

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000659-MR

KENT ROBINSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 13-CI-005029

KENTUCKY COMMUNITY AND
TECHNICAL COLLEGE SYSTEM;
AND ANTHONY NEWBERRY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KRAMER AND VANMETER, JUDGES.

KRAMER, JUDGE: Kent Robinson appeals a judgment of the Jefferson Circuit Court dismissing various tort and contract claims he asserted against the above-captioned appellees. For the reasons discussed below, we affirm.

The facts and procedural history of this matter—as well as the dispositive issue now before this Court—are all within the circuit court’s aforementioned March 26, 2014 order. In relevant part, the circuit court’s order provides:

FACTS

The Plaintiff, Kent Robinson, was employed by JCTC from March, 2002 until November 27, 2012. During his employment, Robinson criticized numerous management and personnel decisions that Newberry and JCTC made. These suggestions and criticisms were ignored. Robinson alleges he was terminated for these and other comments concerning his religious and political beliefs. He contends that there was an employment contract and that the Defendants’ termination of his employment constituted breach of that employment contract, retaliation, wrongful discharge in violation of public policy, violation of his constitutional First and Fourteenth Amendment rights and analogous rights under the Kentucky Constitution, and rights under § 42 U.S.C. 1983.

OPINION

The Defendants’ Motion to Dismiss is pursuant to CR 12.02(a) and (f), which provide, in pertinent part, as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (a) lack of jurisdiction over the subject matter, . . . (f) failure to state a claim upon which relief can be granted

When considering a motion to dismiss for failure to state a claim, the Court must construe all pleadings in the light most favorable to the plaintiff and take all material allegations as true. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987); *Pike v. George*, 434 S.W.2d 626, 627 (Ky. App. 1968). The Court should not dismiss an action for failure to state a claim unless the plaintiff appears not to be entitled to relief under any statement of facts that could be proved to support his claim. *Weller v. McCauley*, 383 S.W.2d 356, 357 (Ky. 1964).

In part, KCTCS seeks dismissal on the ground that it is entitled to sovereign immunity and Newberry seeks dismissal on the ground that he is entitled to qualified immunity. Sovereign immunity is derived from Section 231 of the Kentucky Constitution, which states that “The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.” KY Const. § 231. This precludes any suit against the state unless the state has given its consent or otherwise waived its immunity. *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001).

The Court finds that KCTCS is a state agency engaged in a government function. KRS 44.073(1); KRS 164.001(13); KRS 164.580. KCTCS is also a “university, college or junior college established or supported in whole or in part by funds raised by municipal taxation.” KRS 165.010. Thus, KCTCS is entitled to governmental immunity for the Plaintiff’s contract and torts claims. *University of Louisville v. Martin*, 574 S.W.2d 676 (Ky. App. 1978); *Rooks v. University of Louisville*, 574 S.W.2d 923, 924 (Ky. App. 1978).

The Court finds that Newberry is entitled to official immunity from any claims against him in his official capacity. Governmental immunity extends to public officials who are sued in their representative capacities for the performance of discretionary functions. *Yanero*, 65 S.W.3d at 519. Qualified immunity extends to public officials who are sued in their individual capacities for actions that are discretionary, rather than ministerial,

made in good faith within the scope of the employee's authority. *Id.* at 522. The hiring, firing and disciplinary personnel decisions that constitute Robinson's claims are part of an "inherently subjective process which, of course, is the essence of a discretionary function." *Id.* Personnel decisions are not ministerial, as they require more than "obedience to the orders of others." *Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 845 (Ky. App. 2003). Moreover, the Court does not have jurisdiction over any allegations of negligence by government agencies cloaked in sovereign immunity. KRS 44.073(8).

Finally, Newberry receives qualified immunity from the § 1983, and U.S. and Kentucky constitutional alleged violations to the extent that his conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Autry v. Western Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because KCTCS, not Newberry, was Robinson's employer, Robinson's claim against Newberry in his individual capacity for wrongful termination of [sic] in violation of public policy is not cognizable. Robinson's retaliation claims against Newberry are premised, in relevant part, on the alleged violation of Robinson's free speech rights. However, the First Amendment does not protect "speech addressing merely personal matters—such as intra-office grievances—or speech owing its existence to the employee's professional responsibilities." *Cook v. Popplewell*, 394 S.W.3d 323, 341 (Ky. 2011) (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). Thus, Robinson cannot establish any set of facts under which Defendants could be held liable because Robinson's speech is not protected by the First Amendment, or analogous rights under the Kentucky Constitution.

Robinson alleges that KCTCS' administrative policies and procedures give rise to a contractual relationship which may not be terminated without just cause. However, nothing in the language cited by the Plaintiff creates an employment contract. As stated in *Nork v.*

Fetter Printing Co., 738 S.W.2d 824 (Ky. App. 1987), personnel policy language which sets forth goals the employer strives to follow does not create a contractual obligation and does not alter an employee's at-will status. Further, even if Plaintiff's allegations were correct, such claims must be filed in Franklin Circuit Court. KRS 45A.245(1).

As sovereign immunity shields the Defendants from all of Plaintiff's claims, the Court finds that the Plaintiff has failed to state a claim upon which relief may be granted.

The trial court then ordered dismissal of Robinson's claims without prejudice.

On appeal, Robinson offers a variety of arguments as to why the circuit court erred in dismissing, on the merits, his claims against KCTCS and Newberry. His arguments are misplaced. As emphasized above, the circuit court dismissed all of his claims against each appellee "without prejudice." A dismissal without prejudice in this case means in sum that determination of the merits has not been made and accordingly, the order is entitled to no *res judicata* effect. *See Edinger v. Miller*, 295 Ky. 287, 174 S.W.2d 421 (1943). The propriety of the circuit court's decision in this respect has never been at issue; no post-judgment motion was ever filed asserting this was some form of patent error; and, no argument is raised in this appeal (and no cross-appeal was filed by the appellees) asserting that the circuit court's decision to dismiss "without prejudice" represented an abuse of discretion or was otherwise erroneous.¹

¹ We review a circuit court's decision to dismiss a cause of action with or without prejudice for abuse of discretion, which is a deferential standard. *Sublett v. Hall*, 589 S.W.2d 888, 893 (Ky. 1979).

In short, Robinson has failed to offer any argument that this Court is capable of reviewing. Thus, we AFFIRM.

ALL CONCUR.

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