

RENDERED: DECEMBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000700-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NOS. 07-CI-00610 & 07-CI-00620

RUTH WALKER AND
KENTUCKY PERSONNEL BOARD

APPELLEES

AND

NO. 2008-CA-000749-MR

RUTH WALKER

CROSS-APPELLANT

v.

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NOS. 07-CI-00610 & 07-CI-00620

OPINION AND ORDER
AFFIRMING ON DIRECT APPEAL;
REMANDING ON CROSS-APPEAL;
AND DENYING MOTION TO DISMISS

** ** * * * * *

BEFORE: LAMBERT AND VANMETER, JUDGES; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Commonwealth of Kentucky, Cabinet for Health and Family Services, appeals from an order of the Franklin Circuit Court affirming the decision of the Kentucky Personnel Board to reinstate Ruth Walker’s employment. The Cabinet argues that: (1) the undisputed findings of fact cannot support the decision of the Board; and (2) Walker was involuntarily resigned² from her employment with the Cabinet as a matter of law. On cross-appeal, Walker argues that the trial court erred by failing to find that the Cabinet’s conduct violated the Americans with Disabilities Act (ADA) and the Kentucky Civil Rights Act. She also offers additional grounds for affirming the opinion and order of the trial court. We affirm on direct appeal and remand for further proceedings on the cross-appeal.

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Although “resign” is normally an active verb, its passive use is appropriate here in view of the wording of the administrative regulation under which the Cabinet sought to terminate Walker’s employment, as explained *infra*.

Walker was employed by the Cabinet in 1977. From 1995 until the events which form the basis of this appeal, she served as a nurse consultant inspector for the Kentucky Children's Health Insurance Program (KCHIP). Walker developed a number of health problems over the years and was directed by her doctor to temporarily abstain from work in November 2001. In January 2002, Walker attempted to return to work with accommodations for her health. The Cabinet resisted her attempts and ultimately resigned Walker for her failure to return to work, effective May 15, 2003.

Walker appealed her involuntary resignation to the Personnel Board. A hearing was held in late 2003 and in July 2004. The hearing officer issued a recommended order on November 30, 2006, concluding that Walker's appeal should be dismissed. The Board declined to adopt the recommended order and entered an order reinstating Walker's employment and further ordering that "she otherwise be made whole." The Cabinet appealed the decision of the Board to the Franklin Circuit Court. Walker also filed a petition for judicial review to clarify and enforce the order of the Board. The trial court denied the Cabinet's appeal and affirmed the decision of the Board in an opinion and order entered on March 15, 2008.³ This appeal and cross-appeal followed.

³ On the first page of its opinion and order, the trial court mentioned that Walker had petitioned it to clarify and enforce the Board's order, but there is no further mention of Walker's petition in the opinion and order.

As a preliminary matter, Walker filed a motion to dismiss the Cabinet's appeal. Based upon our review of the record and being otherwise advised, we deny the motion and proceed to the merits of the direct appeal.

The Cabinet argues that the undisputed evidence does not support the Board's finding that the Cabinet failed to comply with the provisions of 101 Kentucky Administrative Regulations (KAR) 2:102 § 2(3)(g) when it resigned Walker from employment and that Walker was resigned from employment with the Cabinet as a matter of law.

In *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003), this Court explained the applicable standard of review as follows:

When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people.

Further, "[a] reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious."

Id.

101 KAR 2:102 § 2(3)(g) states as follows:

An employee shall be considered to have resigned if he:

- (1) Has been on one (1) year continuous sick leave without pay;

(2) Has been requested by the appointing authority in writing to return to work at least ten (10) days prior to the expiration of sick leave;

(3) Is unable to return to his former position;

(4) Has been given priority consideration by the appointing authority for a vacant, budgeted position with the same agency, for which he is qualified and is capable of performing its essential functions with or without reasonable accommodations; and

(5) Has not been placed by the appointing authority in a vacant position.

The record reflects that Walker attempted to return to work in January 2002 and that her attempts were met with resistance by the Cabinet. On February 27, 2003, the Cabinet sent Walker a letter advising her that her sick leave would expire on March 26, 2003, and that she should report to work on March 27, 2003. However, on March 26, 2003, the Cabinet notified Walker's counsel that she should not report to work the next day and that she would not be terminated for failure to report. The conversation was memorialized in a writing dated March 26, 2003. The Cabinet never provided Walker with a new return to work date. Then on May 7, 2003, the Cabinet sent Walker a letter informing her that she would be resigned from employment effective May 15, 2003.

The finding that the Cabinet never provided Walker with a new return to work date is supported by substantial evidence in the record. Further, the failure to provide a return to work date, in and of itself, sufficiently demonstrates noncompliance with 101 KAR 2:102 § 2(3)(g). However, the Cabinet next argues

that it had no authority to rescind the March 27, 2003, return to work date and that the rescission was null and void.

We conclude that there is no merit to this contention. KRS 13A.130 prohibits an administrative body from modifying a regulation through internal policy, memorandum, or other form of action. 101 KAR 2:102 § 2(3)(g)2 states: “An employee shall be considered to have resigned if he . . . [h]as been requested by the appointing authority in writing to return to work at least ten (10) days prior to the expiration of sick leave[.]” The agent of the Cabinet did not modify or expand the regulation. Rather, the agent merely rescinded the notice of a return to work date. We find nothing in KRS 13A.130, or the regulation, which would prohibit the rescission of a return to work date. Moreover, although an agency’s interpretation of its own regulation is entitled to substantial deference, Walker was entitled to rely upon the representation of the Cabinet below. *See Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991).

Even assuming *arguendo* that the Cabinet has no authority to rescind a return to work date, the Board also concluded that the Cabinet failed to establish that Walker was unable to return to her former position. The record demonstrates that while she was on leave from the Cabinet, Walker was able to perform work as a nurse for the Department of Corrections and in the private sector with reasonable accommodations. This fact supports the conclusion that the Cabinet failed to prove that Walker was unable to return to work, which would independently establish

noncompliance with 101 KAR 2:102 § 2(3)(g). The trial court did not err by affirming the decision of the Board and denying the Cabinet's appeal.

On cross-appeal, Walker argues that the Board and the trial court failed to conclude that the Cabinet's conduct amounted to a violation of the ADA and the Kentucky Civil Rights Act. Walker has not cited any caselaw or statutes in support of this argument.

Although this issue was raised in Walker's petition for judicial review of the Board's decision, the trial court did not address it in its opinion and order. Based on the record and briefing before us, we are without a sufficient basis to review this claim. Therefore, we remand this matter to the trial court to address Walker's discrimination claim.

The other issues raised in the cross-appeal are moot.

Accordingly, on direct appeal, the March 15, 2008, opinion and order of the Franklin Circuit Court is affirmed. On cross-appeal, the March 15, 2008, opinion and order of the Franklin Circuit Court is remanded for proceedings consistent with this opinion.

ALL CONCUR.

ENTERED: December 30, 2009

/s/ William R. Harris
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT/
ROSS-APPELLEE:

Ronald W. Crawford
Frankfort, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLANT, RUTH WALKER:

Jonathan C. Hardy
Louisville, Kentucky