RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002108-MR

STEVE ALVEY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-00970

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD; RICHIE FARMER,
DEPARTMENT OF AGRICULTURE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ACREE, JUDGE: Kentucky Revised Statute (KRS) 18A.095(2) states that "a classified employee with status shall not be dismissed, demoted, suspended, or

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

otherwise penalized except for cause." The question in this case is whether the Department of Agriculture provided sufficient evidence to show cause for the appellant's dismissal. Because we find that there was substantial evidence to support the decisions of the Franklin Circuit Court and the Personnel Hearing Board's decision to uphold the appellant's dismissal, we affirm.

By letter dated July 20, 2005, the appellant, Steve Alvey, a classified employee with status, was dismissed from his position as Agricultural Program Coordinator with the Kentucky Department of Agriculture. In addition to formally dismissing the appellant, the letter of dismissal cited fourteen incidents, separated into four categories, to establish cause for the Department's course of action.

The appellant appealed his dismissal to the Kentucky Personnel Board claiming that his dismissal was without cause and in violation of his rights under Kentucky Revised Statute Chapter 18A. After considering the content of two days of evidentiary hearings, which included testimony from the appellant, the Personnel Board upheld the appellant's dismissal. In so doing, however, the Personnel Board dismissed nine of the fourteen incidents cited by the Department to establish cause for the appellant's dismissal. Despite dismissing over half of the alleged incidents offered by the Department, the Personnel Board found that the remaining five incidents were sufficient to establish cause for the appellant's dismissal.

The first of the remaining incidents related to an injury sustained and reported by Pamela Miller, an Agricultural Inspector over whom the appellant was

a second-line supervisor at the time. This incident, and the two following incidents, were included under the section "Lack of Good Behavior and the Unsatisfactory Performance of Duties." Ms. Miller reported her injury to her first-line supervisor, Jeff Boyd. Mr. Boyd, following standard department procedure, reported Ms. Miller's injury to the appellant whose duty it was to file a workers' compensation First Report of Injury on Ms. Miller's behalf. Shortly after reporting the incident, Ms. Miller spoke to the appellant to confirm that the report of her injury had been filed. Appellant responded that it had been "taken care of." It was discovered subsequently that the appellant had, in actuality, failed to file Ms. Miller's workers' compensation report.

The second incident occurred on May 5, 2005. En route to a job assignment in Mayfield, Kentucky, the appellant's supervisor, Lanny Arnold, stopped for fuel at a BP Station in the appellant's hometown of Leitchfield, Kentucky. The appellant happened to be at the same station. Upon seeing his supervisor, the appellant drove up alongside Mr. Arnold and asked, "Are you following me now?" Mr. Arnold responded that he was not. Appellant responded, "You'd better not be f***ing with me; the days of f***ing with me are over as of today."

The third incident occurred five days later, on May 10, 2005. Mr. Arnold had requested that Tom Bloemer, another Department of Agriculture employee, obtain information from appellant needed to fill out a travel voucher. When Bloemer approached the appellant as instructed, the appellant told Bloemer

to convey the follwing message to Mr. Arnold: "He's going to stop f***ing with me! You tell him that I told you the days of f***ing with me are over."

The fourth and fifth incidents cited by the Department are intertwined in that they both involve the appellant's interaction with Jill Redding, an Administrative Assistant at the Department. The fourth incident was categorized under the Section "Workplace Violence" in the dismissal letter and stemmed from a phone call between the appellant and Ms. Redding at a time when he was the subject of an internal investigation. In that conversation, the appellant warned Ms. Redding, "I'd better be able to trust you." This led Ms. Redding, a uniquely challenged individual employed under the Americans with Disabilities Act, already operating on a fragile emotional base, to report to her supervisor that the appellant's statement made her feel "threatened," "upset," and "like he'd be out to get me if I said anything to anyone." She further expressed, "It made me feel like he thought he knew something that I was in trouble for."

The final and most serious incident was listed under the Section, "Violation of Sexual Harassment Policy" in the dismissal letter. The letter recounted, and Ms. Redding testified during the evidentiary hearing, that in early March, the appellant offered to take Ms. Redding to make her check deposit at the Capitol Annex in Frankfort. Rather than going directly to the Capitol, the appellant said he wanted to show Ms. Redding "the mansion," referring to his small residence on the same grounds as a large house. While there, Ms. Redding testified that the appellant showed her his bed and that of a co-worker also residing

in the house, making her feel "pretty uncomfortable." He also began talking "stuff" and got "kind of close" to Ms. Redding, making her feel even more uncomfortable to the extent that she felt it necessary to tell the appellant that she was gay. Following this event, on almost a daily basis, according to Ms. Redding's testimony, the appellant made sexual references to her in their conversation, including questions regarding whether she would sleep with certain female co-workers, whether she had any sex toys, and what her favorite sexual positions were with other women. Ms. Redding testified that the conversations made her feel very uncomfortable and were extremely embarrassing to her.

Following the Personnel Board's decision to dismiss the appellant's appeal and determining that the Department's dismissal of the appellant was for cause, the appellant appealed to the Franklin Circuit Court. Applying a substantial evidence standard of review and showing appropriate deference to the fact-finder's assessment of the evidence, the Franklin Circuit Court affirmed the Personnel Board's decision.

The appellant now appeals to this court arguing that the Department of Agriculture did not submit sufficient evidence to support the dismissal of the appellant.

Our standard of review for evaluating the circuit court's decision to uphold the Personnel Board's ruling is whether there is substantial evidence in the record to support the Board's findings. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). If there is substantial evidence to

support the findings, they will be upheld, even though there may be conflicting evidence in the record. *Id.* It is important to note that "the fact that [we] may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a [our] discretion for that of an administrative agency." *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002). "Upon determining that the [Board's] findings were supported by substantial evidence, [our] review is then limited to determining whether the [Board] applied the correct rule of law." *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, 834 (Ky. App. 1998).

After the evidentiary hearing in which Ms. Miller testified as to the appellant's failure to file her First Report of Injury, the Personnel Board Hearing Officer affirmed the Department's conclusion that this incident constituted a violation of 101 KAR 1:345(1), which states that "[a]ppointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties." 101 KAR 1:345(1).

The appellant argues that the dismissal letter failed to satisfy the specific requirement of KRS 18A.095(8)(b)(1) that the statute or regulation violated be listed. We believe the appellant's reliance on the lack of a specific duty in the Workers' Compensation Statutes requiring the appellant to file the report on behalf of Ms. Miller fails to establish that the duty did not exist. We also believe that the appellant misconstrues the statute by claiming that a duty violation

necessarily means violation of a statutorily imposed duty, as opposed to duties imposed on employees in course of their employment. 101 KAR 1:345(1) contemplates all employees' duties to fulfill their jobs, not just those imposed on the employee by statutory mandate. The statute is a general provision which gives appointing authorities means by which to address bad behavior or the unsatisfactory performance of all duties.

Here, as part of the appellant's duties as branch manager, he was required to file First Reports of Injury. This responsibility was not dictated in any statute or regulation. Rather, this was a departmental duty imposed on the appellant as part of his job. His supervisor, Mr. Arnold, testified that the appellant was trained and understood that filing First Reports of Injury fell within his responsibilities as branch manager. That the appellant was aware of this duty is evidenced by his making false representations to Ms. Miller that the report had been filed when she inquired as to the report's status. This failure constituted unsatisfactory performance of the appellant's duties as Branch Manager.

The Personnel Board Hearing Officer concluded that "the [a]ppellant's failure to take care of an employee for whose welfare he was ultimately responsible, and then to lie about his failure to act could have resulted in an injured employee being denied her just compensation because her second line supervisor failed to meet his obligation to file an employer's First Report of Injury." We believe that the Board's findings of fact provide substantial evidence to support this conclusion of law.

The second incident retained by the Personnel Board Hearing Officer from the Department's dismissal letter was also cited as a violation of 101 KAR 1:345(1). Mr. Arnold, the appellant's supervisor and target of the appellant's profane epithets, accusations and threats, testified that the comments were both insubordinate and demonstrated a lack of good behavior. The Hearing Officer reached the conclusion of law that the appellant's actions constituted a violation of a duty of good behavior and satisfactory performance under 101 KAR 1:345(1).

The appellant argues that there was not substantial evidence to support the claim that the appellant was disrespectful to Mr. Arnold. He bases this argument, we believe erroneously, on Mr. Arnold's subjective reaction to the appellant's profanity-laced statements. The appellant claimed that because Mr. Arnold did not "make note of the incident" until a month after it occurred, he did not really believe the appellant's comments were inappropriate or insubordinate. The appellant also contends that the true reason for the month lapse between the time the incident occurred and the reporting of the incident can be attributed to Mr. Arnold's "hidden agenda" in conjunction with the Department's "all-out efforts" to dismiss the appellant.

How long it took Mr. Arnold to make note of the appellant's actions is immaterial to our inquiry whether there is substantial evidence to support the conclusion that the appellant demonstrated a lack of good behavior in making these statements to his supervisor. Mr. Arnold testified as to his exchange with the appellant and testified that in his opinion, the appellant demonstrated bad behavior

and insubordination. The appellant provided nothing to refute Mr. Arnold's account of the incident. In our view, the subjective intentions of Mr. Arnold and his alleged "hidden agenda" are irrelevant to our review of the Hearing Officer's decision. It is clear that the appellant initiated the exchange with Mr. Arnold. He was unprovoked. He accused Mr. Arnold of following him. He made threats using profane language and showed extreme disrespect to his supervisor. The Hearing Officer found that these actions violated 101 KAR 1:345(1). We find that the Hearing Officer's decision was supported by substantial evidence and therefore not clearly erroneous.

The final incident upheld by the hearing officer as a violation of 101 KAR 1:345(1)'s prohibition on bad behavior and unsatisfactory performance, came a few days after the incident between Mr. Arnold and the appellant in Leitchfield, Kentucky. On this occasion, the interaction was between Tom Bloemer and the appellant. Although Mr. Bloemer was not the appellant's supervisor, he was acting on behalf of Mr. Arnold, asking the appellant for certain information to fill out a travel voucher. The appellant responded, in the words of the Hearing Officer, with "graphic language" and told Mr. Bloemer to warn Mr. Arnold that "the days of f***ing with me are over."

The appellant makes the same defensive accusations regarding the reporting of this incident as he did with the reporting of the exchange between the appellant and Mr. Arnold. He claims Mr. Bloemer's waiting over a month to report the incident is evidence that the reporting of the incident was not because

Mr. Bloemer found the statements offensive, but as a concerted effort to oust the appellant.

The appellant's conspiracy theory argument is supported by no evidence apart from the fact that a month passed from the time of the incidents to the time when a report was filed documenting them. Any number of things could have accounted for the delay. The appellant provided no evidence to refute the accounts of Mr. Bloemer and Mr. Arnold and therefore implicitly acknowledged their taking place. We find that the hearing officer's determination that these statements violated 101 KAR 1:345(1) is supported by substantial evidence and was not clearly erroneous.

The fourth incident retained by the Hearing Officer from the Department's letter of dismissal involved the telephone conversation between the appellant and Ms. Redding. During their conversation, which the appellant initiated in an attempt to discover more about the internal department investigation of which he was the subject, the appellant said to Ms. Redding in the context of discussing whether anyone had contacted her about him, "I'd better be able to rely on you."

The Department claimed in the letter of dismissal that this exchange constituted a violation of 101 KAR 2:095(9) which reads in pertinent part:

> Section 9. Workplace Violence Policy. (1) Workplace violence shall be prohibited and include:
> . . .

> (b) A threatening statement, harassment or behavior that gives a state employee or member of the general public reasonable cause to believe that his health or safety is at risk.
>
> (2) Examples of prohibited workplace violence shall include;
>
> (a) Threats of harm[.]
>
> . . .

The dismissal letter indicated that the appellant's remarks qualified as threatening statements under 101 KAR 2:095(9) and therefore violated the State Workplace Violence Policy. The Hearing Officer upheld this finding holding that the appellant's statement could "easily be construed as a threatening statement" to Ms. Redding.

The appellant contends that both the Department's letter and the Hearing Officer's conclusion that the appellant's conduct was in violation of 101 KAR 2:095(9) are clearly erroneous. He admits that Ms. Redding thought the appellant "might do something" and she did not know what that might be, but this, argues the appellant, is not the same as a threatening statement that would give "a state employee or member of the general public, reasonable cause to believe that his health or safety is at risk." We disagree.

The appellant made the statement to Ms Redding that he had better be able to rely on her. The reasonable inference to be drawn from this statement is the threat that if he were not able to rely on her, meaning if she were to say anything negative about him during the course of the investigation, there would be some sort

of consequence. Ms. Redding did not know what that consequence would be, but it was not unreasonable for her to fear that it might involve her health or safety. This would be the case for any individual subjected to a threat such as the one levied by the appellant. The fact that Ms. Redding is an emotionally fragile person, with certain disabilities, only accentuates the gravity of making such a statement. We believe Ms. Redding's testimony and the appellant's statement, provide substantial evidence to support the Hearing Officer's conclusion of law that the appellant violated 101 KAR 2:095(9).

The final incidents cited by the department as grounds for the appellant's dismissal again involve the appellant's interaction with Ms. Redding and are included in the dismissal letter under the section "Violation of Sexual Harassment Policy." The first incident occurred on or about May 2, 2005 when the appellant took Ms. Redding to his residence, showed her his bed, and made Ms. Redding feel very uncomfortable. The appellant's actions led Ms. Redding, presumably in an attempt to cut off any further advances by the appellant, to inform the appellant that she was gay. Ms. Redding testified during the evidentiary hearing that this information became the subject of multiple graphic inquiries directed to Ms. Redding by the appellant. These types of sexual references and discussions, Ms. Redding testified, occurred on a near daily basis.

The Hearing Officer found that these actions were indeed violations of the Sexual Harassment Policy of the Department of Agriculture and upheld the portion of the dismissal letter citing the appellant's actions as grounds for

dismissal. Speaking of the appellant's conduct in the conclusions of law, the Hearing Officer concluded that "no organization can afford to have a person in authority take advantage of an impressionable subordinate in such a way. It is clearly a violation of the sexual harassment policy and an egregious one under all of the surrounding circumstances."

To counter this claim, the appellant argues that the allegations lack the specificity required under KRS 18A.095(3) and (8). He claims that because Ms. Redding was not able to cite the exact date on which the appellant took her to his residence, the Department has only proved that "something" happened, at some unknown date, and "there is no evidence that on a specific date anything happened involving Ms. Redding and the Appellant." We disagree with the appellant's interpretation of the statute.

We restate KRS 18A.095(8), in full, here:

> (8) If the cabinet or agency head or his designee determines that the employee shall be dismissed or otherwise penalized, the employee shall be notified in writing of:
>
> (a) The effective date of his dismissal or other penalization;
>
> (b) The specific reason for this action, including:
>
> 1. The statutory or regulatory violation;
>
> 2. The specific action or activity on which the dismissal or other penalization is based;
>
> 3. The date, time, and place of the action or activity; and

4. The name of the parties involved; and

(c) That he may appeal the dismissal or other penalization to the board within sixty (60) days after receipt of this notification, excluding the day he receives notice.

In the dismissal letter, the Department of Agriculture used the term "On or about March 2, 2005," to indicate the date on which the trip to the appellant's residence occurred. Whether the incident occurred precisely on March 2, 2005, or a few days before or after, this date constitutes substantial compliance with KRS 18A.095(8)(b)(3). Combined with the details of the accusation, this provided the appellant with sufficient opportunity to reply to the charges, and therefore, under *Goss v. Personnel Board*, 456 S.W.2d 819 (Ky. 1970), the dismissal letter meets the requirements of the statute. *See also, Wade v. Com., Dept. of Treasury*, 840 S.W.2d 215 (Ky.App. 1992). The appellant was aware of the event to which the Board was referring and was given details from Ms. Redding's account of the incident in the dismissal letter. He had ample opportunity at the evidentiary hearing to put on evidence to discredit or refute Ms. Redding's claim, but did not do so. Consequently, there was substantial evidence to support the Hearing Officer's decision that the citation of the incident satisfied the requirements of KRS 18A.095(8).

Despite the frequency and inappropriateness of the appellant's inquiries into Ms. Redding's sexual life, the appellant cites us to federal case law interpreting Title VII of the Civil Rights Act of 1964, for the proposition that the

charge of sexual harassment is not to serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive[.]" He implies that his behavior has only been called into question due to some sort of thin-skinned overreaction from Ms. Redding. He goes on to argue that because Ms. Redding "never indicated to [the appellant] that his conversations were unwelcome or that she was hypersensitive," the appellant was unaware that the inquiries were unwelcome. We believe this not only displays a corrupted view of proper workplace decorum, but it also is clearly more.

The Department of Agriculture's Sexual Harassment Policy is stated in the dismissal letter:

> State law prohibits unwelcome sexual advances, requests for sexual acts or favors, with or without accompanying promises, threats, or reciprocal favors or actions; or other verbal or physical conduct of a sexual nature that has the purpose of or creates a hostile or offensive work environment.

This is not a Title VII claim under the Civil Rights Act of 1964, and therefore the appellant's reliance on cases interpreting Title VII is only helpful to the extent of defining "hostile workplace."[2] The Franklin Circuit Court cited *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) as the standard for determining whether a work environment is hostile in the context of sexual harassment. In *Harris*, the Supreme Court held that a workplace is hostile "[s]o long as the environment would

[2] Title VII permits claims by an employee against an employer who "fails to protect an employee from sexual harassment, thereby forcing the employee to endure an offensive environment or to quit working, the harassment becomes a 'condition of employment[.]'" *Zabkowicz v. West Bend Co.,* 589 F.Supp. 780, 783 (D.C.Wis.1984).

reasonably be perceived [objectively], and is perceived [subjectively], as hostile or abusive[.]" *Id.* at 21.

Ms. Redding's testimony demonstrates her subjective perspective that the appellant's actions created a hostile work environment. During the course of the testimony, Ms. Redding refused to even make eye-contact with the appellant, shielding her eyes from him when addressing the appellant's counsel. She stated that his taking her to his place of residence and getting "close" to her made her feel uncomfortable. When recounting the details of this incident, she became upset and abruptly stated that their business purpose for being together was to make a deposit and it was upsetting to her that they ended up in his bedroom. As to the almost daily questioning regarding Ms. Redding's sexual life, Ms. Redding testified that the comments made her "feel bad" and were not welcome, noting that they were "things you shouldn't say."

The appellant's actions most certainly qualify as conduct that would create a hostile environment to a reasonable person. It is difficult to conceive a situation in which it would be appropriate during working hours for a worker to deviate from his work related travel, to stop by his place of residence, to show his female co-worker his bed, and get uncomfortably close to her. Similarly, discussion about one's intimate sexual activity within the confines of the workspace is inappropriate. Considering the detail and the very graphic nature of the appellant's inquiries, a reasonable person would likely find that being subject to such questioning on a frequent basis would create a hostile environment. Thus,

there was substantial evidence to prove that the appellant violated the Department's Sexual Harassment Policy. Therefore, we uphold the Hearing Officer's decision. We further agree with the Hearing Officer's assessment that the appellant's actions in this regard were alone sufficiently egregious to support the appellant's dismissal.

Because we hold that the appellant's dismissal was for cause supported by substantial evidence, we affirm the Franklin Circuit Court's decision to uphold the Personnel Board's ruling.

ALL CONCUR.

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