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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001044-MR

KYLE COCHRAN AND
WHITNEY MAUPIN — APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 12-CI-00373

NELSON O'DONNELL,
in his Individual Capacity and
Official Capacity as Madison County
Sheriff — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, TAYLOR, AND VANMETER, JUDGES.

MOORE, JUDGE: Kyle Cochran and Whitney Maupin appeal the Madison Circuit Court's order dismissing their complaint for wrongful discharge and intentional infliction of emotional distress against Nelson O'Donnell, in his

individual and official capacities as the Madison County Sheriff. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2006, appellants Cochran and Maupin were employed as Deputy Sheriffs of the Madison County Sheriff's Office. According to their complaint filed in this case, the appellants supported the incumbent, Sheriff Dude Cochran, who is appellant Kyle Cochran's father, in the May 2006 Democratic Primary for Sheriff of Madison County over his challenger, O'Donnell. O'Donnell won the primary. During the general election, the appellants supported O'Donnell's opponent. O'Donnell also won the November 2006 general election.

In late December 2006, O'Donnell terminated the appellants' employment with the Madison County Sheriff's Office. The appellants claim that they were terminated because they had publicly supported O'Donnell's political opponents. They assert that they were never disciplined "or had any other adverse employment action taken against them prior to their terminations." Appellants argue that their employment terminations were illegal because they were terminated based upon their "political and personal beliefs and opinions."

Appellants initially sought relief in the federal courts under 42 U.S.C. 1983. However, that action was dismissed as untimely.

In their state court complaint, appellants contended that "[t]here is a well-defined public policy in the Commonwealth of Kentucky that employees, law enforcement officers in particular, should be free to exercise political support of

and association with the candidate and party of their choice, without fear of reprisal by their employers." Appellants asserted that "[t]his well-defined public policy is expressed with clear legislative intent by Kentucky statute KRS[1] 70.267, in particular, and Kentucky statutes KRS 67C.317, KRS 75.150, KRS 78.435, and KRS 95.017, as well as by other Kentucky law." Appellants argued that O'Donnell's actions were a substantial factor in causing their damages. They also alleged that O'Donnell's actions "were intentional and designed solely to be malicious, vindictive, to punish the [appellants] for their political beliefs, political opinions, and/or political support concerning the Madison County Sheriff's Department, and to cause emotional distress to the appellants." They further asserted that O'Donnell's actions "offend the generally accepted standards of decency in the community." Appellants argued that O'Donnell's actions caused them severe emotional distress

> because it is unlikely that they will find similar employment, have suffered a diminution in the expected value of their pensions, medical, and other benefits upon which they relied, have been embarrassed in the community and among their peers and former co-workers, have suffered damage to their reputations, and have otherwise been emotionally damaged through this ordeal. [sic]

Thus, appellants sued O'Donnell in his individual and official capacities, requesting compensatory and punitive damages, as well as recovery of their attorneys' fees and expenses.

[1] Kentucky Revised Statutes.

O'Donnell moved to dismiss appellants' complaint for failure to state a claim upon which relief can be granted. The circuit court granted O'Donnell's motion to dismiss after finding that the statutes cited by the appellants as the grounds for their wrongful termination claims did not apply to appellants and that the appellants had "failed to identify any emotional harm that could be described as severe" in support of the intentional infliction of emotional distress claim.

Appellants now appeal, contending that: (a) the circuit court erred in dismissing their wrongful termination claim; and (b) the circuit court erred in dismissing their intentional infliction of emotional distress claim.

II. ANALYSIS

A. WRONGFUL DISCHARGE CLAIM

Appellants first contend that the circuit court erred in dismissing their wrongful discharge claim. They assert that their

> political beliefs and opinions, specifically their support of [O'Donnell's] political opponents, are protected under KRS 70.267, explicitly, as well as a general statutory scheme demonstrating a well-defined public policy in favor of protecting public safety employees from retaliation based on their political beliefs and associations. Moreover, Section 1 of the Kentucky Constitution protects all citizens' right to freely communicate their thoughts and opinions.

"Employment in Kentucky is, generally, at-will, meaning that 'ordinarily 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.'" *Baker v.*

Campbell County Bd. of Educ., 180 S.W.3d 479, 483 (Ky. App. 2005) (citation omitted).

> But the Kentucky Supreme Court has recognized narrow public-policy-based exceptions to the at-will employment doctrine. For example, that Court found that "implicit in the Workers' Compensation Act 'is a public policy that an employee has a right to be free to assert a lawful claim for benefits without suffering retaliatory discharge.'" And the Supreme Court established very specific limitations on "'any judicial exceptions to the employment-at-will doctrine.'" Those limitations are 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.

Baker, 180 S.W.3d at 483 (footnotes omitted).

Appellants' claim under KRS 70.267 requires us to engage in a statutory construction analysis. We review the circuit court's construction of a statute *de novo*. *See Rhodes v. Commonwealth*, 417 S.W.3d 762, 764-65 (Ky. App. 2013).

Appellants' reliance upon KRS 70.267 is wholly misplaced because they ignore that KRS 70.267(1)-(3) all begin with "[n]o deputy sheriff covered by the provisions of KRS 70.260 to 70.273. . ." and that KRS 70.260 to 70.273 all concern deputy sheriff merit boards. The circuit court noted that Madison County,

where appellants were employed, does not have a deputy sheriff merit board. Appellants do not assert otherwise. Further, KRS 70.267(4) begins with the following words: "Nothing contained *in this section*. . . ." (Emphasis added). Thus, KRS 70.267(4) clearly applies to those individuals covered by the remaining sections of KRS 70.267, and it is therefore inapplicable to appellants because Madison County does not have a deputy sheriff merit board.

Appellants also allege that Kentucky has "a general statutory scheme demonstrating a well-defined public policy in favor of protecting public safety employees from retaliation based on their political beliefs and associations." They cite KRS 67C.307(6), KRS 78.435(5), KRS 75.150(1), and KRS 95.017 as examples of this. However, upon review of those statutes, it is evident that there is no statute numbered KRS 67C.307(6). In his appellee's brief, O'Donnell discussed KRS 67C.317(6), which he appears to surmise must be the statute the appellants intended to cite. That statute provides: "Nothing contained in KRS 67C.301 to 67C.327 shall be so construed as to abridge the rights of any officer with respect to his or her personal opinions, beliefs, and right to vote." KRS 67C.317(6). Upon review of KRS 67C.301 to 67.327, it is apparent that those statutes pertain to local government police force merit systems, and O'Donnell argues that the Madison County Sheriff's Office is not that type of police force. Appellants do not assert that it is that type of police force. Consequently, KRS 67C.317(6) is inapplicable to appellants.

Additionally, KRS 78.435(5) is similar to KRS 70.267(4), because it provides as follows: "Nothing contained in KRS 78.400 to 78.460 shall be so construed as to abridge the rights of any officer or employee with respect to his or her personal opinions or beliefs or right to vote." KRS 78.435(5). Further, the sections cited in KRS 78.435(5), *i.e.*, KRS 78.400 to 78.460, concern county police force merit boards and, again, appellants have not alleged that Madison County has a county police force merit board, while the Commonwealth contends it does not have one. Therefore, like KRS 70.267(4), KRS 78.435(5) is inapplicable to the present case.

KRS 75.150(1) provides: "No person shall be appointed a member of the fire department in fire protection districts on account of any political service, contribution, sentiment, or affiliation. No member shall be dismissed, suspended, or reduced in grade or pay for any political opinion." This statute is obviously inapplicable to the appellants.

Appellants also cite KRS 95.017 in support of their claim about a public policy protecting public safety employees from retaliation based upon their political beliefs and associations. However, this statute does not apply to appellants because they were not employed by a county police department, which is a specific type of police department that has been established by a county judge executive, as explained in KRS 70.540; rather, they were employed by the county sheriff's department in a county without a deputy sheriff merit board. Therefore, appellants' claim regarding KRS 95.017 lacks merit.

Appellants also contend that "Section 1 of the Kentucky Constitution protects all citizens' right to freely communicate their thoughts and opinions." However, Section 1 of the Kentucky Constitution does not sustain an action for wrongful discharge. *See Mendez v. University of Kentucky Bd. of Trustees*, 357 S.W.3d 534, 546 (Ky. App. 2011). Further, appellants cite no case law and make no further arguments concerning how Section 1 of the Kentucky Constitution applies to their claim, other than to re-state that they "never received any reason for their terminations other than their political support of [O'Donnell's] opponents in the 2006 Madison County Sheriff election – a reason that clearly violates public policy in this state as evidenced by constitutional and statutory provisions." Therefore, because Section 1 of the Kentucky Constitution does not support an action for wrongful discharge, and appellants have made no other arguments concerning the Kentucky Constitution, this claim fails.

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

Appellants also assert that the circuit court erred in dismissing their intentional infliction of emotional distress claim. However although they cite to case law, they simply assert for their argument that they "are entitled under Kentucky law to bring this claim against Appellee, and the Circuit Court erred in granting Appellee's motion to dismiss Count II of the Complaint for failure to state a claim for the tort of outrage." This is rather conclusory and generally fails to meet the requirements for an argument as set forth in CR 76.12(4)(c)(v).

Even if a more sufficient argument was made by the appellants, it would not change our decision to affirm the circuit court. Appellants' 42 U.S.C. 1983 action was dismissed by the federal court as untimely. We agree with the circuit court and the appellee that appellants' claim for intentional infliction of emotional distress could have been addressed in their untimely 42 U.S.C. 1983 action; consequently, it is now time-barred. *See generally Bennett v. Malcomb*, 320 S.W.3d 136, 137 (Ky. App. 2010) ("The tort of outrage was not intended to provide a cause of action for plaintiffs who simply failed to bring a traditional tort claim within the statute of limitations.")

As an additional basis to affirm, we agree with the circuit court that appellants have "failed to identify any emotional harm that could be described as severe." Termination from their employment and embarrassment are insufficient to rise to the level necessary to support appellants' claim of intentional infliction of emotional distress. *See, e.g., Benningfield v. Pettit Envt'l, Inc*., 183 S.W.3d 567, 572 (Ky. App. 2005).

C. O'DONNELL'S REMAINING ARGUMENTS

Appellee O'Donnell asserts various other persuasive arguments in support of affirming the circuit court's order. However, we decline to address those arguments because we found, *supra*, that the circuit court properly dismissed appellants' complaint.

Accordingly, the order of the Madison Circuit Court is affirmed.

ALL CONCUR.

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