

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001492-MR

HAROLD MCDANIEL

APPELLANT

v. APPEAL FROM MARCHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CI-00479

ISP CHEMICAL, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

LAMBERT, JUDGE: Harold McDaniel appeals from the Marshall Circuit Court's entry of summary judgment in favor of ISP Chemical, Inc., on his claims of wrongful discharge, breach of oral agreement, and breach of covenant of good faith. After careful review, we affirm.

Harold McDaniel worked for ISP Chemicals (hereinafter “ISP”) and its predecessor for sixteen years. His last position at ISP was Area Coordinator, wherein he coordinated maintenance and construction activities for the lab, administration building, utilities, waste management, and general plant facilities at ISP’s Calvert City plant. McDaniel also served on the emergency response team, which responded to injuries, fires, and other accidental hazards.

McDaniel alleges that beginning in the summer of 2000 he observed serious violations of various environmental and safety laws at the plant. McDaniel claims he observed employees, including those who monitored and regulated sensitive instrumentation used in chemical production, sleeping on duty at their work stations, risking environmental releases, and delaying monitoring of waste lagoons and other environmental facilities. He claims he also observed unsafe and unlawful releases or spills of various chemical compounds and waste into inappropriate areas, or in violation of the closely regulated and permitted control sites on the employer’s property.

McDaniel brought his concerns about these activities to his supervisors’ and plant management personnel’s attention and claims that the plant management personnel refused to address the concerns. On June 23, 2000, McDaniel reported the conditions to state and federal regulatory authorities and filed written complaints on June 26, 2000. The Occupational Safety and Health division of the Kentucky Labor Cabinet (KOSH) initiated an investigation on August 2, 2000, and the investigations continued through December 20, 2000. On

January 11, 2001, KOSH issued a citation and notification of penalty to ISP.

McDaniel claims he also reported ISP to the Kentucky Environmental Protection Department and the Division of Water.

Also on January 11, 2001, McDaniel was required “as a condition to employment” to attend a mental evaluation. After meetings with management, McDaniel was informed that the psychiatric evaluation was mandatory for his continued employment. McDaniel reluctantly agreed and underwent an evaluation by Dr. Kurt Klauberg. Dr. Klauberg concluded that there was no obvious mental impairment that would prevent McDaniel from continuing his employment and duties as a utilities area coordinator. On January 29, 2001, McDaniel was terminated.

ISP claims that in 1999 McDaniel began a pattern of disruptive and disturbing behavior by making baseless accusations against his coworkers. ISP claims that it investigated each time McDaniel reported some type of inappropriate behavior. Finding nothing to substantiate his accusations, ISP directed McDaniel to get assistance from the company’s employee assistance plan. ISP claims that in the fall of 2000, McDaniel informed them that he had made various complaints to the Kentucky Labor Cabinet about alleged environmental and safety violations at ISP. ISP claims that McDaniel further alleged that his co-workers were harassing him in retaliation for making the reports. ISP claims that it immediately investigated the retaliation claims, and that during this investigation McDaniel informed management that he believed his co-workers, ISP, the union representing

ISP's hourly workers, and his church were all conspiring against him. Among other things, McDaniel claimed his co-workers made sexually suggestive and graphic comments towards him, that ISP followed him on vacations and was spying on him, and that there was a conspiracy to convince people at ISP that he was gay. ISP's investigation found no evidence to support McDaniel's claims and concluded that his accusations were baseless.

After concluding that McDaniel's allegations against his co-workers were unfounded, ISP claims it requested that he be examined to determine whether a medical reason could explain what they termed his "wild" allegations. After concluding that there was no medical basis to explain McDaniel's conduct, ISP terminated his employment.

McDaniel filed this action for retaliatory discharge. ISP filed three separate motions for summary judgment. The trial court granted summary judgment for ISP on McDaniel's claims of intentional infliction of emotional distress, slander, and defamation, leaving the claims for wrongful discharge remaining. After twice denying ISP's motions for summary judgment on the wrongful discharge claims, the Marshall Circuit Court granted summary judgment on June 29, 2007, under the purview of *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567 (Ky.App. 2005) and *Shrout v. TFE Group, Inc.*, 161 S.W.3d 351 (Ky.App. 2005). The trial court found that McDaniel's right to seek a remedy at law for whistle-blowing about environmental safety conditions was preempted by

the administrative structure and remedy in the Kentucky Occupational Health and Safety Act. This appeal followed.

We review a trial court's entry of summary judgment *de novo*. The standard of review on appeal of a 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Since 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. *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky.App. 2001).

McDaniel argues on appeal that his actions in reporting the alleged violations by ISP, followed closely in time with his discharge, create an inference of retaliation sufficient to preclude summary judgment. In Kentucky, wrongful discharge claims are exceptions to the terminable at-will employment rule. In *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985), the Kentucky Supreme Court explained that the wrongful discharge exception to the terminable at-will rule is limited to instances where: (1) the discharge is contrary to a fundamental and well-defined public policy, and (2) that public policy is evidenced by a well-established legislative enactment. The Supreme Court further refined and restricted the exception to just two situations: (1) where an employee was terminated for refusing to violate the law in the course of his employment; or (2) where the employee was terminated for exercising a right conferred by statute. *Id.*

at 402; see also *Boykins v. Housing Authority of Louisville*, 842 S.W.2d 527, 530 (Ky. 1992). The determination of whether McDaniel meets either of these two criteria is a question of law, and thus is appropriate under summary judgment analysis. *Grzyb*, 700 S.W.2d at 401.

In the instant case, it does not appear from the record that McDaniel was terminated for refusing to violate the law in the course of his employment, although he tries to make an argument to the contrary. McDaniel argues that he was terminated for refusing to conceal reportable environmental safety incidents at the plant; however there is nothing in the record to suggest that McDaniel was ever requested to conceal environmental safety violations. Thus, McDaniel must show that his discharge was in retaliation for exercising his statutorily conferred rights.

McDaniel's claim for wrongful discharge was initially based on alleged violations of several state and federal statutes, including the Occupational Safety and Health Act (OSHA) and appears to now be based on two Kentucky provisions, the Kentucky Environmental Protection Act (KEPA) and the Kentucky Water Quality Act (KWQA).

ISP argues that neither KEPA nor KWQA are directed at providing rights or protections to employees in their employment settings. After reviewing KRS 224.01-400 and KRS 224.70-100, we agree. Those statutes do not address the employment setting and do not provide a well-established right upon which McDaniel could base a wrongful discharge claim. In *Shrout v. The TFE Group*, 161 S.W.3d 351, 354-55 (Ky.App. 2005), this Court affirmed the dismissal of a

plaintiff's wrongful discharge claim because "protection of employees [was] not the primary purpose of [the] statute."

In the instant case, the primary purpose of the statutes was not to protect employees but instead to protect the welfare of the public in general. KQWA was designed to safeguard from pollution the uncontaminated waters in Kentucky, to prevent the creation of any new polluted waters, and to abate any existing pollution. The KEPA appears to create a commission to regulate the release of various contaminants into the environment and does not contain a private right of action or any scheme remotely related to retaliatory discharge. Thus, because neither statute provides a well-established right upon which McDaniel could base a wrongful discharge claim, his claims for retaliatory discharge necessarily fail and summary judgment was appropriate.

McDaniel also argues that when ISP required him to see a psychiatrist, his relationship with ISP changed from an at-will employment relationship to an implied contract relationship, and that ISP breached the implied employment contract. However, there is nothing in the record to suggest that ISP's request was followed by a promise of continued employment for a specified time period, and we disagree that their request changed the working relationship from at-will to implied contract.

Finally, McDaniel argues that ISP breached the covenant of good faith and fair dealing. Initially, we decline to address this argument because Kentucky law does not support a covenant of good faith and fair dealing in an at-will

employment context where an employment contract does not exist. *See Wyant v. SCM Corp.*, 692 S.W.2d 814, 815 (Ky.App. 1985); *Day v. Alcan Aluminum Corp.*, 675 F.Supp. 1508, 1513 (W.D.Ky. 1987); and *Webster v. Allstate Ins. Co.*, 689 F.Supp. 689, 692 (W.D.Ky. 1986). Thus, there was no covenant of good faith and fair dealing for ISP to breach and McDaniel’s claims to the contrary fail.

Secondly, we hold that this argument was not preserved for review. CR 76.14(6) states that “[a] party shall be limited on appeal to issues raised in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” Given that the requirements of CR 76.14(6) were not met, we decline to address this issue further.

Because McDaniel could not prove the elements of retaliatory discharge; was an at-will employee; and because a covenant of good faith and fair dealing did not exist in this context, we affirm the judgment of the Marshall Circuit Court.

ALL CONCUR.

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