

RENDERED: AUGUST 19, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000453-MR

WILLIE LOVE TALLEY

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 12-CI-00446

MAC AUTO TEAM, LLC;  
RONALD McCAULEY; and  
WILLIAM WILLOUGHBY

APPELLEES

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING

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

COMBS, JUDGE: Willie Love Talley appeals from an order of the Jessamine Circuit Court dismissing his action against Ronald McCauley, William A.

Willoughby, and MAC Auto Team, LLC (MAC). After our review, we affirm in part, vacate in part, and remand for further proceedings.

Talley began working with MAC Auto Team in Nicholasville on May 8, 2008. He was discharged from his employment on October 5, 2011. The following day, Talley filed a complaint against his former employer with the Kentucky Labor Cabinet in which he alleged that he had often been shorted his earnings.

On May 7, 2012, Talley filed a civil action against MAC alleging that he had been wrongfully discharged. He alleged that MAC discharged him because he had complained about the failure of the company to pay him timely the full amount of his earnings. He also included allegations against Ronald McCauley and William Willoughby (owners and managers of MAC) for allegedly distributing to the community printed material pertaining to Talley's past history derived from Kentucky's sex offender registry. The defendants answered the complaint and denied the allegations against them. A period of discovery ensued.

In a motion filed on October 31, 2014, McCauley, Willoughby, and MAC Auto Team contended that they were entitled to judgment as a matter of law pursuant to the provisions of CR<sup>1</sup> 56. In support of their motion for summary judgment, the defendants filed with the court portions of Talley's deposition testimony. This testimony tended to indicate that Talley had complained to his employer and to the Kentucky Labor Cabinet concerning the disputed earnings

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<sup>1</sup> Kentucky Rules of Civil Procedure.

only *after* he had been discharged. Talley opposed the motion, and, in response, filed his sworn affidavit indicating that he had “constantly” complained to managers *before* his discharge that his earnings had not been properly paid. Talley also filed with the court a copy of his written complaint to the Kentucky Labor Cabinet. In the complaint, Talley had alleged that his “check’s [*sic*] have been wrong for a long time. . . .”

In an order entered on February 25, 2015, the Jessamine Circuit Court granted the motion for summary judgment. The court determined that Talley’s claim for wrongful discharge failed as a matter of law since there was no evidence to support the assertion that he had been discharged as a result of his complaints concerning the improper payment of his earnings. It concluded that Talley’s post-deposition affidavit was insufficient to create a material issue of fact. Additionally, the circuit court concluded that no action could be maintained against McCauley and Willoughby for the distribution of fliers that accurately identified Talley as a registered sex offender. This appeal followed.

Talley argues on appeal that the trial court erred by granting summary judgment. Upon our review, we must examine the pleadings, together with the affidavits and exhibits, to determine whether MAC Auto Team, McCauley, and Willoughby have shown that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. CR 54.03; *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995). We must view the evidence of record in a light most

favorable to Talley. *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W2d 476 (Ky. 1991).

As an exception to the employment-at-will doctrine, a common law claim for wrongful discharge can be maintained where the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law. *Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412 (Ky. 2010). The alleged reason for the discharge of the employee must be: (1) the employee's failure or refusal to violate a law in the course of employment or (2) the employee's exercise of a right conferred by well-established legislative enactment. *Id.* The discharged employee must establish a connection between the protected activity and the discharge. *Follett v. Gateway Regional Health System*, 229 S.W.3d 925 (Ky. App. 2007).

Talley contended that he was discharged, in part, for complaining to his employer that his earnings had not been paid in accordance with our statutory wages and hours provisions. He believed that he was engaged in a *statutorily-protected* activity when he spoke out about the errors in his compensation and that his discharge was directly linked to the complaints he made to his employer. However, the trial court rejected Talley's post-deposition affidavit setting forth that reasoning. The court concluded that Talley had failed to show that there was a connection between the protected activity and his discharge since the evidence of record did not show that he had complained about the alleged wages and hours violations *before* his discharge.

MAC, McCauley, and Willoughby argue that the trial court's summary judgment must be affirmed because Talley failed to show the required connection between his discharge and any complaints he may have made concerning the alleged wages and hours violations. They contend that the trial court properly rejected Talley's affidavit testimony indicating that he had complained about the proper payment of his earnings *before* his discharge because it simply contradicted his prior deposition testimony in which he had described only complaints lodged *following* his discharge. We disagree.

In *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732 (Ky. 2000), the Supreme Court of Kentucky held -- unequivocally -- that a post-deposition affidavit may not be ignored. It accepted the principle that an affidavit which merely contradicts earlier testimony cannot be submitted for the purpose of attempting to create a genuine issue of material fact. Nevertheless, the Supreme Court held that a trial court "should be granted the opportunity to review **all the evidence**, instead of basing its decision on what appears to be clear and unequivocal testimony, but which is really incomplete and misleading." *Id.* at 736. (Emphasis added.)

In this case, MAC Auto Team, McCauley, and Willoughby sought to limit the evidence considered by the trial court to deposition testimony that on its face is indeed "incomplete and misleading." At Talley's deposition, counsel for MAC, McCauley, and Willoughby asked, "is there anything else related to your complaint that we haven't discussed that you would like to talk about here today?"

It appears that Talley's answer was interrupted by counsel and rendered incomplete. Opposing counsel sought to establish whether there were any other issues that had not been discussed other than allegations related to: (1) the wages and hours issue, (2) the distribution of printed material identifying him as a sex offender, and (3) the delivery to him of an offensive package. Talley responded, "No." He further responded as follows: "We discussed exactly what's in that complaint right there. Yes, we have." In his sworn, post-deposition affidavit, Talley explained that he "was not asked about, nor did [he] testify about" other facts -- including his constant complaints to McCauley and Willoughby *before* his discharge regarding their failure to pay him properly and their reactions to these conversations.

We are not persuaded that Talley's post-deposition affidavit *merely contradicts earlier testimony*. Instead, his affidavit explains why the deposition testimony is incomplete and misleading. The affidavit did not *create* a disputed issue of material fact, but the testimony contained in it was sufficient to show the existence of one; *i.e.*, whether Talley's discharge was linked to his statutorily protected activity. Consequently, summary judgment with respect to this claim was erroneously granted, and it must be vacated.

Next, Talley contends that the trial court erred by granting summary judgment and dismissing his claim against McCauley and Willoughby for harassing him in violation of KRS<sup>2</sup> 525.070, which prohibits use of information

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<sup>2</sup> Kentucky Revised Statutes.

from the website of the sex-offender registry to harass a sex offender. He argues that McCauley and Willoughby violated the provisions of the statute by distributing on one occasion sixty-six copies of a flier printed from Kentucky's sex-offender registry. Talley contends that McCauley and Willoughby are individually liable pursuant to KRS 446.070, which authorizes a private right of action for civil damages to an individual injured by the violation of any statute. We disagree.

KRS 525.070 (1)(e) provides that a person is guilty of harassment where, with the intent to intimidate, harass, annoy, or alarm another person, he “engages in a **course of conduct** or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. . . .” (Emphasis added.)

The trial court did not err by concluding, as a matter of law, that the conduct of McCauley and Willoughby did not constitute a violation of the provisions of KRS 525.070 for which Talley could expect to recover damages. Under the circumstances, it cannot be said that a one-time distribution of the fliers -- although 66 in number -- constituted a course of conduct. The act was an isolated occurrence that was not repeated or ongoing in nature. Additionally, it is a matter of fact that Talley is a registered sex offender. The registry is available to the public, and our legislature has determined that distribution of the information contained in it can serve a public safety function.

The actions of Willoughby and McCauley cannot be said to rise to the level of actionable harassment as contemplated and required by the statute. There is no indication that either of them possessed the requisite intent to harass, annoy, or alarm as required by the provisions of KRS 525.070. While it is apparent that the distribution of the information made Talley uncomfortable, Talley's allegations do not demonstrate that the conduct of Willoughby and McCauley alarmed him beyond the fact that he was made to feel uncomfortable. Mere discomfort about the revelation of a fact in which there is no privacy interest is insufficient to support a claim under the provisions of KRS 525.070(1)(e). Moreover, other than the presence of speculation, the record is devoid of concrete evidence that Willoughby and McCauley acted with the intent necessary to underlie a viable claim of harassment. Thus, there existed no genuine issue of material fact concerning Talley's harassment claim, and it was properly dismissed by way of summary judgment.

The judgment of the Jessamine Circuit Court is affirmed in part and vacated in part. The matter is remanded for further proceedings consistent with our opinion.

ALL CONCUR.



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