

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001946-MR

LARRY FARWELL AND
KATHY FARWELL

APPELLANTS

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 04-CI-00167

ESTILL COUNTY BOARD OF
EDUCATION; GARY TAYLOR; AND
KIM SHAW

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Larry and Kathy Farwell appeal the Estill Circuit Court's order granting the motion for summary judgment filed by the Estill County Board of Education (ECBE), Gary Taylor, and Kim Shaw. After a careful review of the

record, we affirm because the Farwells failed to meet the elements of their claim under KRS¹ 61.101, *et seq.*, also known as Kentucky's Whistleblower Act.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kathy Farwell was employed by the ECBE in the Estill County Schools Bus Garage. Her supervisor was Gary Taylor, and Kim Shaw was the Superintendent of Estill County Schools.

The Farwells claim that Kathy sent a letter to Kim Shaw in 2002 that qualifies as a whistleblower's report, but the Farwells failed to specify where in the record we could find that letter. They also failed to attach it as an appendix to their appellate brief. In the record before us, there is a letter dated August 2002, but it does not specify who sent the letter or to whom it was sent. We presume that this is the alleged whistleblower's report that Kathy claims she sent to Kim Shaw, based upon the content of the letter and of the remainder of the record provided. In its entirety, and without correcting errors of spelling, grammar, and punctuation, the letter states as follows:

August 14, 2002

Attached is a copy of a letter I received from Gary Taylor, Transportation Director, on August 12, 2002.

I question the origin of this letter. On approximately August 7th, Robbin Durbin was in my office using the copier. She said that she had reminded me not to sign any documents concerning driver training because in the event of an accident I could get into trouble and I would be hung out to dry. I told her I did not know anything about being reminded not to sign anything. Later, on

¹ Kentucky Revised Statute.

August 12th, Mr. Taylor gives this to me (copy attached). I did not type it and I doubt that he did. He put a copy of this letter in Robbin Durbin's mail box. I saw her get it out. He also put a copy in Angela Flynn's mail box. Why?

I asked Mr. Taylor what I had done that was not correct. He said that Gerald [Flynn] said something about that I had sent a form to Frankfort with a date of certification for Harold Friend. I had signed Gerald's name to the form. He was very vague and didn't give me all the details. I remember Angie coming into my office and taking Harold Friend's file out of the file cabinet. She took it downstairs.

Gerald and Mr. Taylor had the same training that Angie and Robbin did. They never made any attempt to help me with the training files or share any information. Gerald has been a Driver Training Instructor for years before I started working. He and Mr. Harlow did not have the necessary documentation in the drivers' files. I was given the assignment by Mr. Taylor find out what tests and documentation should be in their files. I then copied all the tests and all the papers necessary to retrain the drivers. He and Gerald did that one year for in-service. I then filed all the paperwork in the drivers' folders. Some of the folders have all the information necessary. Other folders have a something missing. I always intended to go back through them and make sure that all the documentation was there. That was one reason I asked to be hired 261 days. This would give me some quite time, when the phone did not ring and bus drivers were not around, to get caught up. I still intend to do that. As long as I was doing the work and they did not have to bother with it, it was ok. Now that Gerald wants his wife to have an office job, I can't seem to do anything right.

After she first came back from Driver Instructor Training in Frankfort, Robbin Durbin told me not to release a bus to a driver, that if it was in an accident they could come back on me for saying it was ok to drive. I do not release buses to anyone without permission from Mr. Taylor or

the mechanics. She also told me that if I signed a requisition for parts that I was responsible for what they were used for. I had better be sure they were used on the vehicles they were ordered for.

Robbin Durbin, Gerald Flynn, and Angela Flynn are telling the other bus drivers that the Driver Training files that are in my office are not valid because I worked on them and that Frankfort would have to come and retrain all the drivers because their files were not legal.

I did not get a job description in writing as I requested. I began to work on things that I have usually done at this time of the year. I filled out and signed Mr. Taylor's name to the Eight Hour Update Cards for 2002-2003. I have done this every year. In the past I asked Mr. Taylor if he wanted to sign the cards or did he want me to. He told me to sign and I have for quite some time (sample cards attached). Angela Flynn saw a card for 2002-2003 and stated to a driver that it was not legal.

In short, Angela Flynn is at the Bus Garage all day, every day. She sits and watches Gerald work or is in Mr. Taylor's office. I cannot ask him questions or carry on business without her being present. If she is not there, then it is Robbin Durbin. Sometimes it is both of them. I try to do my job, but they are there waiting for me to make a mistake or do something that they can complain about. They tell the bus drivers things to try to make me look bad. I feel that Mr. Taylor is going along with them against me. I did not have this problem until Angie and Robbin went to Frankfort to train as Driver Trainer Instructors. Robbin and Angie should not be at the Garage all day everyday. Charles Kirby was not allowed to loaf there and they should not be allowed to. All they are doing is stirring up trouble. This is beginning to affect my attitude and work.

The problem is Gerald wants his wife to have an office job at the Bus Garage and is trying everything he can to accomplish this. Mr. Taylor doesn't want to make Gerald mad. He depends on Gerald make the decisions concerning transportation. Gerald wants to make the

decisions and Mr. Taylor goes along with whatever Gerald wants to do. Mr. Taylor doesn't know his job or doesn't want to be bothered with doing it. He won't cross Gerald and Gerald does whatever Gerald wants.

Several days before Kathy sent this letter to Kim Shaw, she received a letter from Gary Taylor stating: "Please do not sign any driver trainer instructor's name to any training form or certification that is mailed to Frankfort or given to the Estill County drivers. Hopefully, this will prevent any misunderstanding regarding the legality of certification."

In April 2003, Kathy's husband, Larry Farwell, applied for a position as a substitute bus driver with the ECBE. He trained for the position through the bus garage where Kathy worked, and he passed the CDL written exam in June 2003. In July of that year, Gerald Flynn's wife, Angela Flynn, who also worked at the bus garage, sent a letter to Gary Taylor to inform him of some observations she had made regarding Larry. First, Angela stated that she felt Larry made inappropriate comments. For example, she said that he asked her whether she would rather be an egg or a marble, and she responded she would rather be an egg because it is a life form. Larry then replied, "so you would rather be laid than played with." Angela wrote in her letter that she just ignored Larry's comment, got off the bus, and went inside. Angela then wrote that at a later date, Beverly Hall, who also works at the garage, told her that Larry had inappropriately touched Beverly. Angela also stated in her letter that her daughter was at the bus garage

one day, and Larry walked over to Angela's daughter, put his arm around her, teased her, and rubbed her neck and back.

On July 22, 2003, Beverly Hall also wrote a complaint regarding Larry's inappropriate touching of her. Beverly alleged that Larry walked toward her with a "shop rag in hand. He evidently saw something on [her] shirt and came up swiping the rag above [her] right breast and came down with the rag, touching [her] breast" with the rag. She wrote that she was very angry about the incident, and she informed the driving instructor, Angela Flynn, about it after their instruction was finished that day.

Two days later, on July 25, 2003, Gary Taylor sent a letter to Larry, which stated as follows:

I have investigated the complaints filed by two transportation department employees which allege inappropriate conduct on your part during driver training. After discussing the situation with Mr. Shaw, Superintendent, and legal counsel, I believe it is in everyone's best interest to cease your driver training at this time. To avoid any potential conflict, I am requesting that you do not come to the bus garage unless you have business to transact. I appreciate your cooperation and understanding.

Therefore, Larry was not hired as a substitute bus driver by the ECBE, and he was notified of this before he had the opportunity to take the actual driving exam to be properly licensed as a bus driver.

The Farwells filed their complaint in the present case against the ECBE, Gary Taylor, and Kim Shaw almost a year after Larry was told he would

not be hired, on July 7, 2004. In their complaint, they alleged that shortly after Kathy sent the letter to Mr. Shaw in mid-2002, the people she worked with “changed their attitude and demeanor toward Kathy and began treating her in a rude, disparate, hostile, retaliatory manner, which adverse treatment continue[d]” to the time she filed her complaint.

The Farwells also contended that, in retaliation for Kathy complaining to Mr. Shaw, Larry was not hired by Mr. Shaw and the ECBE. They further alleged that the statements regarding Larry’s inappropriate behavior were made maliciously, and those statements were intended to destroy Larry’s reputation in the community and to defame him. The Farwells asserted that the ECBE, Gary Taylor, and Kim Shaw had a legal obligation to avoid waste and to run Estill County Schools efficiently, but that they had failed to do so. Finally, they claimed that “[t]he defendants’ actions . . . constituted fraud, oppression, malice, and showed a wanton disregard for the truth, and therefore, Larry and Kathy . . . [were entitled to] punitive damages.”

The defendants moved for summary judgment, and the Farwells opposed their motion. The circuit court granted the defendants’ motion for summary judgment, first noting that the Farwells had agreed in their response to the motion for summary judgment that their “claims for common law defamation and damages because of the Board’s failure to operate the school system in a reasonable and efficient manner must fail.” The circuit court also noted, however, that the Farwells maintained that their “claims under the Kentucky

Whistleblower's Act remain[ed] viable, and they ask[ed] that the matter be set for jury trial.”

Regarding the whistleblower claim, the circuit court found the Farwells' argument was that “the refusal to hire Larry was indirect retaliation, [but] the Defendants argue that this cannot be retaliation because Kathy was the whistleblower, not Larry.” The circuit court agreed with the Farwells to the extent it found that an employer

may indirectly punish a whistleblower by taking action against a relative.² The problem here is the nexus or connection with the report by Kathy and the refusal to hire Larry by the Board, which was nearly one year later. Put another way, a great deal of time passed from the report by Kathy until Larry was not employed by the Board. The Court is further concerned that the reasons the Board gave for not hiring Larry are not disputed by Larry in his deposition.

The court noted that

[a] dispute arose later as to the voluntariness of Beverly's statements, but Larry does admit to wiping at a spot on her shirt in his deposition on pages 12 to 13, so it does not matter that Beverly wishes she never got involved or was forced to tell or whatever the posture is now. Larry admits to wiping dirt off her shirt.

Further, the court stated it was concerned because the reasons provided by ECBE for not hiring Larry were not disputed by him in his deposition. The court noted that Larry admitted “to touching the shoulders of the tank topped daughter of co-worker [Angela] Flynn after cheerleading practice [in July 2003] to

² The court did not cite to any authority in support of this conclusion of law.

show her some buzzards, but [Angela] Flynn says there was more to it than that, and a complaint was made.” The circuit court also found that Larry admitted to telling Angela Flynn the joke about the marble and the egg in mid-2003.

Regarding Larry’s admission that he attempted to wipe dirt off of Beverly’s shirt, the court stated that Larry admitted the dirt was below Beverly’s shirt collar, and that he had “admitted that it was near her breast.” The court noted that “such is a very sensitive area for a male co-worker to be wiping off dirt when Beverly [was] perfectly capable of doing so with her own two hands and the spot did not appear to be bothering her.” Finally, the court found that Larry admitted telling “[Angela] Flynn that she is nice looking and inquiring as to what happened in her marriage” approximately one week before Larry’s training ceased.

The circuit court found that Kathy had “not suffered any loss of employment or benefits,” and that “the Board ha[d] taken no action against Kathy” after she sent her letter to Kim Shaw. Thus, the court held that, because Kathy had not suffered any loss of benefits and because Larry was involved in the “series of unfortunate events” one year after Kathy sent her letter to Kim Shaw, the Board was entitled “to make the decision it made and is immune for discretionary decisions made under these undisputed factual circumstances.”

The circuit court also held that the individual defendants, Kim Shaw and Gary Taylor, had no civil liability under Kentucky’s Whistleblower Act because only governmental entities have such liability under the Act. Further, the court found that, contrary to the defendants’ argument, the circuit court, rather than

the Board of Claims, had jurisdiction over the case because the matter was not one involving pure negligence. Regarding the Farwells' claims for lost income and lost employment benefits, the circuit court again found that Kathy "continue[d] in the same position and ha[d] never been terminated or threatened with termination and ha[d] lost no income or employment benefits." As for Larry, the court noted that Kathy made her complaint in mid-2002, and Larry was not hired for the job in July 2003, approximately one year later. The court also stated, regarding the Farwells' claims for

loss of reputation in the community and mental anguish, the parties agree that the allegations of sexual harassment against Larry were made by individuals not named in this action and were published to the Defendants, not by the Defendants, and the Plaintiffs have presented no proof that such allegations are even known to individuals outside the employ of the Board.

Therefore, the circuit court concluded that the Farwells had failed to meet the elements necessary to establish a violation of the Whistleblower Act. The court then granted the defendants' motion for summary judgment.

The Farwells now appeal, contending that: (a) the Whistleblower Act forbids indirect retaliation; and (b) there was a genuine issue of material fact, and therefore the circuit court erred in granting summary judgment.

II. STANDARD OF REVIEW

"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). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Further, “the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact.” *Id.* at 482.

III. ANALYSIS

We first note that the Farwells do not challenge the circuit court’s findings regarding their claims for common law defamation and damages; their claims for loss of reputation in the community and mental anguish; or Kathy’s claims for lost income and lost employment benefits. They also do not challenge the circuit court’s determination that the individual defendants, Kim Shaw and Gary Taylor, had no civil liability under Kentucky’s Whistleblower Act, because only governmental entities have such liability under the Act. Therefore, those claims are deemed waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

A. CLAIM THAT THE WHISTLEBLOWER ACT FORBIDS INDIRECT RETALIATION

The Farwells first allege, and the circuit court held, that Kentucky's Whistleblower Act, KRS 61.101, *et seq.*, forbids indirect retaliation. Kentucky Revised Statute 61.102(1) provides 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 . . . any . . . 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.

(Emphasis added).

To prove

a violation of KRS 61.102, an employee must establish 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 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.

Davidson v. Commonwealth, Dep't of Military Affairs, 152 S.W.3d 247, 251 (Ky. App. 2004).

We question whether, under the specific language of Kentucky's Whistleblower Act, an indirect retaliation against an employee's spouse, *i.e.*, a non-employee, constitutes a violation of the Act. Regardless, we do not need to address that question here because we find that the Farwells' claims fail on numerous other grounds, which cause this issue to be moot. We note that we "may affirm the decision of a trial court for any reason sustainable under the record."

Lynn v. Commonwealth, 257 S.W.3d 596, 599 (Ky. App. 2008).

B. CLAIM THAT CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT

The Farwells assert that the circuit court erred in granting the motion for summary judgment filed by ECBE, Kim Shaw, and Gary Taylor. Specifically, the Farwells alleged that the affidavits of John Bicknell and Wanda Vader demonstrated "a genuine issue of material fact concerning the issue of whether the charges against Larry had been manufactured as a pretext to be used as an excuse not to hire him." Both of these affidavits stated that Beverly Hall had expressed remorse for getting involved by writing her letter of complaint about Larry's inappropriate touching of her.

Although Kathy claims she sent a whistleblower's letter/report to Kim Shaw, the Farwells do not specify where in the record we could find such a letter. Again, we assume that the letter set forth herein previously was sent by Kathy to

Kim Shaw and that this is the whistleblower's letter upon which the Farwells base their claims because no other document in the record before us resembles such a letter. In their complaint filed in the circuit court, the Farwells claimed that their whistleblower's letter alleged that "time and money was being wasted in the Bus Garage." The circuit court likewise noted that the letter from Kathy to Kim Shaw complained of these things.

However, upon reviewing the letter at issue, it is apparent that Kathy made no such claims of waste or suspected violations of law. Rather, the letter merely complains of personnel conflicts Kathy was having with other garage employees after Kathy had signed her boss's name to some forms, even though she allegedly did so with her boss's permission.

Kathy has established the first two elements of her KRS 61.102 claim, *i.e.*, that her employer was "an officer of the state or one of its political subdivisions"; and that she was "a state employee or an employee of a political subdivision." *Woodward v. Commonwealth*, 984 S.W.2d 477, 480 (Ky. 1998). However, she has failed to establish the third element of her claim, *i.e.*, that Kathy "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." *See Davidson*, 152 S.W.3d at 251. The letter that Kathy sent to Kim Shaw, complaining primarily of personnel conflicts, does not, as a matter of law, qualify on its face as a whistleblower report. Therefore, the Farwells' whistleblower claim fails because

Kathy did not actually make a good faith report or disclosure of a suspected violation of law.

Regardless, even if Kathy's letter to Kim Shaw had qualified as a good faith report of a suspected violation of law, the Farwells' claim in this case fails for other reasons. First, the ECBE's decision not to hire Larry for the bus driver position based upon the complaints of improper comments and inappropriate touching, which he admitted to, that were made against him by Angela Flynn and Beverly Hall was well founded. In fact, if the ECBE had hired him with the knowledge of these complaints, the ECBE may have exposed itself to lawsuits for negligent hiring. *See generally Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky. App. 1998) (stating that an employer may be held liable for negligent hiring if employer "knew, or reasonably should have known," that the employee was unfit for the job, and employee's placement in the job "created an unreasonable risk of harm" to another employee).

Second, the ECBE's decision not to hire Larry occurred approximately one year after Kathy sent her letter to Kim Shaw. Pursuant to KRS 61.103(3), employees "filing court actions" that allege a violation of KRS 61.102 "shall show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action." As the circuit court noted, given the lapse in time we cannot say the trial court erred in determining there was not a nexus between Kathy's letter and the decision not to hire Larry one year later.

Third, Larry was informed that he would not be hired for the position before he had even obtained his license to drive a school bus. Therefore, whether Larry would have passed his actual driving test and secured this license, thus rendering him eligible for the position of substitute bus driver, is pure speculation, and it is improper for the court to assume that he would have been so eligible.

The rights of litigants in courts of justice are not determined by guesswork, surmise, or speculation. There must either be direct evidence authorizing a finding of fact, or a network of circumstantial evidence, based upon facts which will authorize a finding by a court or a juror without indulgence in mere speculation or surmise.

Magness' Adm'x v. Hutchinson, 274 Ky. 226, 117 S.W.2d 1041, 1043 (Ky. 1938)
(internal quotation marks omitted).

Fourth, the Farwells' claim that the affidavits of John Bicknell and Wanda Vader demonstrated "a genuine issue of material fact concerning the issue of whether the charges against Larry had been manufactured as a pretext to be used as an excuse not to hire him," because both of the affidavits stated that Beverly Hall had expressed remorse for getting involved in the matter. However, as noted by the circuit court, "it does not matter that Beverly wishes she never got involved" because Larry admitted to wiping dirt off the front of her shirt. Therefore, the Farwells cannot show that Beverly's complaint about the incident was a pretext because Larry admitted that he did the inappropriate action.

Finally, as to Kathy, she has also failed to establish the fourth element of her whistleblower claim, *i.e.*, showing that her employer took action or

threatened to take action against her to discourage her from making a disclosure or to punish her for making one. *See Davidson*, 152 S.W.3d at 251. In her deposition, Kathy admitted that she had not lost any income or employment benefits, and her supervisor, Gary Taylor, had not threatened to fire her. Therefore, the Farwells have failed to allege facts sufficient to support their whistleblower claim, and the circuit court did not err in granting the defendants' motion for summary judgment.

Accordingly, the judgment of the Estill Circuit Court is affirmed.

ALL CONCUR.

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