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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000668-MR
AND
NO. 2014-CA-000724-MR

UNIVERSITY OF LOUISVILLE — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CI-005294

LAUREL HARPER — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, NICKELL AND TAYLOR, JUDGES.

ACREE, JUDGE: The University of Louisville appeals the Jefferson Circuit Court's November 15, 2013 judgment affirming the jury's verdict in favor of Laurel Harper and the award of damages with respect to her claim under the Kentucky Whistleblower Act,[1] as well as the March 20, 2014 opinion and order

[1] Kentucky Revised Statutes (KRS) 61.102.

awarding Harper's attorney's fees and costs. Additionally, Harper cross-appeals the circuit court's opinion and order denying her motion for front-pay damages. After review, we reverse.

I. Factual and Procedural Background

Laurel Harper was employed at the University of Louisville in the Office of Communications and Marketing (OCM) from 1999 until February 2011. The University began a reorganization of the OCM in 2007. Mary Griffith was hired in 2008 as a Senior Associate Vice President responsible for the revamping project. The reorganization ultimately led to elimination of certain job functions. Harper's duties as Director of Content Management was included among seven job functions eliminated in the University's reorganization plan.[2]

Harper brought suit against the University alleging age discrimination, gender discrimination, hostile work environment, retaliatory discharge, and violations of the Kentucky Whistleblower Act. Harper's gender discrimination claim and violations of the Kentucky Whistleblower Act proceeded to trial. All of her other claims were dismissed.

Relevant to this appeal is Harper's claim under the Kentucky Whistleblower Act. Harper alleged in her complaint that her reports of departmental waste, mismanagement of funds, and overspending to Griffith and other University employees resulted in the elimination of her position.

[2] The announcement eliminating Harper's position with the University was made in December 2010. However, Harper's last day was February 3, 2011.

At the conclusion of Harper's case, the University made a motion for directed verdicts on the claims, which the trial court denied. The jury returned a verdict in favor of the University on Harper's gender discrimination claim, but in favor of Harper on her claim under the Kentucky Whistleblower Act. The jury awarded damages to Harper in the amount of $226,409 for back pay and $201,000 for mental anguish believed to have been suffered by Harper as a result of the University's misconduct. The trial court affirmed the verdict in a judgment entered on November 15, 2013.

The University subsequently filed a motion for the trial court to enter a judgment notwithstanding the verdict, or alternatively, modify the award of damages in its judgment or order a new trial. Harper also filed motions for an award of attorney's fees and costs and for front pay following the trial court's judgment.

The trial court denied the University's motions in an opinion and order entered March 20, 2014. On the same day, but in a separate opinion and order, the trial court ordered the University to pay attorney fees in the amount of $131,362 and costs in the amount of $1,996.19. The trial court also denied Harper's motion for front pay. This appeal and cross-appeal followed.

Additional facts will be discussed as they become relevant.

II. Standard of Review

As an appellate tribunal reviewing evidence supporting a judgment entered upon a jury verdict, we are limited to determining whether the trial court

erred in failing to grant the motion for a directed verdict. *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461 (Ky. 1990). A trial judge's denial of a directed verdict is reviewed under the clearly erroneous standard. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

Also, in conducting our review, we acknowledge that "[a]ll evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact." *Lewis*, 798 S.W.2d at 461. "Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice." *Bierman*, 967 S.W.2d at 18.

Matters of statutory interpretation are purely questions of law reviewed *de novo*. *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789, 792 (Ky. 2008).

III. Analysis

Whistleblowing, as provided in KRS 61.102(1), occurs when a state employee "in good faith reports, discloses, divulges, or otherwise brings to the attention of … [an] appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance … or any facts or

information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial or specific danger to public health or safety." KRS 61.102(1).

The Kentucky Whistleblower Act serves the remedial purpose of protecting "employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Davidson v. Com., Dep't. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004) (quoting *Meuwissen v. Dep't. of Interior*, 234 F.3d 9, 13 (Fed.Cir. 2000)). It is imperative that the statute "be liberally construed to serve that purpose." *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789, 793 (Ky. 2008).

To demonstrate a violation of KRS 61.102, a plaintiff employee must establish the following elements:

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or punish the employee for making such a disclosure.

Davidson, 152 S.W.3d at 251. The employee must additionally "show by a preponderance of the evidence that 'the disclosure was a contributing factor in the personnel action.'" *Id.* (quoting KRS 61.103(3)). The burden of proof then shifts to the employer "to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." *Id.*

Because the federal and Kentucky whistleblower legislation is similar, our courts have routinely looked to the federal courts' interpretation of the federal statute as persuasive. *Com. Dep't. of Agric. v. Vinson*, 30 S.W.3d 162, 169 (Ky. 2000); *Davidson v. Com., Dep't. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004); *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008).

The University's first contention on appeal is that the circuit court erred when it denied the University's motions for directed verdict and judgment notwithstanding the verdict because Harper's conduct is not protected activity under the Kentucky Whistleblower Act. The University specifically takes issue with Harper's "disclosures" by characterizing her reports as conclusory allegations of wrongdoing of which she had no personal knowledge. The University also maintains Harper did not reveal any information that was not publicly known or accessible.

At trial, Harper presented several instances when she "blew the whistle" on overspending and waste of University funds, within the OCM, beginning in mid-2009 and thereafter until the reduction-in-force (RIF) plan announced in December 2010. Harper testified that she felt obligated to question the OCM's spending practices in her position with the University because, throughout her employment, she saw positions and programs continuously reduced or eliminated across campus due to budgetary constraints. Also, Harper was disturbed by the preferential treatment demonstrated by Griffith toward Griffith's niece, who was also employed at the University in the OCM.

We cannot characterize the group of disclosures as a whole; rather, we must discuss them individually under the Whistleblower Act.

Creative Alliance Advertising

Harper testified that she was taken off a project in August 2009 to develop new television advertising when, during a meeting regarding this project, she voiced directly to Griffith a concern that the budget proposed by the production company for the advertisement was too high.

This is not the type of disclosure warranting the protection of KRS 61.102 as it is simply Harper's expression to her supervisor of her personal opinion regarding the proposed production budget. *See Knott County Bd. Of Educ. v. Patton*, 415 S.W.3d 351, 56-57 (Ky. 2013) (Employee's letter stating that her reprimand was invalid was "plainly an expression of her personal opinion" and not a report or disclosure supporting a claim under KRS 61.102). Following this comment, Harper was not included on any further correspondence on the project. This reaction does not change the fact that Harper's remark does not report, disclose, divulge, or otherwise bring attention to any suspected waste or mismanagement of funds that would implicate protection under KRS 61.102.

Attempted Formal Complaint Against Griffith

Harper's next purported disclosure occurred around September 2009. She registered a complaint with Human Resources Director, Harvey Johnson. Harper testified that she attempted to file a formal complaint with Johnson against Griffith for reprisals against her after Harper's earlier comments about the

department's irresponsible spending. She also wanted to complain that Griffith was treating her disparately from other employees. Harper stated she went to Johnson because she believed her position with the University was threatened based on Griffith's reactions to her comments about OCM spending. A formal complaint against Griffith was never filed, but Harper did have a discussion with Johnson about her problems with Griffith; Johnson advised her how she should handle issues with Griffith going forward.

This report represents a protected disclosure within Kentucky's Whistleblower Act. The statute provides protection for even attempted disclosures. *See* KRS 61.103(1)(a). Her attempt to file a complaint was an expression of her belief that Griffith was abusing her authority and retaliating against her. Harper sought prevention of both.

However, no formal complaint was ever issued against Griffith. Consequently, there is no evidence of a link between Harper's complaint and any conduct that could be called retaliatory. Stated differently, Harper cannot establish a necessary element of a whistleblower act claim, *i.e.*, that her complaint was a contributing factor in the University's personnel action. *See* KRS 61.103(3).

Grawemeyer Logo

Harper also maintains that she reported overspending in the spring of 2010 after approximately $30,000 was paid to an outside agency to design a new logo for the University's annual Grawemeyer Award. During a meeting, when Harper asked Griffith whether the Grawemeyer Committee had approved the logo,

Griffith became angry and yelled at Harper; the logo had been rejected by the Committee after the work had already been completed and the money spent.

This situation does not present a disclosure warranting the protections of KRS 61.102. "An otherwise at-will employee cannot gain whistleblower status, and the protections that come with that status, by simply complaining to her boss about what she perceives as [her] misconduct." *Pennyrile Allied Cmty. Servs., Inc. v. Rogers*, 459 S.W.3d 339, 346 (Ky. 2015). This communication is not a report or disclosure of any suspected concealed wrongdoing, but only indicates Harper's disapproval of what harper considered Griffith's bad management decision. "Criticism directed to the wrongdoers themselves is not normally viewable as whistleblowing." *Horton v. Dep't. of Navy*, 66 F.3d 279, 282 (Fed.Cir. 1995). Harper testified that she did not always agree with Griffith's decisions but, "[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations." *Willis v. Dep't. of Agric.*, 141 F.3d 1139, 1143 (Fed.Cir. 1998). Accordingly, this exchange does not serve as a disclosure within the meaning of KRS 61.102.

Email to Board of Trustees Staff Member

Next, Harper relayed information about perceived misuse of OCM funds to a Board of Trustees staff member. Harper was provided the opportunity to express ongoing concerns at the University through the staff member who was gathering information to take to the University President. She expressed those concerns in an email which was organized into topics of nepotism, hiring outside

University policy, irresponsible spending, and vague job roles and responsibilities. Relevant to our discussion is the following portion of Harper's April 2010 email:

> **Irresponsible spending**: This takes into account all of the above, plus the buyouts written about in the Courier-Journal. Several RFPs also have been posted in the past couple of months for consultancies to assist with tasks that could very well be handled in-house by existing staff, simply by re-directing a small portion of the money consultants would cost to fund a couple of staff positions. This would still leave a chunk of funds in the bank, plus bring some much-needed relief to overworked employees.
>
> . . . .
>
> I trust that you will be able to put this information to good use while respecting my confidentiality, as I have already tried to go through proper channels to bring this to the university's attention but have been cautioned that my job would be jeopardized in doing so.

Harper's email expresses her belief that several projects which were sent out for bid by third parties could have been performed in-house to help save money and boost department morale. Her input had been solicited and, in confidence, she provided suggestions about greater efficiency and economy. This occurred in the midst of the reorganization of the OCM and the University's billion dollar "Capital Campaign." Harper's email is not a disclosure within the meaning of KRS 61.102 for the following reasons.

Harper only voiced her dissatisfaction with the department's decision to request bids from third parties for certain projects. Harper's email serves only as criticism of a business practice within the OCM. This disagreement with what

appears to be customary OCM exercise does not effectively "blow the whistle" on even suspected waste or mismanagement of University funds. It relates only to prospective activity on OCM projects. Accordingly, Harper's email to the staff member to the Board of Trustees is not a disclosure within the meaning of KRS 61.102.

Even if Harper's email was to be construed as a disclosure protected by KRS 61.102, there was no evidence that anyone other than Harper and the email recipient was aware that Harper was the source of these specific complaints. Based on the record before us, the recipient of Harper's email abided by Harper's request that the content of her email remain confidential. Therefore, Harper could not use the email as evidence of a "contributing factor" in the University's personnel action to include her in the RIF plan.

Conversations with John Drees

Harper also testified that she had several conversations with Associate Vice President of the OCM, John Drees, about the OCM overspending on certain projects. Drees was Harper's supervisor prior to Griffith's hiring. Drees recalled that Harper took issue with the amounts spent on the Creative Alliance television advertisement and the Capital Campaign launch party. But Drees cautioned Harper, as her friend, against going forward with any of her criticisms about Griffith and her niece because he felt it could jeopardize her working relationships within the University.

Harper's conversations with Drees are not disclosures within the meaning of KRS 61.102. Based upon Drees's response to Harper's concerns, it is clear that their conversations were not going to result in any corrective action to the perceived misconduct. *See Pennyrile*, 459 S.W.3d at 346.

Comments about the budget

Harper's final complaint about the OCM's spending was made to a fellow Director in the OCM, Jeff Rushton, on November 30, 2010. Rushton was preparing the department's budget for the following year, and asked Harper to review the budget and provide feedback. Harper took issue with a proposed line item that budgeted $6,000 per week for Creative Alliance consulting, saying it was "a bit high" and "ridiculous." Seemingly misunderstanding a budget's purpose to *estimate* future expenses, she questioned how such an amount could be budgeted on a weekly basis without knowing ahead of time that Creative Alliance would perform services worth $6,000 per week. In response, the budget line item was reduced from $6,000 to $5,000.

Apparently related to this process, she questioned an expense item from the previous fiscal year of $670,000 that had been spent on the Capital Campaign launch party, stating it was "ridiculously high" and she "couldn't believe [the University] had spent that much money on a party." (Harper's Test. at 9:50:34, Oct. 30, 2013). However, she also acknowledged that she was not part of the financial planning or administration for the event, that she never saw itemized

costs for the event, and did not know what expenditures were necessary for such a project.

Harper's statements themselves to Rushton do not qualify as disclosures of "mismanagement, waste, fraud [or] abuse of authority" of a whistleblower. She only opined that the amount spent on the party was "ridiculously high." Clearly, the statement was not made to expose any suspected or concealed wrongdoing as the amount was plainly included in the OCM's budget. Harper was not bringing to light anything not otherwise known to the University other than her discontent with the dollar figure.

Also, Harper's suggestion regarding the weekly $6,000 allocation for "agencies of record" is not a protected disclosure of suspected waste or mismanagement. The solicited input is simply Harper's opinion of a proposed budgetary figure. Also, the amount was reduced, and it appears it was at her suggestion. Harper's critiques of the budget are not the type of disclosures contemplated within the meaning of KRS 61.102.

After reviewing the budget and discussing the two items with Rushton, Harper stated that she performed research on what other comparable universities spent on events similar in nature to the launch party. Harper further testified that she did not have a chance to voice her complaint regarding the launch party expense and other spending within the OCM before the University announced the elimination of her job function as part of the RIF plan on December 8, 2010.

Harper cannot achieve Whistleblower status and the protections that come with it by asserting that she had not gotten a chance to voice her complaints about the excessive launch party expenses and other budget expenditures before her position was eliminated as part of the RIF. We are aware of the broadly drafted and liberally constructed KRS 61.102 which allows for even imminent disclosures of suspected misconduct. "Disclosure" is defined in KRS 61.102(1) as "a person acting on his own behalf, or on behalf of another, who reported or *is about to report*, either verbally or in writing any matter set forth in KRS 61.102." KRS 61.103(1)(a)(emphasis added.). Yet, Harper made no threat to report any suspected violations of the law. Harper unquestionably disagreed with business decisions being made within the OCM, especially since Griffith was hired in 2008 and the reorganization implemented. Despite her proffered complaints, she did not report the alleged misconduct in such a way that would be protected by the Whistleblower statute.

Because Harper did not make a good faith disclosure protected under the Kentucky Whistleblower Act "there is a complete absence of proof on a material issue" to her claim. *Bierman*, 967 S.W.2d at 18. Therefore, the judgment of the Jefferson Circuit Court must be reversed.

Based upon our disposition of this action, Harper is not entitled to attorney's fees. Additionally, both the University's remaining arguments and Harper's cross-appeal regarding front pay damages are now moot.

IV. Conclusion

For the reasons set forth above, the judgment of the Jefferson Circuit Court is reversed.

NICKELL, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT:
Randall S. Strause Courtney L. Graham Louisville, Kentucky	Michael A. Augustus Louisville, Kentucky