

RENDERED: NOVEMBER 4, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001053-MR

WARREN LANHAM

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, SPECIAL JUDGE  
ACTION NO. 13-CI-00369

MARTY ELLIOTT, INDIVIDUALLY,  
AND IN HIS CAPACITY  
AS BOYLE COUNTY SHERIFF

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: ACREE, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Warren Lanham brings this appeal from a June 10, 2015,  
Opinion and Order of the Boyle Circuit Court granting summary judgment to  
Marty Elliott upon Lanham's claims relating to his discharge as a sheriff's deputy

from the Boyle County Sheriff Department. We affirm in part, reverse in part, and remand.

In 2002, Lanham was hired as a deputy sheriff in the Boyle County Sheriff's Department and was eventually promoted to Chief Deputy Sheriff. During this time, Marty Elliot was the Sheriff of Boyle County. In 2012 Sheriff Elliott was informed by Boyle Circuit Judge Darren Pickler that members of a grand jury expressed concerns about Lanham's conduct while on duty, including his alleged destruction of a "pill soak" used to manufacture methamphetamine.<sup>1</sup> Thereupon, Sheriff Elliott demoted Lanham to Deputy Sheriff effective October 1, 2012, and then suspended Lanham on October 10, 2012. After additional investigation, Sheriff Elliott orally informed Lanham that he was going to be terminated and by letter dated October 17, 2012, formally terminated Lanham's employment as a deputy sheriff.

On August 12, 2013, Lanham filed a complaint in the Boyle Circuit Court against Sheriff Elliott, in his individual and official capacities. In the complaint, Lanham alleged that Sheriff Elliott violated the due process procedures set forth in the Police Officers' Bill of Rights codified in Kentucky Revised Statutes (KRS) 15.520 by failing to afford Lanham a hearing before discharging him, by failing to obtain affidavits from the complaining grand jury members, and by failing to advise Lanham of his rights before being questioned. Due to Sheriff Elliott's violation of KRS 15.520, Lanham claimed that his discharge was

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<sup>1</sup> Boyle Circuit Judge Darren Pickler recused from this case and Franklin Circuit Judge Phillip Shephard was appointed Special Judge.

improper and sought reinstatement as chief deputy sheriff. Lanham also claimed that Sheriff Elliott wrongfully terminated Lanham for obtaining legal counsel.

Sheriff Elliott filed an answer and eventually filed a motion for summary judgment. Kentucky Rules of Civil Procedure (CR) 56. Sheriff Elliott argued that the due process procedures of KRS 15.520 do not apply to Lanham as a deputy sheriff in Boyle County. Citing KRS 70.030(5), Sheriff Elliott maintained that by not adopting a deputy sheriff merit board, KRS 15.520 was inapplicable to his office and that deputy sheriffs in Boyle County served at the will of the sheriff per KRS 70.030. Sheriff Elliott also maintained that Lanham's claim of wrongful termination must fail as no public policy in Kentucky recognized a general legal right to obtain counsel in anticipation of civil proceedings.

Over a year after filing the complaint, Lanham filed a motion for leave to file a second amended complaint on November 10, 2014. In the second amended complaint, Lanham sought to additionally claim that Sheriff Elliott terminated Lanham's employment as a sheriff deputy due to his age in violation of the Kentucky Civil Rights Act (KRS Chapter 344). Sheriff Elliott opposed the motion to file a second amended complaint and argued that the motion should be denied due to prejudice.

By a June 10, 2015, Opinion and Order, the circuit court granted Sheriff Elliott's motion for summary judgment and denied Lanham's motion for leave to file a second amended complaint. As to Lanham's claim that KRS 15.520

had been violated by Sheriff Elliott, the circuit court concluded that KRS 15.520 was inapplicable:

KRS 15.520, or the Police Officers' Bill of Rights, applies to "police officers of local governments who receive funds pursuant to KRS 15.410 through 15.992," also known as the Kentucky Law Enforcement Foundation Program Fund. Boyle County is a recipient of these program funds, and Lanham was a police officer (covered under this statute) receiving those funds. According to KRS 70.030(1), deputy sheriffs are at-will employees, which the sheriff appoints or revokes, except when prohibited by KRS 70.260 to 70.273. KRS 70.260 describes the option for counties to create a deputy sheriff merit board to be "charged with the duty of holding hearing, public and executive, in disciplinary matters concerning deputy sheriffs." This Board may or may not be enacted, depending on the individual county's primary legislative body.

A substantially similar case was decided before the Court of Appeals, in an unpublished decision, which held that "KRS 70.030(4)<sup>2</sup> clearly is intended to provide local county governments with the option of either providing or not providing merit board protections to deputy sheriffs. If such a board has not been established within a particular county, it must be concluded that deputy sheriffs in that county continued to be hired under KRS 70.030(1) as at-will employees." *Vincent v. Doolin*, 2005 WL 928649 (Ky. App. April 22, 2005). Boyle County had not adopted a merit board, and thus has opted to treat its deputy sheriffs as at-will employees, who do not have the procedural due process protections afforded under KRS 15.520(h). If a hearing had been held, the safeguards listed in KRS 15.520(h) would have been followed; however, it is this Court's opinion that an administrative hearing was unnecessary because Lanham was an at-will employee terminated by the sheriff, in a

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<sup>2</sup> Subsection (4) of Kentucky Revised Statutes (KRS) 70.030 was initially enacted in 1998; however, KRS 70.030 was subsequently amended, and the section was renumbered to subsection (5).

county where a sheriff merit board was not in place. Therefore, Lanham's claim for violation of KRS 15.520 fails and must be dismissed as the law is clear on this issue and no genuine issues of fact remain.

The circuit court also concluded that justice did not demand the amending of Lanham's complaint per CR 15.02; rather, the circuit court believed that Sheriff Elliott would suffer prejudice by allowing the second amendment to the complaint. This appeal follows.

Lanham contends that the circuit court improperly rendered summary judgment. In particular, Lanham maintains that the circuit court committed error "as a matter of law in holding that KRS 15.520 does not grant rights to a deputy sheriff in a county where there is no Deputy Sheriff Merit Board." Lanham's Brief at 4. Lanham points out that a sheriff deputy is included within the definition of "police officer" entitled to the due process procedures outlined in KRS 15.520 and that a county sheriff's office is included in the definition of "local unit of government." KRS 15.420(1) and (2); *Pearce v. Univ. of Louisville*, 448 S.W.3d 746 (Ky. 2014). Lanham further argues that KRS 15.520 applies to any county sheriff's office that receives funds from the Kentucky Law Enforcement Foundation Program (KLEFP) under the plain language of KRS 15.520(4). As the Boyle County Sheriff uncontrovertibly receives KLEFP funding, the procedural protections of KRS 15.520 apply. Lanham believes the creation of a deputy sheriff merit board per KRS 70.260-70.273 is simply inconsequential to the application of KRS 15.520.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. CR 56.03.

This appeal involves the proper interpretation of statutory provisions. The interpretation of a statute presents an issue of law, and our review proceeds *de novo*. See *Pearce v. Univ. of Louisville*, 448 S.W.3d 746 (Ky. 2014).

The proper interpretation and application of KRS 15.520 and KRS 70.030 is a matter of primary dispute between the parties.<sup>3</sup> As noted, KRS 15.520 is also known as the Police Officers' Bill of Rights. *City of Munfordville v. Sheldon*, 977 S.W.2d 497 (Ky. 1998); *Pearce*, 448 S.W.3d 746. It provides specific due process procedures that a local governmental unit must follow when investigating and resolving a complaint against a police officer. Any local governmental unit that receives KLEFP funding is bound by the provisions of KRS 15.520.<sup>4</sup> *Pearce*, 448 S.W.3d 746. KRS 15.520(4) specifically states that “this section shall only apply to police officers of local units of government who receive funds” from KLEFP. Under the 1998 amendments to KRS 15.420, a sheriff's office was included in the definition of “local unit of government,” and deputy sheriff was included in the definition of “police officer.”

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<sup>3</sup> The latest version of KRS 15.520 was amended effective June 24, 2015. However, as the pertinent events took place in 2012 in this case, we are concerned with the version of KRS 15.520 amended effective July 15, 1994, and our analysis will proceed accordingly.

<sup>4</sup> The Kentucky Law Enforcement Foundation Program (KLEFP) was enacted to provide funding to participating law enforcement agencies in an effort to provide education upon the minimum standards of professional conduct and attract “highly qualified young people to the field of law enforcement.” *Pearce v. Univ. of Louisville*, 448 S.W.3d 746, 755 (Ky. 2014).

KRS 70.030 concerns county sheriffs, deputy sheriffs, and KLEFP funding. KRS 70.030(1) generally provides that a sheriff may appoint and revoke the appointment of a deputy sheriff at his pleasure unless the revocation would violate certain statutory provisions applicable only if a deputy sheriff merit board was adopted in that county. As to KLEFP, KRS 70.030 was amended in 1998 to provide that “[a] sheriff’s office may, upon the written request of the sheriff, participate in the Kentucky Law Enforcement Foundation Program Fund authorized by KRS 15.410 to 15.510, without the county establishing a deputy sheriff merit board.” KRS 70.030(5).

Taken separately, the provisions of KRS 15.520(4) and KRS 70.030(1) and (5) appear plain and straight forward. The ambiguity only arises when juxtaposing the two statutes. In KRS 70.030(1), the sheriff’s authority to hire and terminate deputies is only circumscribed if a deputy sheriff merit board has been adopted in that county; whereas, KRS 15.520(4) mandates application of its due process procedures if the sheriff elects to receive funding from KLEFP. And, KRS 70.030(5) allows the sheriff to receive KLEFP funding without establishing a deputy sheriff merit board.

To resolve this apparent conflict, we are guided by the Kentucky Supreme Court’s recent decision in *Pearce v. Univ. of Louisville*, 448 S.W.3d 746 (Ky. 2014). In *Pearce*, the Supreme Court was faced with the question of whether the due process procedures of KRS 15.520 applied to intra-departmental complaints against a police officer. The Court answered this question in the

affirmative and recognized that KRS 15.520 should be given “a broad and expansive reach” to conform to the legislative purpose thereof. *Id.* at 756. The Supreme Court further held that “the entire tone and tenor of KRS 15.520 suggests *uniformity* of due process protections to police officers all across the Commonwealth, irrespective of the urban or rural nature of the local community.” *Id.* at 759. As to the dissent’s perceived conflict with KRS Chapter 70, the Supreme Court dismissed same and reasoned:

And further, the so-called “conflicts” identified by the dissent are actually *not* conflicts at all. An examination of those provisions discloses that KRS 15.520 may easily be overlain onto the existing statutory structure without disturbing the processes provided therein. The dissent greatly overstates the ardor of complying with the basic due process rights required by KRS 15.520.

*Id.* at 759.

In this case, we are mindful that KRS 15.520 must be given a “broad and expansive reach” in order to further its legislative goals and to establish a uniform set of administrative due process procedures in the Commonwealth as recognized in *Pearce*. *See id.* at 755. In accordance therewith, we necessarily interpret KRS 15.520 as mandating that a sheriff is bound by the due process procedures therein if the sheriff has elected to receive KLEFP funding. Simply stated, KRS 15.520 is triggered by the sheriff’s acceptance of KLEFP funds. And, we believe that KRS 70.030(5) simply provides that the establishment of a deputy sheriff merit board has no bearing upon the sheriff’s acceptance of KLEFP funds and concomitant application of KRS 15.520. Although not relevant herein, we



observe that if a sheriff receives KLEFP funding and also establishes a deputy sheriff merit board, “KRS 15.520 may easily be overlain onto the existing statutory structure without disturbing the process provided therein.” *Pearce*, 448 S.W.3d at 759.

Accordingly, we conclude that Sheriff Elliott was bound by the due process procedures outlined in KRS 15.520 and the circuit court erred by rendering summary judgment concluding otherwise.

Lanham next asserts that the circuit court erroneously rendered summary judgment upon his common-law wrongful termination claim. Lanham argues that he was terminated as a deputy sheriff “in whole or in part, because Lanham told [Sheriff] Elliott he was retaining counsel.” Lanham’s Brief at 16. Lanham maintains that “it is against public policy to fire someone precisely *because* he has retained counsel, and that is what Lanham was fired for saying he was going to do.” Lanham’s Brief at 18.

To prevail upon a wrongful termination claim, it must be demonstrated:

- 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.

*Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky.1985).

If Lanham was in fact terminated because he told Sheriff Elliott of his intent to obtain counsel, Lanham's wrongful termination claim must, nonetheless, fail under Kentucky law. Lanham does not cite this Court to a well-defined public policy recognized in this Commonwealth that evidences a general right to counsel in anticipation of civil legal proceedings. Were this a criminal proceeding, our analysis and conclusion might be different. The existence of such a well-defined public policy is a question of law and capable of adjudication by summary judgment. Therefore, we agree with the circuit court that no well-defined public policy existed to be violated under the facts of this case, and we hold that the circuit court properly rendered summary judgment in favor of Sheriff Elliott upon Lanham's common law wrongful termination claim.

Lanham lastly maintains that the circuit court abused its discretion by denying his motion for leave to file a second amended complaint. In the second amended complaint, Lanham sought to assert an age discrimination claim against Sheriff Elliott. According to Lanham, he was unaware of the grounds supporting the age discrimination claim until his deposition was taken on August 28, 2014:

An age discrimination claim was not included in Lanham's initial complaint because he did not realize that he had grounds for alleging age discrimination until giving his deposition on August 28, 2014[,] triggered discussions with his attorney in which the possibility of this cause of action came to light. During his deposition, Lanham testified that Brian Wolford, then a deputy with the Boyle County Sheriff's Department, told Phillip R. Sammons, a Boyle County Magistrate, at a festival in Perryville that Elliott was going to get rid of the older guys and get new people in there and change things. In

subsequent discussions, Lanham told his counsel that Elliott had volunteered to help Lanham get disability benefits if Lanham chose to retire because of some back problems he had experienced, although Lanham's back problems did not prevent him from doing his job and Lanham had no intention of retiring or seeking disability benefits. After Elliott terminated Lanham (who was older than 40), he hired several significantly younger deputy sheriffs.

Lanham's Brief at 10 (citations omitted).

CR 15.01 is controlling and provides, in relevant part:

[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The determination of when justice requires the amendment of a pleading is within the discretion of the circuit court. *Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961).

And, such discretion will not be disturbed on appeal unless there is a clear abuse thereof. *Id.*; *Scott Farms, Inc. v. Southard*, 424 S.W.2d 574 (Ky. 1968).

In this case, the record indicates that the complaint was filed on August 12, 2013, and the motion for leave to file the second amended complaint was filed on November 10, 2014, some fifteen months later. Also, Sheriff Elliott had filed a motion for summary judgment on October 6, 2014, which was pending before the circuit court.

In denying Lanham's motion to file a second amended complaint, the circuit court viewed the assertion of an age discrimination claim to be prejudicial and believed that a release executed by the parties in a companion civil action barred the age discrimination claim:

In a previous wage and hour case filed by Lanham against the Boyle County Sheriff's Office, the action was settled and formalized through an execution of a Release of Claims signed and dated September 9, 2013. The release stated that [Lanham] would release any and all claims, whether known now or discovered in the future, except the claims pending in this action before this Court. It was the parties' intent to cover all outstanding claims that were not already a part of this lawsuit.

At the time of the filing of the initial complaint, and the first amended complaint, [Lanham] was already aware, or should have been aware, of the facts giving rise to an age discrimination claim – that he was in the protected age class, that he was terminated, and that a younger employee was hired in his place. Thus the age discrimination claim is barred by the release that was signed September 9, 2013. Discovery has been closed, dispositive motions have been filed, and in the final hour, [Lanham] is attempting to assert this new claim.

Moreover, the newly asserted claim for age discrimination is a claim about which that [Harrington] knew or should have known at the time of the filing of the case. His own age places him within a protected class, and the age of the person who was hired to replace him was publicly available information. The fact that information emerged late in discovery that the Sheriff allegedly made statements about replacing older deputies does not provide a basis to reopen discovery and litigate a new claim that [Lanham] chose not to assert originally. To allow the assertion of such a claim would place [Elliott] at a great disadvantage after memories have faded, and the passage of time has made it more difficult to marshal evidence relevant to the new claim. A proposed amendment at this late date is subject to the sound discretion of the Court, and the standard for granting the motion is whether "justice so requires." CR 15.01. Here, the Court finds that it would be unfair to allow such an amendment to the pleadings. As the former Court of Appeals has noted, "[w]hile liberality is in granting leave to amend is desirable, the application is

addressed to the sound discretion of the trial judge.”  
*Bradford v. Billington*, 299 S.W.2d 601 (Ky. 1957).

To allow the assertion of such a claim at this late date would be highly prejudicial to the defendants. In the context of the dispute between these parties, where an ancillary claim had already been settled, reserving only claims asserted in this action, it would be unfair to allow [Lanham] to assert a completely new claim at this date. The release signed by [Lanham] contemplated his continued litigation of the claims he asserted here; it did not contemplate that this case could be used as a vehicle to circumvent the release and raise wholly new claims that had never been previously asserted in this case. Accordingly, the Court, in the exercise of its sound discretion, must deny [Lanham’s] Motion to File a Second Amended Complaint.

Based upon the circuit court’s above reasoning, we are unable to conclude that the circuit court abused its discretion by denying Lanham’s motion for leave to file a second amended complaint. We thus affirm that ruling as the circuit court’s decision was not “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

To summarize, we reverse and remand the summary judgment as to application of the due process procedures in KRS 15.520 and affirm upon all other grounds.

For the foregoing reasons, the Opinion and Order of the Boyle Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

MAZE, JUDGE, CONCURS IN RESULT ONLY.

ACREE, JUDGE, DISSENTS AND FILES A SEPARATE  
OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent as to the majority's view on Lanham's claim for a violation of KRS 15.520.

A sheriff's power, as recognized in *McClure v. Augustus*, 85 S.W.3d 584 (Ky. 2002), to terminate an at-will employee can be divested only when the county fiscal court creates a deputy sheriff merit board. *Id.* at 586. Until or unless such action is taken by the county fiscal court, the sheriff's authority to appoint or remove deputies remains at-will. *Id.* The legislature clearly recognized this circumstance in KRS 70.030(5). Subsection (5) of the statute was enacted subsequent to KRS 15.520(4), and provides that a sheriff may apply for KLEFP funds without the establishment of a deputy sheriff merit board. KRS 70.030(5). The absence of the merits board means the appointment and removal authority of the sheriff of at-will deputies endures despite the receipt of the funds. Therefore, Lanham's claim for a violation of KRS 15.520 must fail. Lanham was an at-will employee terminated by the sheriff in a county where a deputy sheriff merit board was not in place. For these reasons, I dissent and would affirm the circuit court in all respects.

BRIEFS AND ORAL ARGUMENT  
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BRIEF FOR APPELLEE:

D. Barry Stilz  
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ORAL ARGUMENT FOR  
APPELLEE:

D. Barry Stilz  
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