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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000352-MR

FLOYD A. SMITH APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 12-CI-005354

NORTON HEALTHCARE, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Floyd A. Smith appeals the dismissal of his wrongful discharge claim for failure to state a claim.

Smith worked for Norton Healthcare (Norton) as an environmental services supervisor. On May 30, 2012, Norton terminated Smith, citing a violation of its workplace violence policy. According to Smith's undisputed version of the facts, on May 23, 2012, as he was being dropped off for work near Norton, he was

attacked without provocation by a hotdog vendor who insulted him and then hit him in the face. After Smith took up a defensive posture, he became entangled with the vendor but never hit him. Norton security officers broke up the altercation and reported the incident to Norton.

Smith filed a wrongful termination claim against Norton arguing his termination violated the fundamental and well-defined Kentucky public policy of the right to self defense as articulated in the Kentucky Constitution §1(1) and Kentucky Revised Statutes (KRS) 503.050(1). Norton filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f) for "failure to state a claim upon which relief can be granted[.]" The circuit court granted this motion, determining §1 "does not provide an employee an avenue to pursue a public policy wrongful discharge claim" and "KRS 503.050(1) does not provide the requisite employment related nexus required to maintain a public policy wrongful discharge claim." Smith appealed.

We review *de novo* the circuit court's dismissal for failure to state a claim as a pure issue of law. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

> Kentucky law permits an employer to discharge an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Wymer v. JH Properties, Inc.,* 50 S.W.3d 195, 198 (Ky. 2001). This is otherwise known as the terminable-at-will doctrine. In light of this doctrine, [an employee] may only establish a cause of action for wrongful discharge by demonstrating that the termination was contrary to a fundamental and well-defined public policy evidenced by a constitutional or statutory provision, *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows,*

> 666 S.W.2d 730, 731 (Ky. 1983); or, that the termination violated fundamental public policy by showing that the discharge was a direct result of his refusal to violate the law in the course of his employment or stemmed from the exercise of a right conferred in a well-established legislative enactment, *Boykins v. Housing Authority of Louisville,* 842 S.W.2d 527, 530 (Ky. 1992).

Mendez v. Univ. of Kentucky Bd. of Trs., 357 S.W.3d 534, 544-45 (Ky.App. 2011). The decision as to whether an employee's discharge is contrary to a fundamental and well-defined public policy as evidenced by a constitutional or statutory provision is a question of law. *Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 421 (Ky. 2010).

When the reason for the termination is the employee's exercise of a well-established legislative right, that right must have "an employment-related nexus[.]" *Grzyb v. Evans*, 700 S.W.2d 399, 402 (Ky. 1985). "Thus, important to a finding of wrongful discharge is the requirement that the public policy must be defined by statute and directed at providing statutory protection to the worker in his employment situation." *Shrout v. TFE Grp.*, 161 S.W.3d 351, 354 (Ky.App. 2005). Examples of situations in which a sufficient employment related nexus was established include discharging an employee for filing a workers' compensation claim, *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 733-34 (Ky. 1983), and discharging an employee for exercising collective bargaining rights through a union. *Pari-Mutuel Clerks' Union of Kentucky, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801, 802-03 (Ky. 1977).

However, even where there is a close relationship to the statute and employment, this may not be a sufficient nexus if the statute was not designed to protect the employee from the specific harm that resulted. *See Nelson Steel Corp. v. McDaniel*, 898 S.W.2d 66, 69 (Ky. 1995) (determining no sufficient nexus existed where an employer terminated an employee who had filed previous workers' compensation claims against a previous employer based on the perceived economic risk this history posed to the new employer); *Shrout*, 161 S.W.3d at 355 (determining no sufficient nexus where an employer violated a federal regulation regarding employee drug testing because the regulation was designed primarily to ensure passenger safety rather than protect employees).

Smith's first argument is that his termination was contrary to a fundamental and well-defined public policy to not punish persons who act in self defense as articulated in §1 of the Kentucky Constitution which states "[a]ll men . . . have certain inherent and inalienable rights" including (1) "[t]he right of enjoying and defending their lives and liberties." Assuming that this provision confers a fundamental right to self defense, it does not apply to private employers. Kentucky courts have repeatedly held that §1 constrains the actions of the government alone.

In *Grzyb*, 700 S.W.2d at 402, when examining whether wrongful discharge could result from the violation of the right to association, the Kentucky Supreme Court stated unequivocally "the protections afforded Kentucky citizens under Kentucky Constitution Section I are against transgressions of government and

lawmaking bodies." *See Mendez*, 357 S.W.3d at 546 (applying *Grzyb* to §1 right to free speech and religious freedom). Therefore, this section of the Constitution does not provide a public policy exception to Smith's at-will employment preventing Norton from discharging him.

Smith's second argument is that his termination stemmed from the exercise of a right conferred in a well-established legislative enactment, KRS 503.050(1), which provides: "The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person." While we agree Smith has a statutorily provided avenue to avoid criminal conviction based upon self-defense, Norton's termination of Smith is not the sort of injury for which KRS 503.050(1) was designed to prevent. KRS 503.050(1) simply has no employment related nexus.

Additionally, Norton's termination of Smith does not alter his ability to establish self-defense in any potential criminal prosecution for the altercation with the hotdog vendor. *See Boykins v. Hous. Auth.*, 842 S.W.2d 527, 530-31 (Ky. 1992) (holding an employee's constitutional right to access open courts is not impinged by her employer terminating her after she filed suit against it, because she still has access to the courts).

While it is possible for a criminal statute to provide recourse for adverse employment decisions based on violations of a statute, such a recourse must be explicit to form a cause of action for wrongful termination. *See Mitchell v. Univ.*

of Kentucky, 366 S.W.3d 895, 902-03 (Ky. 2012) (determining employee established his discharge for violating university policy by possessing a handgun on campus, as otherwise permitted by his conceal carry permit, was contrary to a fundamental and well-defined public policy where the criminal statute permitting his action authorized a civil cause of action for violation of his right and an explicit legislative statement prohibited his discharge).

Accordingly, we affirm the Jefferson Circuit Court's dismissal of Smith's wrongful termination case.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Philip C. Kimball Louisville, Kentucky	Jeremy S. Rogers Vanessa N. Rogers Louisville, Kentucky