

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000004-MR

NICHOLE LAINHART

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 18-CI-00441

CLARK COUNTY FISCAL COURT

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; NICKELL AND L. THOMPSON,
JUDGES.

NICKELL, JUDGE: Nichole Lainhart appeals from an order entered by the Clark Circuit Court on November 30, 2018, dismissing with prejudice her complaint against the Clark County Fiscal Court (“the Fiscal Court”) for terminating her employment in violation of the Kentucky Whistleblower Act, KRS¹ 61.101 *et seq.*

¹ Kentucky Revised Statutes.

After careful consideration, we affirm the circuit court's dismissal of her complaint for failure to state a claim.

As recited in her verified complaint, on or about May 17, 2018, Lainhart began work for the Fiscal Court as a janitor. Several weeks later, on June 22, 2018, Lainhart witnessed the Clark County Attorney "engage in verbally abusive behavior toward another Fiscal Court employee." Lainhart specifically alleged the County Attorney's tirade included the following: the Fiscal Court employee had disrespected the County Attorney and his office's employees; the Fiscal Court employee was "a little girl"; and the Fiscal Court employee was directed never to come to the County Attorney's office again but should instead send another representative of the Fiscal Court. Lainhart believed the County Attorney was using his position of authority to intimidate and abuse the employee, "despite having no legal authority to direct her in any performance of her job duties."

Following the incident, Lainhart encouraged the employee to report the matter to the Clark County Judge/Executive. Lainhart herself reported the incident to a Fiscal Court magistrate, who advised her the incident would be reported to the Judge/Executive. On the morning of July 10, 2018, Lainhart posted her account of the incident on social media. In addition to describing the incident in her post, she also anticipated termination of her own employment based on this

public disclosure. The Judge/Executive confronted Lainhart that same day and expressed his displeasure at her decision to post her account of the incident on social media. According to Lainhart, the Judge/Executive informed her the post was against the Fiscal Court's employment policies. The next day, the Judge/Executive terminated Lainhart's employment by letter. Afterward, the Fiscal Court held a meeting in which the majority of members voted to confirm the termination of Lainhart's employment.

On October 5, 2018, Lainhart filed a verified complaint in Clark Circuit Court alleging the Fiscal Court wrongfully terminated her employment in violation of the Whistleblower Act, KRS 61.102(1).² She contended the reasons given for her termination were merely pretextual, and she was actually terminated based on her report of the County Attorney's abusive behavior. The Fiscal Court moved to dismiss the complaint under CR³ 12.02(f), asserting the complaint failed "to state a claim upon which relief can be granted[.]" Following a hearing on the motion and submission of memoranda by the parties, the circuit court ordered the

² The underlying complaint included individual members of the Fiscal Court as additional party-defendants. The circuit court dismissed the individually named members as parties by separate order on the same day it dismissed Lainhart's complaint for failure to state a claim. In Lainhart's amended notice of appeal filed on December 27, 2018, she explicitly declined to appeal from the dismissal of the individually named members of the Fiscal Court, leaving the Fiscal Court as the sole remaining appellee.

³ Kentucky Rules of Civil Procedure.

matter dismissed with prejudice. The circuit court found Lainhart’s complaint failed to state a claim because the reported incident did not “rise to a violation of Kentucky’s Whistleblower Statute[.]” This appeal followed.

This appeal stems from a dismissal for failure to state a claim. We begin our analysis by reciting the standard of review.

We review dismissals under CR 12.02(f) *de novo*. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011). CR 12.02(f) is designed to test the sufficiency of a complaint. *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968). It is proper to grant a CR 12.02(f) dismissal motion if:

it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. . . . [T]he question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation marks and citation omitted). For purposes of a CR 12.02(f) motion, this Court, like the circuit court, must accept as true the plaintiff’s factual allegations and draw all reasonable inferences in the plaintiff’s favor. *Pike*, 434 S.W.2d at 627.

Hardin v. Jefferson County Board of Education, 558 S.W.3d 1, 5 (Ky. App. 2018).

Lainhart’s complaint asserted she was improperly terminated based on the Kentucky Whistleblower Act, which provides:

No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or

influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the Executive Branch Ethics Commission, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other 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 of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, *or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.* No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

KRS 61.102(1) (emphasis added).

For her sole issue on appeal, Lainhart asserts the circuit court erroneously dismissed her complaint for failure to state a claim. In so doing, the circuit court found Lainhart's disclosure was not of the type afforded protection by the Whistleblower Act. We have previously held an employee must establish four elements to be afforded protection under the statute:

- (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 report or

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 to punish the employee for making such a disclosure.

Davidson v. Commonwealth, Dep't of Military Affairs, 152 S.W.3d 247, 251 (Ky. App. 2004). Here, the parties disagree over whether two portions of element (3) have been met. Lainhart contends the County Attorney's invective against the Fiscal Court employee was an abuse of authority she properly reported to the magistrate and the Judge/Executive of the Fiscal Court. The Fiscal Court argues dismissal was proper because (1) the County Attorney's interaction with the Fiscal Court employee is not a subject covered by the Whistleblower Act, and (2) the Fiscal Court is not an appropriate entity to receive a report under the Act regarding conduct of the County Attorney.

The heart of this case involves Lainhart's report alleging the County Attorney berated a Fiscal Court employee, an act Lainhart attempts to depict as an "abuse of authority" cognizable under the Whistleblower Act. However, even accepting Lainhart's facts in her complaint as true, the verbal altercation was not of such character that qualifies its disclosure for protection under the Act. In *Moss v. Kentucky State University*, 465 S.W.3d 457 (Ky. App. 2014), we affirmed the trial court's grant of summary judgment and held "complaints regarding unfair

treatment by [the appellant's] boss amounted to nothing more than disagreements with a supervisor, not actionable under the Whistleblower Act.” *Id.* at 460.

A closer examination establishes Lainhart's report was, if anything, *less* cognizable under the Whistleblower Act than the report in *Moss*, because the County Attorney does not exercise supervisory authority over the Fiscal Court or its employees. “The fiscal court of each county shall consist of the county judge/executive and the justices of the peace of the county; or of the county judge/executive and three (3) county commissioners elected under KRS 67.050 and 67.060.” KRS 67.040(1). The presiding authority over a fiscal court is the county judge/executive. KRS 67.040(2). It is difficult to construe the County Attorney's conduct as an abuse of authority because he had no authority to abuse in this instance.

At best, Lainhart's report alleged the County Attorney engaged in an unprofessional verbal disagreement with an employee of another county office. Although such conduct is regrettable and should be avoided by public officials, it does not fall within the scope of the Whistleblower Act. “In order to establish a protected disclosure, the whistleblower must have a reasonable belief that a law, rule, or regulation has been violated [or, in the context of the [Kentucky Whistleblower Act], wasteful spending has occurred].” *Harper v. University of Louisville*, 559 S.W.3d 796, 803 (Ky. 2018) (first alteration added in *Harper*)

(quoting *Pedelease v. Dep't of Defense*, 343 F. App'x 605, 609 (Fed. Cir. 2009)).

Lainhart's report alleged no violation of law, rule, or regulation; nor did she make an allegation of wasteful spending. Accordingly, we discern no error in the circuit court's dismissal of Lainhart's complaint for failure to state a claim.

Because we agree with the Fiscal Court's first argument and hold Lainhart's disclosure did not fall within the scope of the Whistleblower Act, we need not consider its second argument as to whether the Fiscal Court was an appropriate entity to receive a report disclosing the County Attorney's conduct.

For the foregoing reasons, we affirm the Clark Circuit Court's order of dismissal entered November 30, 2018.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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