RENDERED: SEPTEMBER 1, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001126-MR

TIMOTHY TODD FARRELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 02-CI-02605

AMERICAN RETIREMENT CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDULGI AND SCHRODER, JUDGES; MILLER,[1] SPECIAL JUDGE.

GUIDUGLI, JUDGE: Timothy Todd Farrell has appealed from the Fayette Circuit Court's summary judgment dismissing his wrongful discharge claim against his former employer, American Retirement Corporation. The sole issue on appeal concerns whether Farrell proved that ARC directed him to violate Kentucky's alcohol and child labor laws and subsequently violated public policy when it discharged him when he refused to do so. Because we agree that

[1] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Farrell did not meet his burden of proof to establish that ARC requested him to violate the law, we affirm.

ARC is a Tennessee corporation that operates retirement living facilities. One of these facilities, Richmond Place, is located in Lexington, Kentucky. Richmond Place offers dining services for its residents and their guests, and hosts special events, including "social hours." In June 2001, former Richmond Place Executive Director M.T. Meaney hired Farrell in the position of Dining Services Director. In this position, Farrell was responsible for all aspects of the food service operations for Richmond Place's residents and employees. Over the course of his employment, Farrell grew concerned about Richmond Place's alcohol policies.

For many years and despite its lack of a liquor license, Richmond Place hosted weekly open-bar "social hours" and routinely served wine at the dinner meal three times per week at no additional cost. As director, Farrell would order and purchase alcohol at a local Liquor Barn on an open account, and his employees would serve the alcohol in the dining room. Many of those employees were under the age of 21, and some were under the age of 18.

By early April 2002, Farrell's concerns regarding Richmond Place's continued violations of Kentucky's alcohol and child labor laws had grown to such an extent that he anonymously

contacted the local office of the Kentucky Alcoholic Beverage Commission and spoke to a detective. He also contacted Richmond Place's deputy Executive Director, Terry Bishop, and ARC's Human Resources Director, Lisa Haley. Haley contacted ARC's Regional Director for Human Resources, Barbara Schmidt Best, regarding the company's alcohol policies. Best told Haley that if the law required it, Richmond Place would have to apply for and obtain a liquor license. In addition to Bishop and Haley, Farrell also contacted ARC's Corporate Dining Services Director, Roger McAleese, who in turn discussed the matter with Tambry Cundiff, who had recently been hired as Richmond Place's new Executive Director. Cundiff and McAleese met with Farrell to discuss the alcohol issues, reviewed the statutes Farrell had provided them, and sought legal advice from outside counsel to determine whether Richmond Place was compliant with the applicable law.

In the meantime, Farrell again contacted the police in late April, this time leaving his name. By early May just prior to a planned Richmond Place Derby Day party, he indicated to Detective Taylor that the stress was getting to him, and was assured that no charges would be brought against him. Farrell contacted Cundiff the morning of Derby Day to tell her he would not continue to break the law. Cundiff, in turn, contacted Fred Ewing, ARC's Vice President of Operations, who recommended that the status quo be maintained until legal advice had been

obtained. When Cundiff reported this to Farrell, he requested that he be permitted to take some time off, which Cundiff approved. A few days later, Farrell sent Cundiff an e-mail in follow up to their conversation the preceding Saturday. In the e-mail, Farrell stated that despite Ewing's request that the status quo be maintained and that he was to continue serving alcohol, he was refusing to do so, and was further instructing his staff not to serve alcohol to Richmond Place's residents.

Cundiff responded to Farrell's e-mail the same day, discussing in great detail the results of the investigation into Richmond Place's alcohol policies. The body of the e-mail reads as follows:

> Tim,
>
> I appreciate receiving your e-mail today regarding our conversation on Saturday, May 4, 2002. As I've explained to you, the delayed response to these items was necessary in order to fully investigate Kentucky state liquor law compliance as it relates to Richmond Place. Today, we received an independent evaluation from our attorney, Mark Overstreet, that indicates we are in fact, substantially compliant with Kentucky state law. With this information in hand, we are pleased to know that there will be no compliance issues beginning May 7, 2002.
>
> We have confirmed that our liquor orders, purchase[d] by check at retail prices and pick ups by our of age employee, and the fact that we are not selling anything to anyone, is compliant with Kentucky state laws. For social hour, as long as a

> majority of the attendees are residents of Richmond Place, we are compliant with Kentucky state law. To our knowledge, this has not been an issue at Richmond Place to date. As for wine in the Dining Room, effective May 7, 2002, we will NO LONGER serve in the dining room. Wine will be served in a closed environment before the evening meal by staff that is age appropriate. No alcoholic beverages will be served or handled in any way by any employee under the age of 18.
>
> As a result of our investigation, we consider Richmond Place to be fully compliant with Kentucky state law beginning on May 7, 2002. In addition, I have the expectation that you will fully cooperate and fulfill your role here at Richmond Place as Food Service Director.
>
> I look forward to meeting with you on Wednesday.
>
> Tamb[r]y

Farrell forwarded this e-mail to Detective Taylor, who then contacted McAleese regarding several additional areas of non-compliance, including that employees must be 21 years old to serve alcohol, that alcohol could not be served on Election Day, and that alcohol could not be purchased on credit. Cundiff sent out memos to the Richmond Place residents on May 7 and May 9 detailing all of the changes.

On May 8, 2002, Farrell met with Cundiff and McAleese. Farrell indicated that he was pleased with the outcome of the alcohol compliance issue. However, he did point out that no one under the age of 21 was permitted by law to serve alcohol.

Cundiff then presented Farrell with an "Action Plan for Success". She and McAleese gave Farrell 24 hours to decide whether he wanted to comply with their requests or resign his employment. Cundiff denied Farrell's request that he be permitted to go home to think about the situation, as he had already been off work on his requested vacation days for the past three days. Farrell then left his employment. He later turned down ARC's offer to rehire him in his same position, citing Richmond Place's hostile environment.

On June 24, 2002, Farrell filed a complaint in Fayette Circuit Court, seeking damages for wrongful discharge, alleging that he was terminated for his failure to agree to continue violating Kentucky's liquor and child labor laws. ARC disputed his claim, asserting in its answer that once it received an opinion regarding Farrell's concerns, Richmond Place changed its practices, and that Farrell had not been terminated, but rather had resigned.

After several years of discovery, ARC moved for summary judgment, arguing that Farrell could not establish that he had been discharged, in fact or constructively, or that he had been asked to violate any laws. In response, Farrell contended that he was forced to resign and that he refused to comply with the instruction that he maintain the status quo with regard to Richmond Place's alcohol policy.

On April 12, 2005, the circuit court entered a summary judgment, thereby dismissing Farrell's claim. For purposes of its ruling, the circuit court assumed that Farrell had been terminated, as opposed to having resigned. The circuit court then addressed whether Farrell's termination was in violation of public policy:

> The court, in considering whether the defendant is entitled to a summary judgment, presumes the facts as set out by the plaintiff. There is no dispute that the plaintiff was an at-will employee of ARC, the defendant. In Kentucky, "ordinarily an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.["] Firestone Tire and Rubber Co. v. Meadows, 666 S.W.2d 730, 731 (Ky. 1983). Firestone goes on to state that the narrow exception to the doctrine is that employees discharged in violation of public policy may bring claims for wrongful termination. Using the reasoning in the case of Grzyb, Maloney, Marks, and Ashland Hospital Corp. v. Evans, 700 S.W.2d 399 (Ky. 1985), in order to prevail in light of defendant's motion for summary judgment, this plaintiff must prove that he was discharged for his failure or refusal to violate a law in the course of employment.
>
> Plaintiff relies on the case of Northeast Health Management, Inc. v. Cotton, 56 S.W.3d 440 (Ky.App. 2001), to support his position. However, in that case the employees were asked to commit perjury, clearly a violation of the law. In the case sub judice, the situation is more like that in Brock v. Britthaven, Inc., 1999 U.S. Dist. LEXIS 12184 (E.D.Ky. Apr. 23, 1999), where the fired employee believed that his nursing home employer was not complying with

> legal requirements relating to patient care. Like this case, there can be legitimate legal issues about exactly what the law requires. It is not at all clear about what practices may violate the law. The defendant took immediate and appropriate steps to investigate the plaintiff's concerns. They sought advice of counsel. All practices that may have violated Kentucky liquor laws were immediately addressed in such a way that even the plaintiff was satisfied and comfortable with the level of compliance. It is clear from Brock that a wrongful discharge claim cannot stand where the employee was never instructed to violate the law. Plaintiff has failed as a matter of law to prove that his discharge violated public policy because he fails to submit any proof that the defendant instructed him to violate the law.

Farrell filed a motion to reconsider or set aside the summary judgment, and the circuit court heard oral arguments solely on whether Farrell was terminated for his refusal to violate the law. The circuit court recognized on the record that ARC took quick steps to bring Richmond Place into compliance once the research into the compliance issue was completed, and could identify no proof that Farrell was terminated for his refusal to violate the law. The motion to reconsider was denied, and this appeal followed.

The sole issue before us on appeal is whether the circuit court properly concluded that Farrell failed to establish any proof that he was terminated for his refusal to violate Kentucky's alcohol and child labor laws, and that ARC

was entitled to a summary judgment as a matter of law. Farrell maintains that the proof of record he developed supports his claim, while ARC disputes this assertion. In addition, ARC argues in the alternative that Farrell failed to establish that his employment had been terminated. We agree with ARC that Farrell did not meet his burden of proof

Our standard of review in an appeal from the entry of a summary judgment is well settled in this Commonwealth. This Court addressed the applicable standard in Lewis v. B&R Corp.[2] and defined it as follows:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest[, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in

[2] 56 S.W.3d 432, 436 (Ky.App. 2001).

> describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. (Citations in footnotes omitted.)

With this standard in mind, we shall review the circuit court's judgment.

As evidenced in many cases, including Firestone Textile Co. v. Meadows,[3] our Supreme Court has recognized that "ordinarily an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible."[4] The same court in Grzyb v. Evans,[5] rendered two years later, identified this as "the 'terminable-at-will' doctrine[.]" In both Meadows and Grzyb, the Supreme Court addressed exceptions to this doctrine, which must be both "clearly defined and suitably controlled."[6]

The Meadows court adopted the limitations on exceptions to the employment-at-will doctrine as imposed by the

[3] 666 S.W.2d 730 (Ky. 1983).

[4] Id. at 731.

[5] 700 S.W.2d 399 (Ky. 1985).

[6] Meadows, 666 S.W.2d at 733.

Wisconsin Supreme Court in Brockmeyer v. Dun & Bradstreet,[7] which the Grzyb court summarized as:

> 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
>
> 2) That policy must be evidenced by a constitutional or statutory provision.
>
> 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.[8]

In the present case, Farrell has not asserted that the policy violation supporting his claim was evidenced by a constitutional or statutory provision. The inquiry, however, does not end here.

For such situations, the Grzyb court adopted the position the Michigan Supreme Court crafted in Suchodolski v. Michigan Consolidated Gas Co.,[9] which identified two situations "where 'grounds for discharging an employee are so contrary to public policy as to be actionable' absent 'explicit legislative statements prohibiting the discharge.'"[10] Those two situations are:

> First, "where the alleged reason for the discharge of the employee was the failure or

[7] 113 Wis.2d 561, 335 N.W.2d 834 (1983).

[8] Grzyb, 700 S.W.2d at 401.

[9] 412 Mich. 692, 316 N.W.2d 710 (1982).

[10] Grzyb, 700 S.W.2d at 402, citing Suchodolski, 316 N.W.2d at 711.

> refusal to violate a law in the course of employment." Second "when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment."[11]

The Grzyb court specifically noted that "the concept of an employment-related nexus is critical to the creation of a 'clearly defined' and 'suitably controlled' cause of action for wrongful discharge."[12]

Farrell, obviously, relies upon the first prong of the Grzyb/Suchodolski test (that the reason for his discharge was his refusal to violate Kentucky's alcohol and child labor laws in the course of his employment) to support his claim of wrongful discharge. We disagree, and hold that the circuit court properly held that Farrell introduced no proof to establish that he was terminated for his refusal to violate the law.

This Court recently addressed a similar situation brought under the same prong of the Grzyb/Suchodolski test in Northeast Health Management, Inc. v. Cotton.[13] In Cotton, the employees sought damages for wrongful discharge after they refused to commit perjury and were later forced to resign. The Court found no merit in the hospital's argument that the request

[11] Id., citing Suchodolski, 316 N.W.2d at 711-12.

[12] Id.

[13] 56 S.W.3d 440 (Ky.App. 2001).

that they perjure themselves had no relation to their employment:

> Dennis called Cotton and Howell into her office for two meetings while they were at work to discuss their possible testimony at her shoplifting trial. Later, when both employees refused to perjure themselves, Dennis made their working environment difficult and uncomfortable to the point that they were forced to resign. We believe that it is insignificant that Dennis asked Cotton and Howell to violate a law in a matter that was personal to Dennis. The request and retaliation by Dennis [were] nonetheless [] abuse[s] of her authority as Cotton's and Howell's supervisor.[14]

Turning to the facts of the present case, we again look to the circuit court's statements in its written order and on the record during the ruling on Farrell's motion to reconsider. While ARC investigated the compliance issue, a legitimate question existed as to whether Richmond Place was operating legally or illegally under the applicable alcohol laws. For this reason, Ewing's statement to Cundiff, and Cundiff's request to Farrell, that the status quo be maintained pending the result of the investigation was quite reasonable. ARC certainly acted very quickly to investigate the matter, which was resolved just over a month after Farrell first contacted Bishop and Haley. This investigation entailed much corporate communication and the hiring of outside counsel to

[14] Id. at 447.

provide legal guidance. Once ARC determined that Richmond Place was partially non-compliant, it immediately acted to bring Richmond Place into compliance. By May 8, 2002, the date of Farrell's meeting with Cundiff and McAleese, Richmond Place was certainly in compliance, and Farrell did not dispute this fact.

Based upon these facts of record, even when viewed in a light most favorable to Farrell, there is nothing to tie his discharge (if, indeed, he was discharged) to his refusal to continue to violate the Kentucky's alcohol law. ARC acted reasonably and swiftly to address Farrell's concerns, and took the necessary steps to bring Richmond Place into compliance once it was determined to be partially non-compliant. The circuit court properly entered a summary judgment, as there were no disputed issues of material fact to be decided and ARC was entitled to a judgment as a matter of law.

Because we are affirming on the issue Farrell raised, we need not address ARC's alternative argument that Farrell was not discharged, but that he resigned of his own volition.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Stephen McDonald
Lexington, Kentucky

BRIEF FOR APPELLEE:

Timothy K. Garrett
Nashville, Tennessee

Bryan Beauman
Lexington, Kentucky