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JANUARY 12, 2000 (1999-SC-0656-D)

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000892-MR

ROBERT M. CLARK and
DEENA CLARK — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 96-CI-01037

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT and
SAM DUNN — APPELLEES

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

BEFORE: BUCKINGHAM, COMBS, and MCANULTY, Judges.

BUCKINGHAM, JUDGE. Robert and Deena Clark appeal from an order of the Fayette Circuit Court granting summary judgment to the Lexington-Fayette Urban County Government (LFUCG) and Sam Dunn. We affirm.

Robert began his employment with the LFUCG in 1982 and was promoted to the position of director of the division of building maintenance and construction (the division) in 1988. In 1994, Dunn became commissioner of general services for the LFUCG, which meant that he became Robert's immediate supervisor. In

September 1994, a report was issued to Dunn by Julius Berry, an administrative aide to the LFUCG mayor, which detailed various allegations against Robert, including favoritism and racism. This report prompted a further study concerning alleged problems in the division.

Despite the serious allegations contained in the Berry report, Robert was evaluated by Dunn in January 1995 and was found to be an Aabove average@ employee who was Adedicated@ and Aworks hard to provide the LFUCG with effective building maintenance and construction services@. In June 1995, Robert fell while working on a roof and suffered a work-related injury for which he filed a claim for workers' compensation benefits. Robert alleges that Dunn screamed at him following the injury and told him that his injury would Acost the city a lot of money@.

In the fall of 1995, the LFUCG engaged Robert Roark to investigate the allegations contained in the Berry report and the subsequent further study. In September 1995, around the same time that the LFUCG retained Roark, Robert filed a second workers' compensation claim and took a medical leave of absence due to work-related stress. When Robert returned to work in October 1995, he was questioned under oath by Roark, an attorney, concerning the allegations contained in the Berry report. Later in October 1995, LFUCG Mayor Pam Miller sent Robert a letter outlining Amany serious matters@ which had come to her attention as a result of Roark's investigation. Among the matters mentioned by Mayor Miller were Robert's alleged failure to complete work requests by the LFUCG Police Department, his

alleged racism, and his extensive renovation of the division's offices. On November 7, 1995, Robert was involved in a work-related auto accident for which he filed a third workers' compensation claim. He was then placed on leave under the Family and Medical Leave Act.

In December 1995, Dunn filed charges with the Lexington-Fayette Urban County Civil Service Commission (the commission) seeking Robert's dismissal as an employee of the LFUCG. Robert resigned his position in January 1996, before the commission had acted on the charges against him. He was awarded disability retirement benefits by the Commonwealth of Kentucky, although the exact nature of his disability (or disabilities) is unclear from the record.

In March 1996, Robert filed a complaint in the Fayette Circuit Court against the LFUCG and Dunn, alleging causes of action which included age discrimination, retaliation for filing workers' compensation claims, and disability discrimination. The complaint also contained a claim by Deena for loss of consortium. Following a period of discovery, the trial court granted the summary judgment motions of the LFUCG and Dunn on all of Robert's and Deena's claims. Robert and Deena then filed the appeal sub judice.

Robert argues that the trial court erred in granting summary judgment to the LFUCG and Dunn because they failed to satisfy Kentucky's stringent standard for summary judgment. The standard for ruling on a summary judgment motion is familiar and clear:

> A movant should not succeed in a motion for summary judgment unless the right to judgment is shown with such clarity that there is no room left for controversy and it appears impossible for a nonmoving party to produce evidence at trial warranting judgment in his favor. . . . The motion for summary judgment must convince the circuit court from evidence in the record of the nonexistence of a genuine issue of material fact.

Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992). Furthermore, A[t]he 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@ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). When summary judgment has been granted by the trial court, the question before an appellate courtAis whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law@ Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). The trial court is entitled to no deference in this area since factual findings are not at issue. Id. We will examine each claim for relief made by the Clarks separately to determine the appropriateness of summary judgment on each claim.

One of the claims made by Robert against the LFUCG and Dunn was that they retaliated against him for filing workers' compensation claims. Kentucky Revised Statute (KRS) 342.197(1) provides that A[n]o employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter@. Robert elaborates at length about the circumstances leading to the filing of his first workers' compensation claim. He states that

Dunn ordered him to check a meter on a defective roof, that the roof caved in and that he was injured, and that Dunn screamed at him upon learning of his injuries and told Robert that he would Acost the city a lot of money@ As these actions occurred prior to the filing of the first claim, we fail to perceive how they can constitute retaliation for Robert's filing a workers' compensation claim. Even if Dunn did scream at Robert after the claim was filed, such an action would not constitute harassment, coercion, or discrimination, as there is no allegation that Dunn threatened Robert's employment or physical well-being, nor is there any allegation that Dunn used abusive language.

Robert also refers to the letter sent by Mayor Miller to him in October 1995. As the trial court noted, the letter contains no reference, either direct or implied, to Robert's workers' compensation claims. Furthermore, the letter was a direct result of the investigation performed by Roark, which had been necessitated by the Berry report. The Berry report was written long before Robert filed any workers' compensation claims, and Robert makes no allegation in his brief that the Roark investigation focused on those claims.

Robert also contends that Mayor Miller's deposition contains proof of workers' compensation-related retaliation. Mayor Miller testified that if a LFUCG employee had four work-related auto accidents in one year, then that employee Ais usually disciplined@ Considering the question asked in the deposition, the response given by Miller, and the apparent failure by counsel to follow with a question to clarify the

response and determine its meaning, we conclude that the testimony is insufficient to create a fact issue concerning retaliation.

In short, as Robert points to no specific incidents which could logically be construed as retaliation for his pursuing his workers' compensation claims, he has not shown that Aretaliation for filing or pursuing a workers' compensation claim was a substantial motivating factor@ in any adverse employment action which the LFUCG took against him. First Property Mgmt. Corp. v. Zarebidaki, Ky., 867 S.W.2d 185, 189 (1993). Furthermore, regardless of the disposition of this claim against the LFUCG, Robert's retaliation claim against Dunn was properly dismissed by summary judgment, as KRS 342.197(1) is directed toward employers and Dunn is not an employer under KRS 342.630.

Robert also alleges a cause of action based upon age discrimination. As Robert is fifty-two years old, he is protected by KRS 344.040, which forbids employment discrimination against persons over forty years of age. ADiscrimination@ is defined in KRS 344.010(5) as meaningAany direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter@. To defeat a defendant's summary judgment motion, a plaintiff alleging age discrimination by his or her employer mustAproduce specific evidence that age was a determining factor@ in the adverse

employment action, since "[i]n the absence of specific evidence of age discrimination, a summary judgment is proper". Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 230 (1984).

Robert contends that he offered direct evidence of age discrimination in the form of an affidavit of John Wayne Turner, who is apparently a LFUCG employee, which provided that Dunn told Turner in October 1995 that "Bob Clark had been brought up through the old school and that Bob was too old to change". This case is similar to Carpenter v. Western Credit Union, 62 F.3d 143 (6th Cir. 1995), in which an employee of a credit union was terminated and subsequently filed suit alleging age discrimination. As part of her proof, Carpenter offered an affidavit which provided that the person who had terminated her and another employee had stated to the affiant that the decision was "purely economical, they were the oldest employees here". Id. at 144. The Carpenter court opined that summary judgment in favor of the credit union was proper as "isolated and ambiguous statements are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination". Id. at 145 (internal quotation marks and citation omitted). As the alleged statement at issue in the case sub judice is far more innocuous than that in Carpenter, we conclude that there is a lack of specific evidence that age was a determining factor in an adverse employment action. In fact, the alleged statement by Dunn was not accompanied by any adverse employment action against Robert.

In the absence of direct evidence of age discrimination, Robert could nevertheless sustain his age discrimination action by proof through indirect evidence. In such circumstances, he would be required to show that: A(1) he was a member of a protected class; (2) he was qualified for the position; (3) he was discharged; and (4) he was replaced by a younger person.@ Id. at 144. While Robert was a member of a protected class due to his age, his forty-five-year-old replacement was also within the same protected class. It is no longer necessary, however, for a plaintiff to show that he was replaced by someone outside the protected class in order to prevail on an age discrimination claim. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996). Instead, when a plaintiff's replacement is also within the protected class, the plaintiff must show that the replacement is Asubstantially younger.@ Id. at 517 U.S. 313, 116 S. Ct. 1310. As Robert was fifty-two years old and his replacement was forty-five years old, we conclude that Robert was not replaced by an individual who wasAsubstantially younger.@

Furthermore, it is apparent that Robert could not prove the second and third elements necessary to prove age discrimination by indirect proof. The second element requires that Robert be qualified for the position. Robert points to nothing in the record to contradict the trial court's finding that he was unable to perform his job duties, and we conclude that he has thus failed to demonstrate he was qualified for his position when he terminated his employment with the LFUCG. The

third element Robert must prove is that he was discharged due to his age. As Robert elected to take disability retirement, he was not discharged by the LFUCG. In short, summary judgment was proper as to Robert's age discrimination claim under any of the aforementioned theories.[1]

Robert also states a cause of action for disability discrimination. KRS 344.040 provides that an employer may not discriminate against Aa qualified individual with a disability . . . .@ A Aqualified individual with a disability@ is defined in KRS 344.030(1) as

> an individual with a disability as defined in KRS 344.010 who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's disability without undue hardship on the conduct of the employ-ers' (sic) business. Consideration shall be given to the employer's judgment as to what functions of a job are essential . . . .

Robert does not specify in what manner he was discriminated against based upon his disability, other than to argue that the LFUCG failed to provide him with a reasonable accommodation. Therefore, as the trial court noted, neither the LFUCG nor Dunn can be found to have discriminated against Robert based upon his disability until such time as they learned that he was disabled. See Taylor v. Principal Financial Group, Inc, 93 F.3d 155, 163 (5th Cir. 1996), cert. denied 117 S. Ct. 586, 136

[1] Summary judgment as to Robert's claim against Dunn for age discrimination is also proper.

L. Ed. 2d 515 (1996); Kocsis v. Multi-Care Management, Inc, 97 F.3d 876, 884 (6th Cir. 1996).[2]

The record does not reflect the exact nature of Robert's disability; therefore, it is difficult to determine when the LFUCG knew of Robert's disability. Deena wrote a letter to Mayor Miller in September 1995, stating her concerns about Robert's Ahealth and general well-being@ However, as the trial court noted, such a letter is notAsufficient to place LFUCG on notice of any [specific] disability Mr. Clark may have had.

The first document received by LFUCG which would arguably be sufficient to place it on notice of Robert's disability is a letter from Robert to Dunn dated November 8, 1995. The letter provides thatAI am requesting leave from November 9, 1995, until further notice for medical reasons$. Accompanying this letter was a statement from a licensed psychologist which stated that Robert would not be able to return to work Auntil further notice@ Therefore, since LFUCG did not know of Robert's disability until it received those letters, it would have been impossible for Robert to have been discriminated against due to his disability prior to November 1995. Taylor, supra; Kocsis, supra.

[2] Neither party has cited, nor have we independently located, a Kentucky case explicitly setting forth the requirements that a plaintiff must meet in order to prevail on a disability discrimination claim under KRS Chapter 344. However, as KRS 344.020(1)(a) provides that one of the general purposes of KRS Chapter 344 is toAprovide for execution within the state of the policies embodied in the . . . Americans with Disabilities Act of 1990,@ then federal cases construing that act are instructive.

Robert wrote another letter to Dunn in December 1995 informing him that he had applied for disability retirement but that it was his Apreference that Lexington Fayette Urban County Government make reasonable accommodations for me to continue my employment . . . @ However, Robert did not specify what reasonable accommodations he was requesting and did not outline the specific nature of his disability. As Robert did not specifically identify his disability and resulting limitations and did not suggest specific reasonable accommodations, the LFUCG cannot be found to have violated KRS Chapter 344 for failing to provide Robert with a reasonable accommodation. See Taylor, supra at 165; Monette v. Electronic Data Systems Corp, 90 F.3d 1173, 1183 (6th Cir. 1996).[3]

Robert's next claim against the LFUCG and Dunn is that he was subjected to a hostile work environment based upon his age and his disability. Assuming that such claims are viable under Kentucky law, the trial court's granting of summary judgment on the claims was proper. As we have noted previously, the LFUCG had no notice of Robert's disability until November 1995. Thus, it cannot have created a hostile work environment for him based on that disability prior to that date. Also, Robert has not

[3] In addition, as noted by the trial court, Robert is also precluded from prevailing on this claim because he cannot demonstrate that he suffered an adverse employment decision due to his disability. First, since Robert elected to take disability retirement, any adverse employment decision was of his own choosing. Second, the charges filed with the commission stemmed from an investigation which predated the LFUCG's knowledge of Robert's disability. Therefore, it cannot be said that the LFUCG attempted to discharge Robert because of his disability.

offered any evidence that the LFUCG or Dunn took any action against him, verbal or otherwise, which could be construed as discriminating against him based upon his disability.

Furthermore, Robert has presented insufficient evidence to demonstrate that he was subjected to conduct which created an objectively hostile working environment for him due to his age. The fact that Dunn allegedly stated that Robert was Atoo old to change@ is an isolated utterance which is insufficient to create an objectively reasonable hostile working environment. The trial court properly granted summary judgment to both the LFUCG and Dunn on this claim.

Robert has also alleged a cause of action for the tort of outrage, also known as intentional infliction of emotional distress. This tort occurs when someone Aby extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . @ Craft v. Rice, Ky., 671 S.W.2d 247, 251 (1984)(quoting Restatement (Second) of Torts § 46 (1965)). It is unclear which alleged actions by the LFUCG and Dunn Robert relies upon for this claim. Presumably, he relies upon actions such as the filing of the charges against him with the commission, Mayor Miller's letter to him accusing him of misconduct, and Dunn's screaming at him after his work-related roof accident. However, none of those actions, either separately or combined with any of the other facts of this case, is sufficient to sustain a claim for intentional infliction of emotional distress. Those allegations are not Abeyond all possible bounds of decency@ such as Ato be regarded as atrocious,

and utterly intolerable in a civilized community@. Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1, 3 (1990). Summary judgment was properly granted to the LFUCG and Dunn on this claim.[4]

Deena's claim is for loss of consortium. KRS 411.145 allows a spouse to recover damages from a wrongdoer for loss of consortium. That statute contains no indication, express or implied, that it was intended to be a waiver of sovereign immunity. Thus, Deena's loss of consortium claim against the LFUCG is barred by the doctrine of sovereign immunity. Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997). Likewise, her claim against Dunn is barred by official immunity. Malone, supra. We conclude that the trial court properly granted the LFUCG and Dunn summary judgment on this issue.

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[4] The trial court based its summary judgment in this area on the doctrine of sovereign immunity. It is unquestioned that the LFUCG is entitled to claim the protection of sovereign immunity from court liability. Hempel v. Lexington-Fayette Urban County Government, Ky. App., 641 S.W.2d 51, 53 (1982). Robert's argument that sovereign immunity applies only to unintentional torts is to no avail, as the law is clear that Athe sovereign state cannot be held liable in a court of law for either intentional or unintentional torts . . . @ Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District, Ky., 805 S.W.2d 133, 139 (1991). Similarly, any intentional infliction of emotional distress claim against Dunn is barred by immunity, as a public official Ais immune from liability when exercising a discretionary function as long as the official acts within the general scope of the authority of office.@ Franklin County, Kentucky v. Malone, Ky., 957 S.W.2d 195, 202 (1997). Dunn's election to file charges against Robert with the commission was a discretionary function of his powers as Robert's supervisor. The alleged screaming incident is insufficient to rise to the level of reprehensible conduct required to constitute intentional infliction of emotional distress. Seitz, supra.

Finally, the Clarks allege that the trial court erred by failing to compel the LFUCG and Dunn to respond to interrogatories related to the Roark investigation. The trial court denied the Clarks' motion to compel based upon the work product doctrine of CR 26.02(3)(a). Robert seeks discovery of documents obtained by the Roark investigation "to show that the charges [filed against him with the commission] were without merit and merely a pretext for discrimination". As we have determined that summary judgment was proper as to all of the aforementioned claims, this issue is rendered moot. Nevertheless, the trial court properly resolved this issue, as the Clarks were apparently provided with a list of the witnesses who were interviewed by Roark and the Clarks have apparently taken Roark's deposition. Therefore, the Clarks had a means of ascertaining the "substantial equivalent" of the fruits of Roark's investigation. See CR 26.02(3)(a). We further conclude that the cases relied upon by the Clarks on this issue are distinguishable.

The judgment of the Fayette Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I cannot agree that Kentucky's stringent standard for summary judgment has been met by the defendants-appellees in this case. Appellant has raised serious issues of material fact that merit

examination by a trial on the merits. For example, the coincidences in timing surrounding his first injury and the subsequent investigation allegedly premised on the Berry report clearly raise the innuendo or specter of possible retaliation for having filed a workers' compensation claim. He has, in my opinion, withstood the test to prevent entry of summary judgment dismissing his claim as to the retaliation charge. However, I agree that summary judgment was properly entered as to all of his other claims.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

J. Robert Cowan
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