

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000657-MR

DEBBIE C. BURKE

APPELLANT

v. APPEAL FROM SHELBY COUNTY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 09-CI-00078

SHELBY ENERGY COOPERATIVE, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

LAMBERT, SENIOR JUDGE: Debbie C. Burke appeals from a summary judgment of the Shelby Circuit Court on her wrongful discharge claims. On

¹ Senior Judge Joseph E. Lambert 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.

appeal, she argues that her discharge fell under the public policy exception to the at-will doctrine. Upon a review of the record, we affirm the Shelby Circuit Court.

History

Burke was an employee of Shelby Energy Cooperative, Inc., a member-owned cooperative utility company regulated by the Kentucky Public Service Commission (PSC). It provides electrical service to the Shelby, Henry, and Trimble county areas. Burke was employed by Shelby Energy as a general accountant. At the time of her dismissal, Burke had been an employee of Shelby Energy for nearly twenty-seven years.

On July 1, 2008, Burke accessed Shelby Energy's private data and printed off financial reports and payroll documents of the utility. These documents contained sensitive information, including employee names, social security numbers, and bank account information. Burke took these documents and provided them to Bruce Stansbury, a former employee of Shelby Energy, who had been fired the previous week. It was common knowledge at the utility that Stansbury had filed a complaint against Shelby Energy more than a year prior thereto.

Stansbury planned to file another complaint with the PSC under KRS 278.260, and asked Burke to provide him with any documents that would highlight the "problems" at Shelby Energy. Burke stated that the financial documents were intended to show the utility's financial instability. She stated that the payroll

documents were intended to evidence the high turnover rate among employees of Shelby Energy.

Burke was aware that the financial reports and payroll documents were confidential. She was also aware of Shelby Energy's policy which prohibited the disclosure of confidential information. Further, Burke was aware the disclosure of confidential information was a terminable offense.

On July 7, 2008, Stansbury filed his complaint with the PSC. He provided the above documentation therewith. Shelby Energy was informed of the complaint and the documents in question. After discovering that confidential documents had been provided to Stansbury, Shelby Energy launched an internal investigation to determine how Stansbury obtained the documents. The computer system revealed that Burke accessed and printed the documents on July 1, 2008.

Debbie Martin, CEO of Shelby Energy, confronted Burke with this information. Burke admitted that she had provided the documents to Stansbury. Burke was sent home that very day and terminated a few days later, by letter.

Burke filed an action in the Shelby Circuit Court for wrongful termination, alleging that her employer fired her for exercising her right under KRS 278.260 to file a complaint with the PSC (by and through Stansbury). After a small amount of discovery had been completed, Shelby Energy moved for summary judgment, which was granted by the court.

Analysis

Burke now appeals to this Court. On appeal, she argues (1) that the court erred as a matter of law because relevant caselaw support her wrongful discharge claims, and (2) that summary judgment was inappropriate because a genuine issue of material fact remained regarding her termination.

Upon review of a summary judgment, we ask whether the trial court accurately determined “that there were no genuine issues as to any material fact and that the [movant] was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). We owe no deference to the trial court when making this inquiry. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). Whether a discharge is unlawful because of “a right implicit in a statute[]” is a question of law for the courts. *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 733 (Ky. 1983).

We first address Burke’s argument that Kentucky caselaw supports her claims of wrongful discharge. The leading case on wrongful discharge in this jurisdiction is *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows, supra*. In *Firestone*, our Supreme Court retreated from a blind application of the “terminable-at-will” doctrine. The “at-will” doctrine provides that “an employer may discharge [an] at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.” *Firestone*, 666 S.W.2d at 731. In *Firestone*, the Court recognized that a strict application of the “at-will” doctrine would stand contrary to public policy in certain circumstances. *Id.* at 733.

Thus, the *Firestone* Court found that exceptions to the doctrine can be made where a fundamental and well-defined public-policy is at stake. *Id.* Using this newly created exception, the Court held that an employer could not fire an employee for filing a claim under the Workers' Compensation Act. *Id.*

A mere two years later, the Supreme Court revisited its holding in *Firestone*, and limited the scope of the public policy exception in *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985). In *Grzyb*, the Court defined the parameters of the public policy exception as follows:

- 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
- 2) That policy must be evidenced by a constitutional or statutory provision.
- 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Id. at 401. It is apparent that the Court intended to narrow the exception. Indeed, the *Grzyb* Court held that only two situations existed where discharge of an employee would be so contrary to public policy as to be actionable:

First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative enactment."

Id. at 402 (Internal citations omitted) quoting *Suchodolski v. Michigan Consol. Gas Co.*, 316 N.W.2d 710, 711-12 (Mich. 1982).

Burke does not argue that she was asked to violate the law in the course of her employment. Thus, her claim for wrongful discharge can only stand under the public policy exception if the reason for her discharge was her “exercise of a right conferred by a well-established legislative enactment.”² *Id.*

Burke argues that by supplying the documentation to Stansbury, she was actually assisting him in making a complaint with the PSC, and that KRS 278.260 confers a well-established public policy right to citizens to file complaints with the PSC. She claims that she was terminated for assisting Stansbury in filing the complaint. She also claims that her termination was designed to intimidate other employees and prevent them from filing complaints with the PSC.

We cannot accept this reasoning. Burke did not herself file a complaint with the PSC. Instead, she furnished confidential documents to a non-employee. Secretly transmitting an employer’s confidential documents to a non-employee is not “a right conferred by a well-established legislative enactment.” *Grzyb* 700 S.W.2d at 402, quoting *Suchodolski*, 316 N.W.2d at 711-12. As Burke was not exercising a right conferred by statute, there was no public policy exception to the at-will employment doctrine.

Accordingly, we affirm the Shelby Circuit Court.

ALL CONCUR.

² Burke cannot claim protection under the Whistleblower Act, KRS 61.102, because she was a private, rather than a public, employee.

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