

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001301-MR

NORTHERN KENTUCKY AREA
PLANNING COMMISSION

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 04-CI-02651

RUSSELL CLOYD; KENNETH W. SCOTT;
MARK KENYON; AND ANGELA GREEN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Northern Kentucky Area Planning Commission (“NKAPC”) appeals from a Judgment of the Kenton Circuit Court reflecting a jury verdict in favor of Russell Cloyd. NKAPC contends that the circuit court failed to render proper evidentiary rulings at trial, and improperly instructed the jury. We find no error, and accordingly affirm the Judgment on appeal.

Cloyd was employed by NKAPC as a building inspector beginning in 1999. At the time of his hiring, Cloyd was supervised by Executive Director William Bowdy, who retired in 2002. Bowdy was replaced by Executive Director Dennis Gordon.

On November 7, 2003, Cloyd received a negative employment evaluation from Gordon. As part of the evaluation, Cloyd was informed of Gordon's opinion that Cloyd lacked the level of customer service and diplomacy befitting NKAPC's core values. He was also told that this failure might jeopardize his continued employment.

At about the same time, Gordon and Cloyd began disagreeing on the proper response to a number of inspections that Cloyd had conducted. In one instance, Cloyd had been called to inspect the construction of a pool at an apartment complex called Rivers Breeze. Upon inspecting the completed pool, Cloyd determined that it had no complete fence or enclosure, and no complete walkway around it such that a person exiting the pool might potentially fall over a rocky embankment over which the pool's "vanishing edge" flowed. Cloyd issued a notice to vacate the pool based on these perceived safety deficiencies. When Gordon became aware of Cloyd's conclusion, he directed Cloyd not to issue the notice but to work with the builders. According to the record, Cloyd told Gordon that the County Attorney should be informed of the deficiency, and Gordon told him not to report it.

Later, Cloyd was dispatched to inspect another project called Devou Park, which involved the construction of a wood frame public pavilion in Covington, Kentucky. When Cloyd attempted to inspect the construction, he determined that the frame had already been covered in drywall, thus preventing the frame's inspection. Believing that the framing potentially represented an issue of public safety, Cloyd issued a stop work order until the frame could be exposed and inspected. Shortly thereafter, Gordon ordered Cloyd to remove the stop work order. On November 16, 2003, Cloyd notified the Kentucky Attorney General to report what he believed to be violations of the Kentucky Building Code ("KBC") at the River Breeze and Devou Park projects, and Gordon's alleged actions to prevent Cloyd from carrying out his duties. Cloyd would later state that the relationship between Cloyd and Gordon became hostile after Gordon learned that Cloyd had contacted the Attorney General.

Some months later in July, 2004, Cloyd inspected the Wright Summit project. Cloyd denied issue of a certificate of occupancy upon determining that there were no fire alarm devices installed in the tenant space or outside it that could be heard inside the space as required by the KBC. When informed of Cloyd's actions, Gordon allegedly told Cloyd to sign the certificate of occupancy, and that Gordon would sign it if Cloyd did not. Cloyd then told Gordon that Cloyd was going to file a complaint with the County Attorney due to the continuing KBC violations. Gordon then signed a temporary certificate of occupancy. Based on his belief that Gordon was not authorized to issue the certificate under the KBC, Cloyd

reported Gordon's actions to the Kentucky Attorney General by way of a letter dated July 9, 2004.

Cloyd also filed with the County Attorney a complaint against the building owner. Immediately thereafter, Gordon terminated Cloyd's employment with the NKAPC. One of the reasons cited for the termination was that Cloyd failed to follow a directive from Gordon telling him not to report the violation to the County Attorney's office. Other reasons cited included Cloyd's alleged persistent failure to adapt to and honor the core values of NKAPC regarding professionalism and customer service.

Thereafter, Cloyd filed the instant action against the NKAPC in Kenton Circuit Court alleging wrongful termination and violation of Kentucky's Whistleblower's Act, KRS 61.102 *et seq.* A jury trial was conducted for three days beginning on November 1, 2011, resulting in a verdict in favor of Cloyd. After a Judgment reflecting the verdict was rendered, the Kenton Circuit Court rendered a separate Order granting retirement benefits that Cloyd allegedly missed by virtue of not remaining employed at NKAPC through his projected date of retirement. This appeal followed.

NKAPC now argues that the Kenton Circuit Court made erroneous evidentiary rulings and submitted jury instructions that ignored the Whistleblower Act's requirement of "good faith" reporting. NKAPC argues that in so doing, the court rendered ineffective NKAPC's defense theory that Cloyd's whistleblowing actions were not made in good faith. Directing our attention to KRS 61.102 *et seq.*

and *Thornton v. Office of Fayette County Attorney*, 292 S.W.3d 324 (Ky. App. 2009), NKAPC first notes that an essential element of a Whistleblower action is that the employee's allegations which purportedly gave rise to the employer's reprisals were made in "good faith." NKAPC sought to demonstrate that Cloyd's allegations of wrongdoing were not made in good faith; therefore, his Whistleblower action was without support.

NKAPC contends that Cloyd's allegations of wrongdoing only began *after* he received what NKAPC characterizes as a highly critical evaluation which signaled that his tenure at the Commission may be in jeopardy. NKAPC asserts as a claim of error the circuit court's denial of its attempt to introduce this evidence. Additionally, NKAPC notes that Cloyd's immediate prior employment with Boone County, Kentucky, also ended with allegations of wrongdoing against that employer, a resultant Whistleblower Act suit, and a mediated severance package from Boone County in excess of \$40,000. This fact as well was excluded from the evidence by way of Cloyd's successful motion in limine, and the jury never learned of it. NKAPC characterizes as error the Kenton Circuit Court's exclusion of this evidence from the jury's consideration, and argues that the effect was to improperly stymie its efforts to demonstrate that Cloyd's allegations of wrongdoing were undertaken for some purpose other than the mere exercise of good faith. The central issue for our consideration, then, is NKAPC's contention that the Kenton Circuit Court improperly prevented it from demonstrating that Cloyd's allegations of wrongdoing were not motivated by good faith.

The Kentucky Whistleblower Act, KRS 61.102(1), provides protection from reprisal for “any employee [of the Commonwealth or its political subdivisions] 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 . . . 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.” (Emphasis added).

Kentucky courts have held that the “good faith” is an essential element of such an action. *Thornton, supra*. After examining whether second-hand knowledge was a proper basis for an employee’s whistleblowing activity, a panel of this Court held in *Thornton* that the “critical question remains as to whether the report was made in good faith.” *Thornton*, 292 S.W.3d at 331. The panel went on to note that “it is not good faith to make a report, particularly one based on second-hand knowledge, for a corrupt motive like malice, spite, or personal gain.” *Id.*

In the matter at bar, the Kenton Circuit Court sustained Cloyd’s motion in limine upon determining that the evidence of Cloyd’s prior employment and related whistleblower activity was not relevant and that its probative value was outweighed by the danger of undue prejudice. This determination is supported by the record and the law. The Kentucky Rules of Evidence (KRE) provide that a trial court may exclude evidence that is not relevant. KRE 402. Additionally, relevant evidence may be excluded if the danger of undue prejudice, confusion of the issues or misleading the jury outweighs its probative value. KRE 403. It is

noteworthy, and dispositive herein, that no portion of the excluded evidence demonstrated or suggested that Cloyd's prior whistleblower actions arising from his previous employment with Boone County were improper, falsified or otherwise motivated by bad faith. Cloyd's prior whistleblower activity resulted in a settlement, and there was no judicial finding or other basis for concluding that his claims were made in bad faith.

“Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion.” *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994).

Abuse of discretion implies arbitrary action or capricious disposition under the circumstances. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). “There is no precise test of relevancy, but it is a determination which rests largely in the discretion of the trial court and must be exercised according to the teachings of reason and judicial experience, considering its probative value.” *Glens Falls Ins. Co. v. Ogden*, 310 S.W.2d 547, 549 (Ky. 1958).

We cannot conclude that the Kenton Circuit Court engaged in a clear abuse of discretion. The evidence at issue did not demonstrate that Cloyd had previously engaged in bad faith whistleblowing, and the court's action did not imply “arbitrary action or capricious disposition under the circumstances.” *Kuprion, supra*. We find no error on this issue.

NKAPC also argues that the jury instructions improperly permitted the jury to consider multiple alleged whistleblower reports as a single “contributing factor”

in support of his hostile environment theory, contrary to the plain language of the statute requiring “a disclosure” to be separately considered as a “contributing factor” to the termination. At the heart of this claim of error was the trial court’s rejection of NKAPC’s request to separately instruct the jury as to each alleged disclosure. Rather, NKAPC contends that Instruction No. 4 - while accurately requiring the jury to conclude that Cloyd made a disclosure that was a contributing factor in his termination - improperly failed to require the jury to determine which of the alleged disclosures was the contributing factor in his discharge. NKAPC maintains that this failure constituted a due process violation and prejudicial error entitling it to a new trial.

We do not find persuasive NKAPC’s contention that the jury instruction at issue improperly blended distinct legal theories into a consolidated instruction as addressed in *Hilsmeier v. Chapman*, 192 S.W.3d 340 (Ky. 2006). Rather, the instruction directed the jury to determine if a disclosure (i.e., *any* disclosure) was a contributing factor in Cloyd’s termination. We find no basis in Kentucky’s Whistleblower’s Act, KRS 61.102 *et seq.*, requiring each alleged disclosure to be memorialized in a separate jury instruction. Rather, Cloyd was required to prove the element that a disclosure was a contributing factor in his termination. We find no error.

NKAPC’s final argument is that the trial court erred in awarding future damages representing unrealized retirement benefits (a.k.a. “front pay”) which were legally and factually unsupported. NKAPC directs our attention to various

Federal appellate opinions wherein the duration of the plaintiff's employment was found to be too speculative to support an award of front pay, and notes that the highly speculative nature of the trial court's judgment in the instant case "presents similar concerns[.]" At the very least, NKAPC argues that the trial court's unsupportable speculation about Cloyd's future employment with NKAPC is arbitrary, capricious, and an abuse of discretion requiring reversal.

We agree with NKAPC that one must speculate as to the potential duration of Cloyd's employment with NKAPC had he not been terminated. He might have voluntarily severed his employment a few weeks later for reasons unrelated to the alleged retaliation, or might have continued on with his employment until the age of retirement. We simply do not know. What we do know, however, is that front pay is available as a discretionary, equitable award in lieu of reinstatement, and it is determined by the trial court. *Standley v. Chilhowee R-IV School Dist.*, 5 F.3d 319 (8th Cir. 1993). "Reinstatement and front pay are equitable remedies." *Id.* at 321. Such an award is reviewed under an abuse of discretion standard. *Id.* at 322.

In the matter at bar, the court noted the jury's finding that but for the NKAPC's illegal actions, Cloyd would still be employed. Additionally, the court relied on the damage calculations of Cloyd's expert witness in calculating front pay. The expert calculated the amount of front pay as such:

- 1) yearly benefit = final compensation x 2.2% benefit factor x years of service
- 2) yearly benefit x number of years = lost benefit

Applying that formula:

$\$21,236.37 = \$62,828 \times 2.2\% \times 15.364$ years, and

$\$21,236.37 \times 13$ years = $\$276,072.81$.

Based on this calculation, the trial court awarded Cloyd $\$276,072.81$ in front pay. The jury's conclusion that Cloyd would still be employed but for the NKAPC's actions and the expert witness's calculations set out in the record reasonably support the trial court's award of front pay. Because that award is discretionary, and as there is no basis upon which we may conclude that it constituted an abuse of discretion, we find no error on this issue.

For the foregoing reasons, we affirm the Judgment of the Kenton Circuit Court.

ALL CONCUR

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Jason V. Reed
Covington, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE RUSSELL CLOYD:

J. Mark Kenyon
Florence, Kentucky