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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000813-MR

PIKE COUNTY FISCAL COURT — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 99-CI-00678

GLEN GIBSON — APPELLEE

OPINION
VACATING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON,[1] SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: This is a case for wrongful discharge from employment filed by Glen Gibson, a Pike County road foreman, who alleges that he was terminated as result of the exercise of his rights under the Constitution of Kentucky. The circuit court agreed and ordered Glen reinstated with full retirement benefits back to the date of his discharge. We hold that under the facts there is no protection afforded Glen by the

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kentucky Constitution and, we must therefore, vacate the judgment.

At the time of his discharge, Glen had worked for the Pike County Road Department for over 20 years. For the first 10 years he was a right-of-way agent, and the last 10½ years he was a county road foreman for District I. His duties as foreman required that he oversee various projects and perform certain administrative tasks. He was not required to operate heavy equipment and was not trained in that capacity.

Glen is married to Karen Glen who in 1997 was a Pike County Fiscal Court member. There was, according to Karen's and Glen's testimony, animosity between Karen and the County Judge/Executive, Donna Damron.[2] In March 1997, the Pike County Fiscal Court invoked a policy requiring employees of the Solid Waste and Road Department who occupied specific positions to obtain a Commercial Driver's License by September 1, 1997. Glen's position as foreman was one of those specified. The policy further provided, however, that "[f]or good cause shown, the judge/executive may grant a waiver of this requirement, but only if the employee does not operate equipment on the job which requires a CDL under federal law." On March 5, 1997, employees were notified of the policy and informed that, if needed, the

[2] Karen was elected to the position of County Judge/Executive in 1998 and took office in January 1999.

county would provide vehicles in which they could take the test. The notice also informed them of the possible waiver.

Despite having knowledge of its requirements, Glen did nothing to comply with the policy and did not apply for a waiver during the six months grace period provided. As a result, on September 2, 1997, he was notified that at the fiscal court meeting on September 15, 1997, the county judge would recommend Glen's employment be terminated for failure to comply with the policy. Glen requested that he be reinstated, and provided the necessary training to operate the equipment. He assured that he would then attempt to obtain a CDL. After consideration of Glen's request, the fiscal court members voted to terminate Glen. Glen's wife abstained.

Glen filed this action on May 17, 1999, against the Pike County Fiscal Court alleging that his discharge was in retaliation for his association with his wife, as well as his effort to unionize county employees and his expression of constitutionally protected speech. He also contended that the action of the fiscal court was arbitrary in violation of Section 2 of the Constitution of Kentucky. He later amended his complaint to state that the CDL requirement itself was arbitrary and capricious. Glen again amended his complaint to include Judge Damron and the fiscal court members, excluding his wife, in their official and individual capacities.

The fiscal court, Damron and the fiscal court members settled all claims for monetary relief sought by Glen. The only issue remaining was whether he was entitled to reinstatement. Despite the county's contention that the settlement and release resolved all monetary damages claims, including retirement benefits, the circuit court awarded such benefits and reinstatement of Glen to his former position or a better position.

Glen did not attempt to bring his action pursuant to 42 U.S.C. § 1983, nor could he have since the statute of limitations had expired.[3] Thus, his action, if it can be sustained at all, depends on this state's public policy exception to the terminable at-will doctrine.[4]

It is Glen's position that the county judge and the fiscal court knew he had no training in the operation of the equipment so that obtaining a CDL would be impossible, causing him to lose his employment. The enactment of the policy, he maintains, was part of a scheme to oust him from his position in retaliation for his political association with his wife, and for his previous support of a union. In response, the fiscal court contends that the policy was enacted for the protection of the

[3] Dennis v. Fiscal Court of Bullitt County, 784 S.W.2d 608 (Ky.App. 1990).

[4] The statute of limitations for a wrongful discharge action is five years. Bednarek v. United Food and Commercial Workers Int'l. 780 S.W.2d 630 (Ky.App. 1989).

safety of the citizens of Pike County by requiring all operators of county equipment to be qualified and was unrelated to any political battle between Glen, his wife and the county judge. The fiscal court points out that all the employees subject to the policy complied with its provisions, or attempted to comply, with the exception of one who was also terminated from his position.

Glen was not a merit employee nor otherwise explicitly contractually employed by the county, but he cites a section of the Pike County Administrative Code that prohibits dismissal of employees because of their political opinions or affiliations. Although not artfully stated, it seems that Glen's reliance on that section is an attempt to argue that there is some sort of implied contractual arrangement with the county. Glen was an administrator, who under another section of that same code, could be dismissed with or without cause by the fiscal court. We can find no basis for holding that the Administrative Code gives rise to a cause of action for Glen's alleged wrongful discharge. He was a terminable at-will employee.

The lead case in Kentucky relating to wrongful discharge is Firestone Textile Co. Div. v. Meadows[5] where the court retreated somewhat from the harsh consequences of the terminable at-will doctrine. The doctrine, once considered an

[5] 666 S.W.2d 730 (Ky. 1983).

absolute rule, provides that an employer may discharge an at-will employee for no cause, or even for a cause that some might view as morally indefensible.[6] The court recognized that there are limited situations where the public policy of the Commonwealth is undermined if the terminable at-will doctrine is blindly enforced. In that case, the court found implicit in the Workers' Compensation Act a right to freely assert a claim without fear of retaliatory discharge.[7]

It was not long before the Supreme Court had the opportunity to clarify its holding in Firestone and limit its scope. In Grzyb v. Evans,[8] the court held that there are only two situations where discharging an at-will employee is so contrary to public policy as to be actionable. First, if the alleged reason was the failure or refusal of the employee to violate a law in the course of employment. The other is, as in Firestone, where the discharge is the result of the employee's exercise of a right conferred by a well-established legislative enactment. "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."[9]

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[6] Id. at 731 (citations omitted).

[7] Id. at 732.

[8] 700 S.W.2d 399 (Ky. 1985).

[9] Id. at 401.

In Grzyb, the court heard and rejected the claim that the First Amendment to the United States Constitution and Kentucky Constitution Section I provide a cause of action against private employers for wrongful discharge. In that case, the employer was a private hospital that allegedly discharged the plaintiff because of his fraternization with a female employee. The constitutional protection of freedom of association, the court held, does not, in itself, provide a cause of action against employers for wrongful discharge.[10]

> The First Amendment guarantee of freedom of association only proscribes governmental transgressions. U.S. Const., Amend. I. The First Amendment provides that "Congress shall make no law," not that "employers shall make no work rule" respecting the freedom of association. U.S. Const. Amendment I. Similarly, the protections afforded Kentucky citizens under Kentucky Constitution Section I are against transgressions of the government and lawmaking bodies. Thus, although the Court of Appeals made reference to Evans' 'constitutionally protected rights of personal liberty,' the constitutional protection of freedom of association does not limit the employer's right to discharge an employee.[11]

Although Grzyb involved a private employer, following its logic, the court in Boykins v. Housing Authority of

[10] Id. at 402.

[11] Id.

Louisville[12] rejected a Housing Authority employee's attempt to carve a wrongful discharge action from Section 14 of the Kentucky Constitution. After finding that KRS 61.102, the "Whistle Blower" statute, was not applicable, the court considered the contention that the "open-courts" provision of Section 14 creates an exception to the terminable at-will doctrine. With the same reasoning applied in Grzyb, the court again rejected the application of the protections afforded by the Kentucky Constitution to employment relationships. Section 14, the court pointed out, mandates the government to provide open access to the courts. Rejecting it as a basis for a wrongful discharge action in that particular case, the court stated:

> Section 14 has nothing to do with employment rights as such. There is no employment-related nexus between the constitutional policy stated in Section 14 and Boykins' discharge. When Boykins filed suit against HAL on behalf of her infant son she found the court's doors open to her.[13]

In a recent case this court was asked as a matter of first impression to extend Firestone and its progeny to include a cause of action for retaliatory failure to hire.[14] Although

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[12] 842 S.W.2d 527 (Ky. 1992).

[13] Id. at 530.

[14] Baker v. Campbell County Board of Education, 180 S.W.3d 479 (Ky. App. 2005).

ultimately it was concluded that no cause of action exists, the analysis included a reaffirmation of the law that Kentucky Constitution Section 1 does not in itself sustain a wrongful discharge action. Notably, the Baker case also involved a public entity.

Despite the reluctance of the Kentucky courts to broaden the scope of the Commonwealth's Constitution to the realm of the employment relationship, we are cognizant of the federal law and the interpretation of the Federal Constitution. At one time, there was no more protection afforded a government employee by the Constitution than a private employee. As Justice Holmes, when sitting on the Supreme Judicial Court of Massachusetts, summarily stated, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[15] In the past fifty years, however, the courts have recognized that permitting the government to quash or chill the rights of freedom of political association and speech is repugnant to the Constitution and to public policy.[16] A state, the highest court has held, can not condition public employment on a basis that infringes on the

[15] McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

[16] See e.g. Keyishian v. Board of Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)).

employee's protected free speech interest.[17] However, the protection afforded by the First Amendment is not without limitation and the rights of the employee citizen must be balanced against the interests of the state as an employer.[18] In striking the balance, the protection afforded by the First Amendment is limited to speech on a matter of public concern.[19]

While this state's highest court has previously rejected wrongful discharge claims based on Section 1 and Section 14 of the Constitution of Kentucky, the reasoning was based on the facts of those cases and can not be interpreted to completely preclude wrongful discharge cases based on those or other constitutional provisions. We are not inclined, however, to further comment whether, if a public employee is discharged for the expression of matters of public concern or political association, the public policy of this state would sustain a wrongful discharge action based on this state's constitution. The pleadings and facts presented here render it unnecessary.

Glen does not present with distinct clarity the motive behind his discharge. He states that it was politically motivated, not against him, but against his wife who had political disagreements with the county judge. His own

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[17] Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[18] Id. at 461 U.S. 142, 103 S.Ct. 1687.

[19] Id. at 461 U.S. 145, 103 S.Ct. 1690.

testimony indicated that he had little contact with the county judge. As for his freedom of expression claim, there are no facts that indicate the nature of the speech or opinion made by Glen that caused the county to retaliate in the form of his discharge. In fact, Glen fails to state the words uttered that allegedly precipitated the fiscal court's decision. If there was an expression at all it came from his wife, and not from Glen, in the form of political opinion on a matter of public concern. The only facts presented indicate that there was political strife between Karen Glen and Damron. Glen and Karen may not have been liked by the then county administration but there is no constitutional right to be thought well of by others, including a public employer. There is absolutely no basis to support Glen's wrongful discharge action based on either freedom of association or freedom of speech.

Glen also contends that his discharge was in retaliation for his participation in an attempt to unionize county employees; his testimony indicates, however, that his involvement was no more than attending a meeting and voting in favor of the union. There is no contention, nor could there be under the facts, that this case falls within the purview of KRS

336.130, which prohibits employers from interfering with collective bargaining activities.[20]

Finally, the fact most determinative is Glen's complete lack of effort to either comply with the CDL requirement or timely seek a waiver. For this, he offers no acceptable explanation. He suggests that his belief the CDL requirement was a political scheme designed to remove him from employment justifies his failure to comply with a direct mandate of his employer. It appears to this court, however, that the waiver was applicable to Glen's situation had he timely applied. So, while he argues that there was a plot against him, there was a loop-hole arguably put into the policy for employees in his position, but he simply failed to pursue the waiver.

Although Glen appears to have abandoned on appeal any argument to the contrary, we briefly point out that the policy is rationally related to a legitimate public purpose.[21] Road department employees, as a part of their duties, are often required to operate heavy equipment on the public roads. If operated by those unqualified, the potential harm to the public is substantial; we see nothing unreasonable or arbitrary, therefore, by requiring the employees to obtain a CDL.

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[20] Pari-Mutuel Clerks' Union v. Ky. Jockey Club, 551 S.W.2d 801 (Ky. 1977).

[21] Buford v. Commonwealth, 942 S.W.2d 909 (Ky.App. 1997).

Since under the pleadings and facts presented there is no cause of action for wrongful discharge we do not address the remaining issues of immunity, the scope of the release, or the power of the court to order reinstatement. The judgment of the Pike Circuit Court is vacated.

ALL CONCUR.

BRIEF FOR APPELLANT:

John F. Kelley, Jr.
Farmer, Kelley, Brown,
Williams & Breeding
London, Kentucky

BRIEF FOR APPELLEE:

Lawrence R. Webster
Pikeville, Kentucky