RENDERED: AUGUST 10, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001246-MR

JULIE ANNE WILLIAMS APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN T. ALEXANDER, JUDGE
ACTION NO. 16-CI-00116

CITY OF GLASGOW, KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Julie Anne Williams appeals from two Barren Circuit Court orders, one granting City of Glasgow's ("City") motion for summary judgment and the second upholding the constitutionality of Kentucky's Claims Against Local Governments Act (CALGA). Discerning no error, we affirm.

Williams was employed as a public affairs officer with City's police department.[1] While at work on November 30, 2015, Sgt. Michael Burton[2] requested Williams assist him in printing an image. The image was part of a text message exchange between Sgt. Terry Flatt and Officer Tammy Britt, one of Flatt's subordinate female officers, portraying Britt in the nude. Burton told Williams he needed her assistance in making a paper print of the photograph and accompanying messages to give to Chief of Police Guy Howie. Williams complied, assuming Burton was investigating the impropriety of the text exchange. Williams had no further involvement or knowledge of the investigation Burton was conducting or its progress. It was later revealed Burton had not conducted an investigation but intended to use the image to his advantage.

The police department initiated an internal affairs investigation into Burton's conduct in relation to the image and Burton was subsequently terminated. On January 5, 2016, Williams was also terminated for her actions concerning the image. On her termination form Chief Howie stated by not telling him about the image and text messages Williams had allowed further violations to occur.

[1] As a public affairs officer, William's status was a non-sworn officer. As such, Williams is not afforded the statutory protections of Kentucky Revised Statutes (KRS) 95.450, nor the protections of the policeman's bill of rights under KRS 15.520.

[2] Williams testified in her deposition at the time of this request Sgt. Burton was living with Williams' daughter and they now have a child together.

Williams filed her complaint alleging City violated the Kentucky Civil Rights Act (KCRA)[3] by taking retaliatory and discriminatory actions against Williams for her assistance and/or participation in an "investigation" and also claiming wrongful termination and discharge in violation of public policy. City propounded written discovery to Williams who filed answers in the record. Williams was deposed. After setting the case for trial, City moved for summary judgment. City argued Williams had not engaged in activity protected under the KCRA—specifically KRS 344.280—therefore, City was entitled to judgment as a matter of law on those claims, as well as on Williams' wrongful discharge claim. Williams responded. Williams moved for an order declaring Kentucky's CALGA unconstitutional to the extent it does not allow punitive damage awards against Kentucky municipalities.[4] The trial court entered orders granting City's motion for summary judgment and upholding the constitutionality of Kentucky's CALGA. Williams appeals from these orders.

As an initial matter, in contravention of CR[5] 76.12(4)(c)(v), Williams does not state how she preserved any of her arguments in the trial court.

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[3] KRS 344.010, *et seq.*

[4] Williams duly notified the Attorney General as required by KRS 418.075. The Attorney General has not participated or intervened in this matter.

[5] Kentucky Rules of Civil Procedure.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Further, in contravention of CR 76.12(4)(c)(iv) and (v), which require ample references to the trial court record supporting each argument, Williams' initial brief contains no such references in the argument section and her reply brief makes only one reference to the complaint. This simply does not constitute ample citation to the record.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although

noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike her brief or dismiss the appeal for Williams' failure to comply. *Elwell*, 799 S.W.2d at 48. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

Williams advances three overarching arguments in seeking reversal. Her first argument is the trial court erred in granting summary judgment on her KCRA claims because she believes she engaged in protected activity and she further believes, contrary to the trial court's finding otherwise, that a formal proceeding before the Kentucky Commission on Human Rights (KCHR) was not a prerequisite to her KCRA claims. Second, she argues the trial court erred in granting summary judgment on her wrongful termination claims because she was terminated contrary to the public policy encouraging investigation of potential work place harassment claims and prohibiting retaliation for investigation participation. Finally, Williams argues CALGA should be declared unconstitutional because it precludes an award of punitive damages against local municipalities/governments. After careful review, we discern no error.

Williams' first two arguments assert the trial court erred in granting summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000)).

Williams' first argument pertains to the trial court's award of summary judgment disposing of her KCRA claims. Williams argues she engaged in activity protected by KRS 344.280 and initiation of a formal proceeding before the KCHR is not a prerequisite to her claim under the participation clause of this statute. However, Williams' arguments fail because she did not put forth sufficient allegations to legitimately bring her claims under the KCRA. She simply alleged her actions were protected under the KCRA, but bald assertions are insufficient to properly plead a cause of action.[6] Her remaining allegations are likewise insufficient to bring her claims within the KCRA for reasons discussed herein.

[6] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' [*Bell Atlantic Corp. v. Twombly*,] 550 U.S. [544] at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual

Williams asserts KRS 344.280 is remedial legislation that, as a matter of law, must be liberally construed. As the trial court aptly stated:

> [p]laintiff rightfully observes that the KCRA is remedial legislation and should be liberally construed. It would require that the Court defy precedent found in federal Court of Appeals and the United States District Court decisions from all across the country, however, to apply this rule of statutory construction so as to interpret the statute in the manner suggested by Plaintiff.

For reasons set forth by the trial court as well as the reasons discussed herein, we agree with the trial court's interpretation of applicable law.

Williams, City, and the trial court focus on whether Williams "engaged in protected activity" because it is the first element of a *prima facie* action of impermissible retaliation. *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 132 S.W.3d 790, 803 (Ky. 2004). Without properly alleging this element, from which the others flow, Williams has no claim under the KCRA. "Protected activity" is defined by KRS 344.280, which states, in pertinent part:

> [i]t shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
>
> (1) [t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or

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enhancement.' *Id*., at 557, 127 S.Ct. 1955." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

> participated in any manner in any investigation, proceeding, or hearing under this chapter[.]

KRS 344.280(1) consists of two clauses referred to as the "opposition clause" and "participation clause." The first clause concerns opposition to perceived violations of the KCRA. The second deals with participation in an investigation or other proceeding under the KCRA. The trial court found, and we agree, Williams' allegations attempt to state a cause of action under the participation clause for her part in assisting in an "investigation." However, it is undisputed that no investigation, proceeding, or hearing under the KCRA was ever made or even contemplated.

Williams' argument consists solely of a recitation of theories of law with little or no application to the facts of the case now before us. The cases she relies on differ from this case greatly both factually and in their applicable law. The cases she cites rely on the opposition clause rather than the participation clause to sustain those actions. Because Williams attempted to state her case utilizing the participation clause, her reliance on cases brought under the opposition clause is misplaced.

Williams compared her case to *Charalambakis v. Asbury University*, 488 S.W.3d 568 (Ky. 2016), but it is patently distinguishable. As pointed out by the trial court, *Charalambakis* involved an action under the opposition clause and the Plaintiff therein actually filed a complaint under the KCRA. Furthermore,

although *Charalambakis* held action under the KCRA was not a prerequisite for claims under the opposition clause, it did not state a participation clause claim could be successfully prosecuted without formal action under the KCRA.

The trial court found, and we agree:

> [g]uidance from state appellate courts is relatively sparse in this area. However, reported federal cases are legion. "Because of the substantial similarity of the respective texts and objectives, we interpret the civil rights provisions of KRS Chapter 344, in both the discrimination and retaliation contexts, consistent with the analogous federal anti-discrimination statutes." *Charalambakis v. Asbury University*, 488 S.W.3d 568, 575 (Ky. 2016), *citing Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005) ("[The Kentucky Supreme Court] has consistently interpreted the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws."). Thus, Kentucky's jurisprudence relies heavily on federal decisions when considering issues under the KCRA, largely because of the similar purposes underlying the two statutory schemes. *See, e.g., Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d at 803.

Federal courts have specifically held the participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the [Equal Employment Opportunity Commission (EEOC)]; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC." *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (internal footnotes and citations

omitted).[7] The Sixth Circuit has likewise held "the instigation of proceedings leading to the filing of a complaint or a charge, including 'a visit to a government agency to inquire about filing a charge,' *Polk* [*v. Yellow Freight System, Inc.*], 801 F.2d [190,] 200 [6th Cir. 1986], is a prerequisite to protection under the participation clause." *Booker v. Brown & Williamson Tobacco Co*., 879 F.2d 1304, 1313 (6th Cir. 1989). Therefore, we hold, in Kentucky, the KCHR must be involved even if only through an inquiry about filing a charge to invoke statutory protection under the participation clause.

As previously pointed out, any "investigation" Williams alleges she participated in was, at most, internal in nature as the actions were confined within the police department. No action was made or contemplated involving the KCHR. This failure is fatal to Williams' claims under the KCRA. As such, the trial court did not err in granting summary judgment on those claims.

Williams' second argument pertains to the trial court's award of summary judgment disposing of her wrongful termination claims. It is undisputed Williams was an at-will employee. A narrowly defined exception to the terminable-at-will doctrine was identified in *Firestone Textile Co. Div., Firestone Rubber Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983), providing a cause of action

[7] The KCHR is Kentucky's counterpart to the federal EEOC. The KCHR is established and enabled by KRS 344.010 *et seq.*, specifically KRS 344.015 and KRS 344.150.

for employees terminated in violation of public policy. *See also Grzyb v. Evans*, 700 S.W.2d 399, 400 (Ky. 1985). Williams asserts her termination was violative of well-established public policy.

Once again, Williams' argument consists solely of a recitation of theories of law with little or no application to the facts. Williams asserts there is a well-recognized public policy in favor of promptly investigating a matter involving sexual harassment once it comes to light. Williams argues the same public policy encourages workers and co-employees to voluntarily and meaningfully participate in such an investigation. Williams further argues "[t]his public policy that encourages a forthright participation in the context of a charge of sexual harassment is separate and apart form [sic] the statutory prohibition against retaliation; rather, it is a recognized affirmative defense, generally known as 'prompt corrective action.'"

However, taking the allegations of Williams' pleadings as true, her claim fails because she has not pled a cause sufficient to demonstrate either a charge or investigation of sexual harassment.[8] This failure is fatal to Williams' claim her termination contravened well-established public policy. As such, the

[8] In her complaint, Williams only alleges Burton was investigating the "impropriety" of the text exchange. There was no allegation of sexual harassment, nor do the facts support one.

trial court did not err in granting summary judgment against Williams on her wrongful termination claims.

Williams' third argument is CALGA is unconstitutional because it precludes punitive damages from being assessed against local municipalities. Williams' argument again consists of only a cursory recitation of theories of law with little or no application to the facts. We will not search the record to construct Williams' argument for her, nor will we go on a fishing expedition to find support for her underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Additionally, because Williams has no remaining viable claims in this action and is, therefore, not entitled to an award of damages, punitive or otherwise, we hold the provisions of CALGA are wholly irrelevant to her; therefore, our discussion as to the constitutionality of CALGA will be brief.[9]

> It is an axiomatic rule of statutory interpretation that when this Court considers the constitutionality of a statute, we must draw all fair and reasonable inferences in favor of upholding the validity of the statute. *See, e.g., Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006). In Kentucky, a statute carries with it the

[9] The trial court properly pointed out Williams' claims under the KCRA are limited to recovery of injunctive relief, actual damages, costs, and attorney fees under KRS 344.450. Therefore, Williams would not be allowed to make a claim for punitive damages even if CALGA permitted them to be assessed against a municipality.

> presumption of constitutionality; therefore, when we consider it, "we are 'obligated to give it, if possible, an interpretation which upholds its constitutional validity.'" *Commonwealth v. Halsell*, 934 S.W.2d 552, 554 (Ky. 1996) (quoting *American Trucking Ass'n v. Com., Transp. Cab*., 676 S.W.2d 785, 789 (Ky. 1984)) (emphasis added). To the extent that there is reasonable doubt as to a statute's constitutionality, all presumptions will be in favor of upholding the statute, deferring to the "voice of the people as expressed through the legislative department of government." *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968). A constitutional infringement must be "clear, complete and unmistakable" in order to render the statute unconstitutional. *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 499 (Ky. 1998).

Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc., 286 S.W.3d 790, 806 (Ky. 2009).

Williams argues the prohibition on assessing punitive damages against a municipality violates the jural rights doctrine and separation of powers provisions of the Kentucky Constitution. We disagree.

The jural rights doctrine is a judicially created right that comes from a reading of Sections 14, 54, and 241 of the Kentucky Constitution and makes it unconstitutional for the General Assembly to limit recovery in a common-law right of action for wrongful death or personal injury. *Ludwig v. Johnson*, 243 Ky. 533, 49 S.W.2d 347 (1932); *Taylor v. King*, 345 S.W.3d 237, 243 (Ky. App. 2010); *Bishop v. Manpower, Inc. of Central Kentucky*, 211 S.W.3d 71, 77 (Ky. App. 2006). When discussing the jural rights doctrine as applied to CALGA, we must

consider the related issue of sovereign immunity. Under the doctrine of sovereign immunity, a governmental entity can only be sued in the manner it consents to be sued. Kentucky Constitution § 231. The Supreme Court of Kentucky has long held this provision constitutionally protects sovereign immunity in all suits against the Commonwealth "because otherwise it has no meaning." *Kentucky Center for the Arts Corporation v. Berns*, 801 S.W.2d 327, 329 (Ky. 1990).

Immunity for other governmental bodies is derivative of sovereign immunity and is premised on policy determinations that governments should be insulated from civil liability. *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). It is valid public policy for the legislature to extend the judicial doctrine of sovereign immunity to municipalities. *Caneyville*, 286 S.W.3d at 801. This policy was confirmed by the General Assembly when it enacted CALGA. We have previously held CALGA does not violate the jural rights provisions of our state constitution because the General Assembly merely codified the law regarding municipal immunity by enacting CALGA. *Russell v. City of Owensboro*, No. 2012-CA-002006-MR, 2014 WL 1407238, at *5 (Ky. App. Apr. 11, 2014). Therefore, we continue to hold CALGA does not violate the jural rights doctrine and the trial court did not err in so finding.

Williams further argues CALGA is unconstitutional because it violates the doctrine of separation of powers. Williams claims CALGA, to the

extent it precludes punitive damage awards against a city, intrudes on the fact-finding role of the courts, in violation of Sections 27, 28, and 109 of the Kentucky Constitution. Williams asserts these sections prohibit one branch of government from exercising powers vested in another branch. However, Williams provides no explanation or support in her brief for this assertion. As before, we will not search the record to construct Williams' argument for her or to find support for her underdeveloped arguments. We hold CALGA does not violate the doctrine of separation of powers. The trial court did nor err in finding CALGA constitutional.

For the foregoing reasons, the orders of the Barren Circuit Court are AFFIRMED.

ALL CONCUR.

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