that he had filed a workers' compensation claim. There was no impact on the burden of proof or any prejudice caused to either party by the court's brief, cautious remarks to the jurors.

Griffin last argues that the court erred in its award of attorney's fees. KRS 342.197(3) authorizes an award of attorney's fees. When a statute authorizes the payment of attorney's fees, our standard of review is to determine whether the court abused its discretion. King v. Grecco, 111 S.W.3d 877, 883 (Ky.App. 2002). The only requirement for a court is that the award be "reasonable." Id.

In his motion for attorney's fees, Mullen's attorney sought an award equal to 40% of the jury's award -- an amount consistent with his contingency fee contract with Mullen. In the alternative, he asked for an award based on his time (estimated at 253 hours) multiplied by $125, his standard hourly fee. He stated that the case involved "difficult questions" and required "the service of an attorney experienced in handling these type[s] of claims." He noted that he took a substantial risk in representing Mullen on a contingent fee contract because the evidence was entirely circumstantial in nature.

In calculating its award, the trial court opted to multiply the hours of representation by $125. Griffin complains that the award is an abuse of discretion because it is based on an estimate of time that was reconstructed by Mullen's attorney after the trial rather than on contemporaneous records maintained throughout the pendency of the case. Thus, Griffin

argues that it was impossible for the court to arrive at a reasonable award.

We do not agree that the failure to maintain detailed contemporaneous records either prevents an award of attorney's fees or serves to render the award unreasonable. The actual time that an attorney spends in representing a client is only one of many factors to be considered -- with numerous other elements to be evaluated in arriving at a just reward. Those other factors were set forth in the venerable case of Boden v. Boden, 268 S.W.2d 632, 633 (Ky. 1954):

> An attorney fee cannot be fixed with arithmetical accuracy. The factors to be considered are well summarized in *Axton v. Vance*, 207 Ky. 580, 269 S.W. 534. Briefly stated, they are:
>
> (a) Amount and character of services rendered.
>
> (b) Labor, time, and trouble involved.
>
> (c) Nature and importance of the litigation or business in which the services were rendered.
>
> (d) Responsibility imposed.
>
> (e) The amount of money or the value of property affected by the controversy, or involved in the employment.
>
> (f) Skill and experience called for in the performance of the services.
>
> (g) The professional character and standing of the attorneys.

(h) The results secured.

The court was in the best position to observe Mullen's attorney, to assess his competency, and to determine the value of his services to Mullen. Our review of the record reveals that Mullen's counsel was required to undertake considerable pre-trial preparation, including attendance and preparation for numerous depositions; to prepare for and to attend a two-day jury trial; and to expend considerable time and effort in defending Griffin's post-trial motions. Considering the pertinent factors, we find no abuse of discretion in the award of $31,625 for his attorney's fees.

In his cross-appeal, Mullen argues that the trial court erred in failing to instruct the jury on punitive damages. The court did not believe there was a sufficient amount of clear and convincing evidence of wrongdoing to justify the imposition of punitive damages on Griffin. We agree with the court -- but for a different reason.

KRS 342.197(1) and (3) provide:

> (1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter[;]
>
> . . . .
>
> (3) Any individual injured by any act in violation of the provisions of subsection (1) or (2) of this section

> shall have a civil cause of action in Circuit Court to enjoin further violations, **and to recover the actual damages sustained by him**, together with the costs of the law suit, including a reasonable fee for his attorney of record. (Emphasis added.)

In McCullough, supra, the Supreme Court of Kentucky held that punitive damages are **not an available remedy** under KRS 344.450, the Kentucky Civil Rights Act. Like KRS 342.197(3), KRS 344.450 provides that a victim of illegal employment discrimination can seek redress in circuit court and "recover the actual damages sustained, together with the costs of the law suit." The Supreme Court held that the term "actual damages" means "compensatory damages" only and does not include punitive damages. Id. at 138. The Court further held that neither KRS 411.184 nor KRS 411.186 (the punitive damages statutes relied upon by Mullen) serves to "make punitive damages available under KRS 344.450." Id. at 140. In light of the fact that KRS 342.197(1) and (3) utilizes language identical to KRS 344.450, as well as the similarity in their purposes and the wrongs to be remedied, we believe the trial court was correct in refusing to allow the jury to consider the issue of punitive damages -- even though its reasoning was more generalized rather than based on this statutory analysis.

Mullen last contends that the trial court erred in reducing the jury's award of damages by the amounts that he

received in state unemployment benefits. However, Mullen could not be prejudiced by the alleged error as he would have been required to reimburse the state for the duplicate wages if the reduction had not been made. See, KRS 341.415. Regardless of the statutory repayment provisions, the reduction in the verdict (giving credit to Griffin for unemployment benefits) prevented double recovery for the same injury (lost wages). We find no error. See, Simpson County Steeplechase Association v. Roberts, 898 S.W.2d 523 (Ky.App. 1995).

We affirm the judgment of the Logan Circuit Court.

ALL CONCUR.

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