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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002480-MR

DENISE MULLINS

APPELLANT

APPEAL FROM LINCOLN CIRCUIT COURT
v. HONORABLE VERNON MINIARD, JR., SPECIAL JUDGE
ACTION NO. 03-CI-00204

WILLIAM DAVID GOOCH,
INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS JAILER
FOR THE LINCOLN COUNTY JAIL

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

BUCKINGHAM, SENIOR JUDGE: Denise Mullins filed this action
against William David Gooch in his individual capacity and in
his official capacity as jailer for the Lincoln County Regional
Jail alleging: (1) that she was wrongfully terminated from her
employment; (2) that she was denied due process under the

¹ Senior Judge David C. Buckingham 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 and United States Constitutions; (3) invasion of privacy; (4) outrageous conduct; and (5) abuse of process. Mullins contends that the trial court erred when it entered a directed verdict in favor of Gooch in his individual and official capacities on all her claims. Finding no error, we affirm.

As a part of her duties as a deputy jailer for the Lincoln County Regional Jail, Mullins was to prepare bonds, place the bond money in an envelope, and then drop it into a slot in a locked box while speaking on a camera. The camera took pictures only at certain intervals so that the employees were required to move slowly in order that their movements could be recorded. On June 29, 2002, while on duty, Mullins accepted \$504 in cash as bond money for an inmate. The envelope containing the money was later discovered missing.

On July 2, 2002, Mullins met with Gooch and Chief Deputy Carl Leach who accused her of stealing the missing bond money. The three reviewed the video surveillance tape, which showed that, contrary to jail procedure, Mullins could not be seen dropping the envelope in the slot but she could be seen moving off camera toward the direction of her purse. The tape also indicated that Mullins left the control room door open and prepared the bond in the presence of an inmate.

Gooch met with Mullins again on July 4, 2002, to discuss the missing bond money and, following the meeting, she was suspended without pay. Also, Gooch allegedly demanded that Mullins apply her current paycheck to pay back the bond money or, he threatened, he would pursue an indictment against her. Mullins refused, and she denied she took the money. After Gooch suspended Mullins, he carried through with his threat and pursued criminal charges; the grand jury, however, did not return an indictment.

After suspending Mullins, Gooch conducted an internal investigation into suspected illegal drug use by Mullins. Following receipt of a positive drug test, Gooch requested and received a statement from Mullins's physician that controlled substances were contained in Mullins's prescribed drugs. Gooch then made a written request for the specific dosage of her medication.

On September 28, 2002, Gooch sent Mullins a letter setting forth the following reasons for her dismissal: (1) theft of \$504; (2) failure to properly use the surveillance equipment; (3) failure to keep the control room door closed and locked;(4) abandoning the control room; (5) failure to control inmate movement; and (6) chronic use or abuse of narcotics or controlled substances.

Although the Lincoln County Regional Jail had an internal grievance procedure, Mullins did not pursue that remedy. Rather, she filed this action. Following discovery, Gooch filed a motion for summary judgment to which Mullins objected on the basis that it was noticed to be heard just three days prior to the scheduled trial date, February 14, 2005, and that she did not receive proper notice. Mullins's objection was overruled, and the trial was rescheduled for May 3, 2005. Prior to the trial, however, the presiding judge passed away and the motion for summary judgment remained pending.

On October 18, 2005, the special judge appointed to the case denied the motion for summary judgment. The case proceeded to trial and, following the close of Mullins's case, the trial court granted Gooch's motion for a directed verdict on all the claims alleged on the basis that: (1) Mullins had failed to exhaust the jail grievance procedure prior to filing the action; (2) there were no violations of her state or federal due process rights; (3) there were no facts presented establishing an invasion of privacy claim or an abuse of process claim; and (4) Gooch was entitled to absolute immunity in his official capacity and qualified immunity in his individual capacity.

STANDARD OF REVIEW

Any attempt by Mullins to revisit the timeliness of the motion for summary judgment cannot succeed because,

generally, the denial of a summary judgment is an interlocutory order that cannot be reviewed on appeal. And it does not preclude the court's consideration of the same issues of law and fact raised by way of a directed verdict. See *Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave*, 751 S.W.2d 36 (Ky.App. 1988). Once the trial is commenced, "all matters of fact and law procedurally merge into the trial phase, subject to in-trial motions for directed verdict or dismissal and post-judgment motions for new trial and/or judgment notwithstanding the verdict." *Id.* at 38.

Since the court explicitly denied the motion for summary judgment, the standard of review is that applicable to the granting of a directed verdict.

A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved for the trier of fact. The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a

verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied. *Gibbs v. Wickersham*, 133 S.W.3d 494, 495-496 (Ky.App. 2004) (citations omitted).

EXHAUSTION OF REMEDIES DOCTRINE

Kentucky Revised Statutes (KRS) 71.060(2) states in part that the jailer may discharge a deputy "at any time with cause." Additionally, KRS 441.055(1) requires that the Corrections Cabinet promulgate minimum standards for jails. Pursuant to that directive, 501 KAR 3:020 requires that the jailer develop and maintain a manual of policy and procedure, including a personnel policy. As a consequence, by statute and regulation, upon termination deputy jailers are entitled to procedural rights. *Said v. Lackey*, 731 S.W.2d 7 (Ky.App. 1987).

In compliance with the statutes and regulations, the Lincoln County Regional Jail has an employee manual that provides that if the employee is dissatisfied with the personnel action taken, the employee must immediately submit a written grievance to the jailer. Within five days, the jailer shall either confer with the employee about the grievance or, "at his sole discretion, assemble an employee grievance review board consisting of himself and two of the highest ranking jail staff members available to confer with the employee...." Thereafter,

the jailer has five days to notify the employee of the final determination. After the Lincoln County Jail Employee Grievance Procedure is exhausted, the manual provides for further review. The "employee shall then have the right to pursue his/her grievance through the County's established grievance procedure; if such a grievance procedure exists. Only after all administrative procedures are exhausted shall the employee proceed by way of civil action in a court of law."

At the time she was hired, Mullins signed a document entitled "Lincoln County Regional Jail-Acknowledgment form-Employee Misconduct" which states that she is aware she is responsible for reading and understanding the jail's policy and procedure manual. Despite her acknowledgement of the grievance procedure, Mullins did not pursue her internal remedies. Thus, as the trial court held, the exhaustion of remedies doctrine precludes her from now seeking relief on her wrongful termination claim. We agree.

As a general rule, a party is required to exhaust available administrative remedies prior to seeking judicial relief.

Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may: (1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise

without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471 (Ky. 2004), quoting 2 AM.JUR.2D Administrative Law § 505 (1994).

In this case, a similar rationale compels the application of the doctrine.

The employee manual sets forth specific steps to be taken to initiate the grievance procedure and ultimately entitled Mullins to the county grievance procedure. Had Mullins pursued her internal remedies, the dispute may have been resolved allowing the county to deal with its own personnel matter without interference by the judiciary. Additionally, Mullins agreed to the terms and conditions of her employment when she acknowledged she had read the contents of the manual. To allow her to "sidestep these procedures would undermine the internal grievance procedure that the parties had agreed to and encourage other litigants to ignore the available procedure as well." *See Neiman v. Yale University*, 851 A.2d 1165, 1172 (Conn. 2004).

Mullins contends that she was not required to pursue her internal remedies because the procedure was not accessible. Contrary to that contention, is the signed acknowledgement that she understood she was responsible for reading and understanding

the manual. Although a copy was available to her at the jail and at the fiscal court both during and after her employment, Mullins did not read the manual. Moreover, there are no facts that suggest that Gooch or any county personnel prevented Mullins from reviewing the manual. Although Gooch failed to respond to Mullins's post-termination request for copies of the manual, he was not obligated to insure that Mullins actually knew the procedures or had a copy in her physical possession. It was Mullins's responsibility to be aware of her rights and to follow the proper procedures.

Mullins claims that even had she been aware of the procedure, her complaint would not have been favorably resolved; she claims, therefore, that her remedy was to pursue a court action. An exception to the exhaustion of remedies doctrine exists when the pursuit of those remedies would have been futile. *Popplewell's, supra*. Merely because Mullins predicts that the outcome would not have changed had she pursued the internal grievance procedure, however, is insufficient to demonstrate the futility of the process itself. Although the resolution of the employee's initial grievance is largely discretionary with the jailer, it is an initial step in the process of affording meaningful review that ultimately concludes with a review in accordance with the county grievance procedure. Mullins's futility argument is not sufficient for this court to

ignore the long-standing principle of the exhaustion of remedies doctrine.

DUE PROCESS VIOLATIONS

Mullins was not a terminable-at-will employee and had a property interest in her continued employment. *Said, supra*. A full evidentiary hearing, however, is not required prior to termination and due process requires only that the employee receive notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The pre-termination "hearing" is an "initial check against mistaken decisions-essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 470 U.S. at 545-46, 105 S.Ct. at 1495.

Prior to her termination Mullins was afforded two opportunities to discuss the accusations with Gooch and given written notice of the reasons for her termination. Through the grievance procedure, further due process was available. There was no denial of due process.

ABUSE OF PROCESS

After Gooch confronted Mullins regarding the missing bond money, he pursued criminal charges against her and the case was eventually presented to the grand jury, which did not return an indictment. Mullins contends that Gooch's pursuit was an

abuse of the criminal process, and she relies on a statement made by Gooch at the second pre-termination meeting that if she did not return the bond money he would seek criminal charges.

Abuse of process is a tort designed to compensate a plaintiff for an injury incurred as a result of the irregular or wrongful employment of a judicial proceeding and requires more than a showing that the legal proceeding was unsuccessful. It must be established that there was: (1) an ulterior purpose; (2) a willful act in the use of the process not proper in the regular conduct of the proceeding; and (3) an injury to the plaintiff. *Mullins v. Richards*, 705 S.W.2d 951 (Ky.App. 1986). Even if the defendant has an ulterior purpose in securing an indictment, unless there is also an attempt to actually use that indictment for a purpose outside the criminal proceeding, there is no abuse of process. *Id.* at 952.

There is no evidence that Gooch attempted to use the criminal proceeding for a purpose other than to seek criminal punishment, including restitution, for Mullins's alleged theft of the bond money. The motion for a directed verdict was, therefore, proper.

INVASION OF PRIVACY

In *McCall v. Courier-Journal and Louisville Times Company*, 623 S.W.2d 882 (Ky. 1981), the court adopted the

Restatement (Second) of Torts (1976) Section 652A which states that:

One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another...; or (b) appropriation of the other's name or likeness...; or (c) unreasonable publicity given to the other's private life...; or publicity that unreasonably places the other in a false light before the public. *Id.* at 887.

The action protects the rights of a person to be left alone and free from unwarranted interference by the public about matters not of public concern. *Voneye v. Turner*, 240 S.W.2d 588 (Ky. 1951). It is not an unlimited right, however, and is subject to the customs of the time and place and it is determined by the norm of the "ordinary man". *Id.* at 591.

Mullins was a public employee who, as described in the employee manual, was subject to random drug testing. On June 3, 2002, she took a urine drug screen and the positive results were returned by the Jefferson County Health Department with a note attached listing the prescription drugs Mullins was taking at the time of the test. Mullins physician then supplied a statement that she had been prescribed opiate therapy and benzodiazepines.

Despite her consent to drug testing, Mullins contends that Gooch requested her medical information without her knowledge or consent. Assuming her version is accurate, if there was any invasion of her privacy, it was the medical personnel who gave the information to Gooch who committed the tort. Merely making a request is not an intrusion upon the seclusion of another sufficient to sustain the cause of action. The trial court properly granted a directed verdict.

EVIDENTIARY ISSUES

Mullins cites four instances where the trial court either erroneously excluded evidence or admitted evidence. She claims that it was error to exclude evidence that she offered to take a lie detector test and that she requested 30 days of the video tape produced at the jail but received only four days. She also maintains that the specific medications she was prescribed should have been excluded as well as the report of Dr. Robert Granager, a defense witness. Even if we were to find error in any of the evidentiary rulings, because we find that the directed verdict was proper, our decision would not change; further consideration is, therefore, unnecessary. The trial court properly granted a directed verdict on all the claims alleged.

OFFICIAL AND INDIVIDUAL IMMUNITY

Since we have found that Mullins failed to establish facts sufficient to support her claims against Gooch, the resolution of the immunity issues, either as applied in Gooch's official capacity or in his individual capacity, is not required.

The judgment of the Lincoln Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

ABRAMSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Bradley S. Guthrie
Harrodsburg, Kentucky

BRIEF FOR APPELLEE:

John T. Pruitt
Heidi Schultz Powers
Travis, Pruitt, Powers & Yeast
Somerset, Kentucky