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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001033-MR

GRADY THRONEBERRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-010506

THE CITY OF AUDUBON PARK AND
CARL REESOR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Grady Throneberry appeals from a summary judgment granted by the Jefferson Circuit Court to the City of Aububon Park and its Police Chief, Carl Reesor. Throneberry claims that he was improperly terminated from his employment as a police officer by the City in violation of the

[1] Senior Judge Michael L. Henry 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 Whistleblower Act, Kentucky Revised Statutes (KRS) 61.101 et seq., because he made inquiries about the availability of the state hazardous duty pension plan. He further argues that the trial court erred in ruling that pension benefits do not constitute wages under KRS 337.010, and that Throneberry was a probationary employee and therefore not entitled to the due process protections provided in KRS 15.520 and KRS 95.765.

Throneberry was hired as a part-time police officer by the City in August 2003. He initially worked approximately sixteen hours per week and later worked additional hours in exchange for the use of his marked patrol car in his other employment as a security officer for local companies. At the time of his hiring, Carl Reesor, the City Police Chief, and Colonel Dale Vittitoe, the Deputy Chief, explained that additional benefits would become available to Throneberry if he became a full-time employee of the City. According to Throneberry, Reesor, Vittitoe and Major Richardson Dodson told him on various occasions that these benefits included eligibility for one of two retirement plans: the state hazardous duty pension plan or a private retirement plan awarding a lump sum based on years of service. On February 9, 2004, Throneberry accepted a full-time position with the City police department. While on duty some time later, he injured his ankle. As a result, Throneberry went on workers' compensation medical leave for an extended period in June 2004, during which time his police powers were suspended. While on leave, he accessed an Internet service known as Kentucky Courtnet on several occasions.

Before going on medical leave, Throneberry had asked Reesor and Vittitoe about the hazardous duty pension plan because he was not seeing deductions from his paycheck going towards the plan. Throneberry was dissatisfied with their answers and therefore contacted a friend, George Hunter, who submitted an Open Records request to the City in order to learn whether it participated in the hazardous duty plan. Hunter's Open Records request was denied by the City in a letter dated August 17, 2004. After the request was denied, Reesor asked Throneberry if he knew who might have submitted the request. On the next day, August 18, 2004, Reesor directed Vittitoe to initiate an internal affairs investigation of Throneberry on the grounds that Throneberry's use of Courtnet while on medical leave was a violation of both departmental policy and Throneberry's individual user agreement with Kentucky Courtnet.

Following the investigation, Throneberry received a letter dated September 16, 2004, from City Mayor Michael Scalise, informing him that he had been terminated because he had accessed Courtnet while on medical leave. The termination letter also referred to Throneberry's probationary status, although Throneberry maintains that he was not a probationary employee at that time.

After the termination, Throneberry contacted Richard Dodson, who had recently retired from employment with the City, and told him he believed he had been fired because of his inquiries into the availability of the hazardous duty pension. After contacting an acquaintance with the retirement board in Frankfort, Dodson informed Throneberry that Audubon Park did not participate in the

hazardous duty pension plan. According to Throneberry, Dodson was taken aback by his discovery.

Throneberry contends that he accepted the full-time position with the City in reliance on the appellees' representations regarding the availability of the hazardous duty pension plan. He also contends that he took on significantly fewer off duty side jobs as a result of accepting the full-time position.

Throneberry brought a lawsuit against the City of Audubon Park and Chief Reesor, in his individual and official capacities, claiming violations of the wage and hour laws set forth in KRS Chapter 337; retaliation for making a worker's compensation claim; violations of the Kentucky Whistleblower Act; and violations of KRS 15.520 and KRS 95.765 (the "Police Officer's Bill of Rights").

The circuit court granted summary judgment to the defendants on Throneberry's worker's compensation retaliation claim and the Whistleblower claim against Reesor in his individual capacity. These rulings have not been appealed. Later, on a renewed motion by the defendants, the circuit court granted summary judgment on the Whistleblower claim. It also entered an order in response to a joint motion filed by the parties, which held that pension benefits did not constitute "wages" under KRS 337.010, and that Throneberry as a probationary employee was not entitled to the protections of the Police Officer's Bill of Rights. Throneberry filed a motion for reconsideration which was denied, and this appeal followed.

Throneberry argues that he successfully established a prima facie case under the terms of the Whistleblower Act, KRS 61.101 et seq., and that the trial court erred in granting summary judgment to the appellees on this issue. The Whistleblower Act "was designed to protect employees from reprisal for the disclosure of violations of the law." *Boykins v. Housing Authority of Louisville*, 842 S.W.2d 527, 529 (Ky. 1992). It provides in pertinent part as follows:

> No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

KRS 61.102(1).

In order to demonstrate that a violation of KRS 61.102(1) has occurred, a claimant must establish the following elements:

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure. The employee must show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action. The burden of proof is then on the state employer to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action.

Davidson v. Commonwealth, Dept. of Military Affairs, 152 S.W.3d 247, 251 (Ky. App. 2004) (footnotes and quotation marks omitted).

The circuit court found that Throneberry could not prevail on two of the four elements. First, it found that the City of Audubon is not a political subdivision of the Commonwealth, on the ground that municipal corporations are separate and distinct entities from counties; and second, it found that there was no evidence that Throneberry had ever made or attempted to make a report or disclosure of a suspected violation.

We will address the latter point first. Specifically, Throneberry offered as evidence that he had reported or attempted to report a suspected violation that (1) he had asked Reesor and Vittitoe, apparently on several occasions, whether the City employees were eligible for the hazardous duty pension plan; (2) he had later asked why deductions for the plan were not being taken from his paycheck; and (3) he had asked a friend to make an Open Records request to determine whether such pension eligibility existed. Throneberry

contends that these numerous attempts to expose the alleged fraud being perpetrated on the City employees (that they were eligible for the hazardous duty pension plan) met the reporting requirement of the statute as it was described in *Commonwealth Dept. of Agriculture v. Vinson,* 30 S.W.3d 162, 164 (Ky. 2000):

> The acts which are prohibited are described and easily understood as actions which are in response to an employee who in good faith reports or otherwise brings to the attention of an appropriate agency either violations of the law, suspected mismanagement, waste, fraud, abuse of authority or a substantial or specific danger to public safety or health. The reprisal or other retaliation occurs in response to the good faith reporting and such retaliation is done to either punish, silence or stifle a state employee.

Including Throneberry's actions within this definition would expand the scope of the reporting requirement to an extent that is simply not supported by the language of the statute or our case law. In *Miracle v. Bell County Emergency Medical Services*, 237 S.W.3d 555 (Ky. App. 2007), this Court recently addressed a factual situation similar to this one and concluded that the reporting requirement was not met. In that case, Harold Miracle and Amy Brumbach, who were employed as an EMT and a paramedic, respectively, alleged that they were discharged by the Bell County EMS, because of their whistleblowing reports of alleged Medicare or Medicaid fraud.

> Although he accused Broughton [the Bell County EMS Director] of being involved in the alleged fraud or abuse, Miracle admitted in his deposition that his reports of wrongdoing were limited to oral complaints to Broughton, and "probably . . . to some ER staff maybe possibly." As Miracle admittedly made no timely report

> of the alleged fraud or abuse to a statutorily-designated authority, he does not fall within the whistleblower exception to the terminable at-will doctrine. Further, there is no merit to any claim that Brumbach engaged in whistleblowing activities if and when she conversed with Broughton's wife about his alleged marital misconduct in the workplace. Neither this report nor appellants' various other allegations of workplace inefficiency and mismanagement were made to a statutorily-designated authority, and the claims did not allege specific violations of statutory or constitutional provisions. Hence, as a matter of law, appellants were not entitled to the protections of the whistleblower exceptions to the terminable at-will doctrine. KRS 61.102(1).

Miracle, 237 S.W.3d at 559.

Throneberry has presented no evidence that he attempted to bring his concerns to the attention of a statutorily designated authority, nor has he specified violations of any statutory or constitutional provisions. Because his actions failed to meet this element of the statute, we need not address the contention that the employees of a municipal corporation are not covered by the Whistleblower Act.

Next, Throneberry argues that the circuit court erred in ruling that his claim for damages pursuant to Kentucky's wage and hour statutes failed because the pension benefits he relied upon are not "wages" as defined in KRS 337.010. KRS 337.055 provides that "[a]ny employee who leaves or is discharged from his employment shall be paid in full all wages or salary earned by him[.]" Furthermore,

> Any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full

> amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court.

KRS 337.385. The statute defines wages as follows:

> (c) "Wages" includes any compensation due to an employee by reason of his employment, including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy. The wages shall be payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to the allowances made in this chapter;

KRS 337.010.

The circuit court relied on the maxim *expressio unius est exclusio alterius*, concluding that because "pension benefits" were not listed among the items enumerated as wages, (as opposed to elsewhere in the KRS where the legislature has listed wages and pension benefits individually as income), they were not wages for purposes of KRS 337.010.

In our view, it is irrelevant whether pension benefits are wages under the statute because Throneberry has provided no evidence that he was entitled to receive any pension benefits whatsoever. If, for instance, he had voluntarily terminated his employment with the City, there is no indication that he would have been entitled to receive any pension benefits (even if the City had participated in the hazardous duty plan), that he had any vested interest in any pension plan, or

what the liquidated amount of these benefits would be. Indeed, he has testified that no deductions or withholdings were made from his paychecks for any such benefits, and that this fact contributed to his suspicions that the hazardous pension plan was not available as allegedly promised.

His final argument concerns the trial court's holding that, as a probationary employee, he was not entitled to the due process protections of KRS 15.520 and KRS 95.765. It is undisputed that the City had adopted the provisions of these statutes for its non-probationary employees.

The City's "Personnel Policy/Civil Service Policy" handbook, which is provided to all officers, states in pertinent part:

> A person initially appointed to a position shall be on probationary status for one (1) year.
>
> Any employee who has served an initial probationary period and is promoted from within the City service to a new position shall be on probation in the new position for one (1) year.
>
> While on probation, a new employee may be dismissed at any time without right of appeal.

The circuit court found that Throneberry had been employed as a full-time officer for less than one year, and that prior to that time, he had been an independent contractor on a part-time basis. As he was on probation at the time of his dismissal, he had no right to appeal.

Throneberry contends that his change in status from part-time to full-time officer on February 9, 2004, was not a "promotion," and that therefore he had

served out his one-year probationary period at the time of his termination. He argues that his situation is analogous to that of the appellant in *Bunch v. Personnel Bd., Commonwealth of Ky.*, 719 S.W.2d 8 (Ky. App. 1986), who was employed as a cook at a state park. The regulations provided that an employee attained various due process protections after serving a six-month probationary period. Bunch's employment classification was changed after two and one half years. He had completed his probationary period under the first classification. The question was whether he would be required to complete a second probationary period in the second classification, even though the work he was performing was identical. This Court held that he should not be required to complete a second probationary period. It explained its reasoning as follows:

> The appellees claim that the probationary period is necessary in order to gauge a new employee's ability to adequately perform a job. This statement is no doubt true in circumstances such as when a new employee is hired or a present employee is transferred to perform a different job than he had done previously in which his **responsibilities or duties are increased** or changed. This rationale does not hold true for someone in the appellant's circumstance. As he was continuing in the same position and performing the same tasks he had done for two-and-a-half years, a probationary period was completely unnecessary. If his work was unsatisfactory, it does not seem logical that he would have been placed on full-time basis.

Bunch, 719 S.W.2d at 9-10.

The facts in Throneberry's case are entirely distinguishable: he had not completed a full probationary period as a part-time employee, and was

therefore not being required to serve a second probationary period, and his responsibilities and duties had increased as a full-time officer because he began working full-time hours. Most importantly, under the terms of the City's personnel policy, the probationary period did not start to accrue until he became a full-time employee. The City's Personnel Policy/Civil Service Policy specifically exempts part-time employees from the coverage of civil service. The section entitled "Scope of Coverage" explicitly exempts from coverage the following officers and employees of Audubon Park:

> a. All elected officials
>
> b. All members of Boards or Commissions;
>
> c. City Engineer
>
> d. Consultants, advisors, and counsel rendering
>
> e. Independent contractors
>
> f. **Seasonal/Part-time**; and
>
> g. Members of volunteer organizations.
>
> 2. All officers and employees not explicitly exempted from coverage of these policies and procedures shall be subject to its provisions.

Thus, Throneberry's status for purposes of coverage under the terms of the policies and procedures only began to accrue when he became a full-time employee. In other words, the one-year probationary period did not start to run until he was hired full-time. As such, he was still a probationary employee at the time he was terminated.

Throneberry further argues that even if he was a probationary employee at the time of his termination, he was still entitled to statutory due process protections under the holding in *Brown v. Jefferson County Police Merit Bd*., 751 S.W.2d 23, 26 (Ky. 1988). We disagree because the holding in *Brown* is expressly limited to members of county police forces covered under KRS 78.425:

> In *Rottinghaus v. Board of Commissioners of City of Covington*, Ky.App., 603 S.W.2d 487 (1979), the Court of Appeals upheld the validity of a Covington city ordinance providing that "all appointments from the Police Eligibility List shall be for an initial probationary period of one year," and "that until such time as the appointee has successfully completed this one-year probationary period he is not to be considered a permanent employee and, therefore, is not entitled to the procedural protections afforded police and fire department members under KRS 95.450." *Id*. at 488. However, the statutory scheme controlling the present case differs from the *Rottinghaus* case. KRS 78.425, quoted above, specifies that "[a]ll police officers of whatever rank and title" appointed to the county police force are "covered by the provisions hereof" and "deemed to be permanent employes" [sic] for purposes of the procedural protections afforded by the county police force merit system. This eliminates the discretion enjoyed by the city council in the *Rottinghaus* case to create a class of probationary officers who were not given the procedural protections granted to permanent officers. Unlike the City of Covington, the administrative agency here involved, the Merit Board, exists for one reason only, to carry out the county police force merit system established by the legislature, including the procedural guarantees.

Brown v. Jefferson County Police Merit Bd., 751 S.W.2d 23, 26 (Ky. 1988). Like the city council in *Rottinghaus*, the City was free to create a class of probationary officers who were not given the procedural protections granted to

permanent officers. Under *Brown*, therefore, the circuit court was correct to rely on *Rottinghaus* to find that, as a probationary employee, Throneberry was not entitled to an administrative appeal of his termination.

For the foregoing reasons, the summary judgment and other rulings of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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