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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000549-MR

BRIAN BAKER; WILLIAM BELLOMY;
ADAM BROWN; BRIAN COBB;
CHARLES FARLEY; R. GRAY;
LANCE GREEN; MICHAEL HAGAN;
TRAVIS HOLT; JEFF HORN;
CHRIS JOHNSON; RONALD JONES;
MATTHEW LANEY; BLAKE LEATHERS;
ANTONIO MUNIZ; STEVE NEWTON;
DILYANA NICOLOVA; KEVIN PADDOCK;
MICHELLE PATTON; J.R. POWELL;
KEVIN PRESTON; MONIKA ROZALSKI;
JORDAN TRUETT; JORDAN TYREE;
GLEN WAGONER AND
MCKENZIE WILLOUGHBY APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 16-CI-03022

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: The appellants are Lexington-Fayette Urban County Government (LFUCG) police officers and members of the LFUCG Policemen's and Firefighters Retirement Fund (the Fund) established by Kentucky Revised Statutes (KRS) 67A.360 to 67A.690. The issue is whether their pension benefits are governed by the version of KRS Chapter 67A in effect prior to March 14, 2013 (prior law) or the present version of the statutes, including amendments effective March 14, 2013. The appellants argue that they entered into valid contracts of employment with LFUCG before the effective date of the present version of the statutes or, alternatively, LFUCG should be estopped to deny that they are members of the pension system under the prior law. The Fayette Circuit Court disagreed with appellants and entered summary judgment in LFUCG's favor. We agree with the circuit court that appellants did not have contracts of employment prior to March 14, 2013, and that the elements for equitable estoppel are not present.

Appellants applied to participate in a LFUCG Police Training Academy in the spring of 2013. On February 5, 2013, LFUCG sent each appellant

an email with a "conditional job offer."[1] The email stated:

> **Congratulations!** You have been selected as a Police Recruit for the March 2013 academy with the Division of Police. This conditional job offer is contingent upon approval by the Mayor and ratification by Council, plus successful completion of a medical exam/drug screen.
>
> ...
>
> We will email final job offer notices after receipt of all medical results.

On February 12, 2013, LFUCG passed Resolution Number 54-2013, which ratified the February 5 conditional job offer to appellants and stated, "upon successful completion of the physical or medical examination, the [appellants] may begin the probationary civil service probationary period." The resolution was signed by Mayor Jim Gray.

Also on February 12, 2013, Clay Mason, Commissioner of Public Safety, sent an in-house email to other LFUCG employees, including John Maxwell, Director of Human Resources. It informed the recipients that a "conditional letter" had been sent to the selected recruits for the Police Training Academy. It further stated:

> Director Maxwell's impression and experience is that benefits are always changing and are subject to change. In this instance, the system as it exists is what the letter

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[1] The actual dates of the emails varied but all were received on or about February 5, 2013 and were identical in content. For convenience, we refer to the emails collectively as "the February 5 email."

> went out offering, but if the General Assembly changes prior to actual hire date, that would be what the recruits would come in under . . . . So if the GA passes a law effective upon the Governor's signature, that is what the recruits would be covered by if they start after that signing date.

Meanwhile, the LFUCG and representatives of the police and fire department reached a consensus as to possible changes to statutes governing the pension fund to be presented to the Kentucky legislature. In accordance with this consensus, House Bill 430 (HB 430) was introduced in the Kentucky House of Representatives on February 19, 2013, proposing emergency legislation to amend the statutes relating to the Fund. On January 18, 2013, and on February 19, 2013, press releases were issued in regard to the proposed legislation.

On February 28, 2013,[2] LFUCG emailed appellants informing them that they had met the pre-employment requirements to be appointed as police officer recruits and that the next Police Training Academy would begin on March 11, 2013. The February 28 email also stated: "[W]e also want to apprise you of pending legislation that, if passed, will affect the Police and Firefighters' Pension Fund benefits. In this regard, we encourage you to check with the state legislature for specifics and further developments on this issue."

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[2] Some of the emails were dated February 27, 2013. For convenience, the emails are referred to collectively as "the February 28 email."

On March 8, 2013, LFUCG notified appellants that the start date for the Police Training Academy was changed from March 11, 2013 to March 18, 2013. Although the March 8 email did not explain the reason for the change, LFUCG training personnel were directed to call appellants and explain that the change was to allow the pension legislation to be determined so that appellants' pension benefits would be clear at the time of their entry into the academy.

On March 14, 2013, HB 430 was signed into law as emergency legislation and the amendments to KRS 67A.360 to 67A.690 went into effect immediately. Included were changes to the Lexington policeman and firefighter pension fund benefits. Under the prior law, an officer may begin collecting pension benefits at twenty years of membership while under HB 430, an officer cannot collect a pension until twenty-five years of service. KRS 67A.410. According to appellants, they were first informed of the pension system changes when they reported to the Police Training Academy on March 18, 2013. With knowledge of the changes, appellants completed their training and the LFUCG council ultimately ratified their hiring as sworn police officers.

Appellants filed this action requesting that the Fayette Circuit Court order the LFUCG to add them to the pension benefit package in place under the prior law. They contended that the February 5 and February 28 emails constituted binding contracts and, therefore, they were hired prior to the effective date of HB

430. They also contended that LFUCG should be estopped from relying on HB 430 to determine their retirement benefits

The parties filed cross-motions for summary judgment. The circuit court concluded that the February 5 email was only a conditional offer and did not create a binding contract. It concluded the February 28 email was a promised offer that was not accepted by appellants until they reported to the Police Training Academy on March 18, 2013. The circuit court ruled that appellants did not have enforceable employment contracts until after HB 430 went into effect. The circuit court also concluded that LFUCG was not estopped from applying HB 430 to appellants because it made no representation concerning appellants' pension benefits and, in the February 28 email, expressly advised appellants of the pending legislation that could change the pension benefits. Finally, the circuit court concluded that even if appellants' contracts of employment were made prior to the effective date of HB 430, under the prior law, they were required to complete their academy training before becoming members of the Fund. The appellants did not complete their training until after the effective date of HB 430 so that regardless of the date the contracts were made, appellants' pension benefits would be governed by HB 430. Summary judgment dismissing appellants' claims was entered. This appeal followed.

Summary judgment "shall be rendered forthwith 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." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996).

The appellants' argument is that they each had an enforceable employment contract with LFUCG prior to the effective date of HB 430 and that the contract was breached by LFUCG when they were not added to the pension benefit package available under the prior law. To succeed on their claim, they

must establish: "(1) existence of a contract; (2) breach of that contract; and (3) damages flowing from the breach of contract." *Metro Louisville/Jefferson County Gov't v. Abma*, 326 S.W.3d 1, 8 (Ky.App. 2009). A contract does not exist unless there is an "offer and acceptance, full and complete terms, and consideration." *Cantrell Supply, Inc. v Liberty Mut. Ins. Co*., 94 S.W.3d 381, 384 (Ky.App. 2002).

In defining the elements of a contract, Kentucky courts have relied on the Restatement (Second) of Contracts. *See*, *e.g.*, *Furtula v. Univ. of Kentucky*, 438 S.W.3d 303, 309 (Ky. 2014). As defined in the Restatement, an offer "is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981). Acceptance may come through the giving of a mutual promise or by performing the act requested in the offer. *Id*. at § 50(2) and (3). However, an acceptance must be "unequivocal." *Venters v. Stewart*, 261 S.W.2d 444, 446 (Ky. 1953). As the *Venters* Court explained:

> An acceptance must be unequivocal in order to create a contract. An offeror is entitled to know in clear and positive terms whether the offeree has accepted his proposal. It is not enough that there are words or acts which imply a probable acceptance. Generally speaking, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or the performance requested.

Id.

Appellants argue that the February 5 email constituted an offer of employment and that the offer was accepted when they were ratified by the LFUCG Council and Mayor and when appellants passed their medical exams and drug screens. The problem with appellants' argument is that it ignores the express words contained in the February 5 email. The email expressly states that it is a "conditional job offer" and that "[LFUCG] will email final job offer notices after receipt of all medical records." The February 5 email was not an offer but only informed appellants they were recruits for the Police Training Academy and the conditions required to be fulfilled before a final job offer would be made.

The internal email sent by Mason to LFUCG's Director of Human Resources and other employees does not, as appellants would like, support their argument. To the contrary, it states that if the pension law changed prior to appellants' hire date, that new pension law would control the recruits' pensions.

The circuit court concluded that the February 28 email was an offer to attend the Police Training Academy and upon successful completion of the training, to be employed as a LFUCG police officer. However, the circuit court concluded that appellants could accept the offer only by successfully attending the Police Training Academy on March 18, 2013, after HB 430 went into effect.

We agree with the circuit court and LFUCG that the February 28 email was a contingent offer that could not be accepted until appellants attended

the Police Training Academy on March 18, 2013. Prior to that time, appellants had not responded to either the email or in any other way bound themselves to report to the training academy. They could either report to the training academy on March 18, 2013, and accept the offer or not report, thereby declining the offer.

Appellants argue that the February 28 email was not an offer at all but was a conformation that all the contingencies for employment stated in the February 5 email were met. We cannot agree. Again, the February 5 email was only an offer to make a job offer if certain contingencies were met. A contingent offer of employment was made in the February 28 email that was not accepted until March 18, 2013, after the effective date of HB 430.

Appellants contend that if LFUCG had not moved the academy training from March 11, 2013 to March 18, 2013, they would be entitled to pensions as they existed under the prior law. Their contention is merely hypothetical. LFUCG acted well within its authority to change the training start date to March 18, 2013, and the fact is appellants were not in training when HB 430 went into effect.

Appellants argue that LFUCG should be estopped from not providing them pension benefits under the prior law. The circuit court did not err in rejecting the appellants' claim as a matter of law.

The elements of equitable estoppel are:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Elec. & Water Plant Bd. of City of Frankfort v. Suburban Acres Dev., Inc., 513 S.W.2d 489, 491 (Ky. 1974) (quoting 28 Am.Jur.2d Estoppel and Waivers 35 and *Smith v. Howard*, 407 S.W.2d 139 (Ky. 1966)). As noted in *Bd. of Trustees, Kentucky Ret. Sys. v. Grant*, 257 S.W.3d 591, 595 (Ky.App. 2008) (quoting *Microcomputer Technology Institute v. Riley*, 139 F.3d 1044, 1052 (5th Cir. 1998)), equitable estoppel "is almost never available against the government." It is available only in extraordinary circumstances. *Id*.

Here, the elements of estoppel do not exist even if asserted as to a private party. In the February 28 email, appellants were specifically advised that there was "pending legislation that, if passed, will affect the Police and Firefighters' Pension Fund benefits" and appellants were encouraged to check with the state legislature for developments on the issue. A simple look at the LRC website would have revealed the content of HB 430.

Because we are affirming for the reasons stated, we do not address whether appellants' contract claims are barred by sovereign immunity or whether LFUCG has authority to provide appellants with a benefit package in place before HB 430.

The Fayette Circuit Court's summary judgment dismissing this action is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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