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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002146-MR

NORMA F. NORTHERN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-001694

KENTUCKY COUNCIL ON
POSTSECONDARY EDUCATION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Norma Northern appeals from a Franklin Circuit Court summary judgment in favor of the Kentucky Council on Postsecondary Education (CPE). In its judgment, the Circuit Court concluded that Northern's

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.

claim did not meet the necessary requirements of the Kentucky Whistleblower Act (Act). On appeal, Northern contends that she submitted ample evidence to indicate that her position was terminated based upon a series of communications that were protected by the Act. After a careful review of the briefs and the record, we are not persuaded by Northern's arguments. For reasons stated herein, we affirm the Franklin Circuit Court summary judgment.

I. Factual and Procedural History

In 2003, Northern was employed by CPE and held the position of Chief Operating Officer (COO) for the Kentucky Virtual University (KYVU). Shortly after Northern was given the title of COO, she was appointed as the Interim Chief Executive Officer.

KYVU provides internet and web-based post-secondary courses. Based upon the nature of the educational system, KYVU is reliant upon the CPE information technology (IT) department to function properly. During her employment, Northern repeatedly complained about the IT department.

Northern's complaints primarily involved allegations of incompetence. Northern complained to the Executive Director of KYVU and CPE officials that the IT department had an unreasonable backlog of requests and failed to test software and address problems in a timely manner. She also complained that various IT employees were distracted from their work by family issues and personal matters.

In March 2005, a non-technical employee located a rogue file on the KYVU server. An investigation revealed that the file was placed upon the server by a hacker two years before it was found. Based upon this discovery, KYVU officials were concerned that the security of student information had been compromised. Northern recommended that the IT department immediately notify those students whose private information might have been leaked. The IT department did not provide such notification, but did not attempt to conceal the file's discovery.

Northern repeatedly met with CPE general counsel, Dennis Taulbee, and IT supervisor, Miko Pattie, concerning the problems with the IT department. She also met with CPE Vice President, Sue Moore, about Pattie's alleged mismanagement of the IT department. Northern also discussed her concerns with officials in the Kentucky Community and Technical College System (KCTCS) and officials in the Kentucky Department of Education.

In May 2005, a panel appointed by the Southern Association of Colleges and Schools reviewed KYVU. The panel suggested that CPE make the following changes: (1) CPE should employ a permanent CEO for KYVU; (2) CPE should establish a more effective administration for KYVU; and (3) CPE should conduct a comprehensive review of KYVU's staff in order retain employees experienced in academic affairs and student services. In response to the panel's recommendation, CPE President, Dr. Thomas Layzell, hired Al Lind as the permanent CEO of KYVU, and Northern was reassigned to her prior COO position. Over the course

of the next year, Lind conducted a comprehensive review of KYVU. Lind concluded that the COO position could no longer be justified. On September 21, 2006, Northern was notified that her position would be eliminated effective on October 30, 2006.

On December 6, 2006, Northern filed a complaint in the Franklin Circuit Court claiming that she was terminated in violation of the Act based upon her reports of waste and mismanagement of the IT department. On June 6, 2007, Northern amended her complaint to include a claim that the reorganization of CPE was implemented in violation of KRS 12.028.² On June 11, 2009, CPE moved for summary judgment on the grounds that Northern failed to state a sufficient claim for relief under the Whistleblower Act. The Franklin Circuit Court granted summary judgment in favor of CPE. This appeal follows.

II. Standard of Review

Summary judgment is properly granted when no genuine material of fact exists and the moving party is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. When ruling upon a motion for summary judgment, the trial court must view the evidence in the light most favorable to the party opposing the motion. *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1990). In this case, there is no dispute concerning material facts. Consequently, we need only consider the question of whether Northern's complaint was viable under the Whistleblower Act. As this is a

² Northern has not argued on appeal that the trial court erred in dismissing her claim under KRS 12.028.

question of law, our Court must examine this question under a *de novo* standard of review. *Id.*

III. The Kentucky Whistleblower Act

In 1983,³ the Kentucky General Assembly enacted the Whistleblower Act, codified in KRS Chapter 61, as a means “to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information.” *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004) (quoting *Meuwissen v. Dep’t of Interior*, 234 F.3d 9, 13 (Fed Cir. 2000)); KRS 61.102.

The Kentucky Whistleblower Act provides:

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

³ The Whistleblower Act was amended in 1993. See *Commonwealth, Dept. of Agriculture v. Vinson*, 30 S.W.3d 162 (Ky. 2000).

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 establish a claim under KRS 61.102, a party must prove the following four 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 of a suspected violation of state or local law to an appropriate authority; and (4) the employer took action, or threatened to do so, to discourage the employee from reporting. *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998); *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d at 251. Once the claimant shows, by a preponderance of the evidence, that the “disclosure was a contributing factor in the personnel action,” the burden of proof shifts to the state employer “to provide by clear and convincing evidence that the disclosure was not a material fact in the personnel action.” KRS 61.103(3).

IV. Northern’s Claim

Northern claims that the trial court erred by finding that her claim did not meet the required elements under the Whistleblower Act. Specifically, the court concluded that Northern’s reports of poor supervision and incompetence do not fall within the disclosure protected by the Act. We agree with the trial court’s conclusion.

The vast majority of Northern's complaints involved the IT department's alleged negligence and ineffective work practices. Reports of simple negligence are not included in the list of protected communications covered by the statute. *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d at 254. Although the statute specifically provides protection for disclosures concerning mismanagement and waste, Northern's claims do not rise to that level. Cf. *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852 (Ky. 2008).

Northern's most significant disclosures involve the "rogue" file and potential security breach. Northern reported that a hacker placed a file on the KYVU servers, which was undetected by the IT department for two years. Once the file was discovered, the IT department quickly worked to secure the server. Although the IT department did not report the potential breach to students, there is no evidence that the department attempted to conceal the file's discovery. These practices certainly raise questions concerning the competence of the IT department and lack of supervision. However, these acts constitute oversight and negligence rather than mismanagement and fraud. To expand the Whistleblower Act to encompass negligence and poor performance could create hostility between coworkers and open the flood gates to potential Whistleblower claims. Such an expansion would not further the purpose of the Act.

As previously mentioned, Northern must show all four elements in order to prevail in her Whistleblower claim. Given our conclusion, we need not

consider whether she was terminated as punishment for the disclosure. However, we note that Northern was terminated after years of complaining about the IT department. More specifically, she was terminated almost two years after the discovery of the rogue file. This timeline does not suggest that Northern's termination was a punishment.

Accordingly, we affirm the Franklin Circuit Court summary judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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