

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0778

JEW
RHP by JEW
JDH by JEW

RANDALL KLING

VERSUS

LOUISIANA DEPARTMENT OF REVENUE

Judgment Rendered: JAN 25 2013

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 602,141

Honorable William A. Morvant, Judge

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BEFORE: PARRO, HUGHES, AND WELCH, JJ.

WELCH, J.

Plaintiff, Randall Kling, appeals a judgment sustaining a peremptory exception raising the objections of no cause of action and no right of action filed by defendant, the Louisiana Department of Revenue (Department). We reverse and remand.

BACKGROUND

On May 26, 2011, Mr. Kling filed this lawsuit against the Department, alleging that the Department terminated him from his position with the Louisiana Office of Alcohol and Tobacco Control (ATC) in retaliation for submitting complaints regarding ATC Commissioner Troy Hebert to the Department. Specifically, Mr. Kling made the following allegations: On March 10, 2011, he and other employees submitted a complaint to Cynthia Bridges, the Department's Secretary, regarding what they reasonably believed to be offensive behavior on Mr. Hebert's part. Later that month, on the 16th, 22nd, and 25th, Mr. Kling submitted additional complaints regarding Mr. Hebert's behavior to Dee Everett, Director of Human Resources. Mr. Kling alleged that the complaints addressed matters of public concern, including threats, hostile work environment, systematic intimidation, discrimination, harassment, inefficiency, favoritism, humiliation, and moral problems in the ATC office. On March 30, 2011, within a few days of submitting the complaints, Mr. Kling's employment was terminated. Mr. Kling alleged that his termination was in retaliation for the exercise of his expressional rights under Article 1, Section 7 of the Louisiana Constitution, and he sought reinstatement to his position, an award of lost wages, and other damages.

The Department filed a peremptory exception raising the objection of no cause of action. The Department claimed the allegations of Mr. Kling's petition failed to set forth a cause of action for a free speech retaliation claim because Mr. Kling's complaints do not involve matters of public concern, but rather, are merely

complaints of an employee against his superior that are not entitled to constitutional protection. On September 21, 2011, the trial court granted the Department's exception of no cause of action and gave Mr. Kling fifteen days to amend the petition.

Thereafter, Mr. Kling filed an amended petition in which he deleted most of the paragraphs of the original petition and replaced them with paragraphs 4-10. He alleged that on March 10, 2011, six members of the Command Staff of the ATC and six employees of the ATC, including himself, joined in the written complaint to Secretary Bridges. In Paragraph 7 of the amended complaint, Mr. Kling set forth, in Subparagraphs A-X, twenty-four alleged violations of policy, procedure, and law that Mr. Kling and the other ATC employees accused Mr. Hebert of committing. These allegations include, among others, that Mr. Hebert: (1) compromised the Civil Service Performance Planning and Review System (Subparagraph D); (2) operated the ATC in total disregard of the rules of the Louisiana Department of Civil Service (Subparagraphs H and O); (3) used state resources for personal and political gain and in furtherance of his plan to seek elective office (Subparagraph J); (4) attempted to undermine ethics laws by attempting to form a non-profit entity whereby funding could be solicited and received from the alcohol industry, which is regulated by the ATC, and boasting that the alcohol industry would gladly donate funds to furnish his proposed new office suite at ATC (Subparagraph K); (5) schemed to build himself a new office in such a manner as to avoid legislative and Division of Administration oversight (Subparagraph L); (6) harassed employees who cooperated with the investigations conducted by the Office of Inspector General and the Louisiana State Police concerning the conduct of Murphy Painter (Subparagraph N); and (7) repeatedly violated sensitive computer policies, which violations have the potential to jeopardize sensitive law enforcement initiatives and have placed the safety of the

law enforcement officers in extreme jeopardy (Subparagraph X). He also alleged that in his March 16th and 22nd complaints to Ms. Everett, he provided further details concerning Mr. Hebert's abuse, harassment, and intimidation of him in particular. Additionally, Mr. Kling alleged that in the complaint sent to Ms. Everett on March 25, 2011, he complained that Mr. Hebert's systematic abuse of employees had been the worst violations of the Civil Service rules he had ever witnessed and concluded the letter by stating: "[t]his irrational behavior and the systematic destruction of employees' lives and careers, as well as the dismantling of the agency itself, is unconscionable. What I have described to you in this letter is just the tip of the iceberg." He further complained in another letter to Ms. Everett that day that Mr. Hebert's conduct resulted in a hostile work environment at the ATC. Mr. Kling asserted that the complaints described in the letters taken as a whole primarily raised issues of public concern, even though they raise ancillary issues of private concern. He alleged that the issues of public concern principally include: misconduct within a law enforcement agency that threatens the ability of the law enforcement agency, in this case, the ATC, to properly perform its duties; sexual harassment perpetrated on state workers; gender discrimination; systematic employment practices that adversely affected the functioning of the agency by placing the safety of the ATC officers in jeopardy; damaging the morale of the ATC's employees; and causing a mass exit of highly qualified and experienced state workers from the ATC.

In response, the Department filed a peremptory exception raising the objections of no right of action and no cause of action. The Department argued that Mr. Kling was attempting to assert a claim for retaliatory discharge due to complaints that were not made by him individually, but by at least eleven other employees of the ATC. It urged that Mr. Kling could not assert a claim for retaliatory discharge based on complaints lodged by his co-workers. The

Department claimed that the allegations in the March 10, 2011 letter were not made by Mr. Kling and did not pertain specifically to him. In support of this argument, the Department cited complaints of sexual harassment towards females, insisting that Mr. Kling could not have possibly complained of this, as he is not a female. Further, the Department claimed that an analysis of Mr. Kling's individual complaints made in his letters to Ms. Everett supported the Department's claim that most of the allegations in Paragraph 7 were not made by Mr. Kling. The Department asked for the dismissal of all allegations except for Subparagraph A (extreme aggressive levels of harassment and intimidation of ATC employees), Subparagraph D (compromising the Civil Service Performance Planning and Review System), Subparagraph F (undermining all levels of supervision) and Subparagraph O (disregarding civil service policy and rules). It also urged that Mr. Kling's amended petition failed to state a viable cause of action as the complaints he made are simply that of an "unhappy employee" and not a matter of public concern, and therefore are not constitutionally protected.

In support of its exception of no right of action, the Department attached copies of a portion of the March 10, 2011 letter to Secretary Bridges and Mr. Kling's March 16th, 22nd, and 25th complaints to Ms. Everett. In opposition to the exception, Mr. Kling submitted the sixteen page March 10, 2011 letter, including the bulleted list of the grievances by the ATC employees.

At the hearing on the exceptions, the trial court refused to allow Mr. Kling's attorney to argue on the basis that the opposition brief was untimely. The court also refused to allow Mr. Kling to testify on the exception of no right of action on the basis that his opposition brief did not specifically set forth that he was going to offer evidence at the hearing, but did allow Mr. Kling's testimony to be proffered. Evidence was introduced at the hearing, including the March 10, 2011 letter to

Secretary Bridges and Mr. Kling's letters to Ms. Everett.¹ The court compared the allegations made by Mr. Kling in his individual letters to Ms. Everett with the allegations of Paragraph 7 of the amended petition and found that only four allegations contained in Paragraph 7 matched the complaints set forth in Mr. Kling's correspondence to Ms. Everett: Subparagraphs A, D, F, and O. The court concluded that all of the remaining Subparagraphs were not complaints raised by Mr. Kling and that Mr. Kling could not raise complaints made by other employees in his retaliatory discharge claim. Accordingly, the trial court struck all remaining Subparagraphs contained in Paragraph 7 from the amended petition. Considering only the remaining allegations of the petition, the court concluded that it did not set forth a cause of action for retaliatory discharge because none of the allegations rose to the level of public concern, but were merely workplace criticisms by Mr. Kling in his role as an employee and not as a concerned citizen. The court signed a judgment on February 1, 2012, sustaining the exception of no right of action and striking nearly all of the subparagraphs of Paragraph 7 of the amended petition and sustaining the exception of no cause of action, thereby dismissing Mr. Kling's lawsuit with prejudice. Mr. Kling appealed, challenging those rulings as well as the trial court's refusal to allow him to participate in oral arguments at the January 23, 2012 hearing or to introduce evidence in opposition to the exception of no right of action.

DISCUSSION

Although often confused and improperly combined in the same exception, the peremptory exceptions of no cause of action and no right of action are separate and distinct. See La. C.C.P. art. 927(A)(5)&(6); **Robertson v. Sun Life**

¹ The Department offered only a portion of the March 10, 2011 letter initially; Mr. Kling objected to the introduction of the incomplete letter and offered the entire March 10, 2011 letter. The Department objected to the letter to the extent that it contained the names of the other ATC employees, citing their privacy concerns. Mr. Kling offered a copy of the entire letter with the names redacted, which was considered by the trial court in ruling on the exception of no right of action.

Financial, 2009-2275 (La. App. 1st Cir. 6/11/10), 40 So.3d 507, 511. An exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition. *Id.* No evidence may be introduced to support or controvert the exception of no cause of action. The exception is triable on the face of the pleadings, and for determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. If the petition alleges sufficient facts to establish a cause of action, an exception of no cause of action must fail. *Id.*

The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. See La. C.C.P. art. 927(A)(6); **Robertson**, 40 So.3d at 511. The function of the exception is to determine whether the plaintiff belongs to the class of persons to whom the law grants a cause of action asserted in the lawsuit. This exception assumes that the petition states a valid cause of action for some person and questions whether the plaintiff is a member of the class that has a legal interest in the subject matter of the litigation. *Id.* Unlike the exception of no cause of action, evidence may be received. In order to prevail, the defendant has the burden of establishing that the plaintiff does not have an interest in the subject matter of the lawsuit or legal capacity to proceed with the lawsuit. **Robertson**, 40 So.3d at 512. Where doubt exists as to the appropriateness of this exception, it must be resolved in favor of the plaintiff. *Id.* Whether a plaintiff has a right of action is a question of law and is reviewed on appeal *de novo*. **Gibbs v. Delatte**, 2005-0821 (La. App. 1st Cir. 12/22/05), 927 So.2d 1131, 1135, writ denied, 2006-0198 (La. 4/24/06), 926 So.2d 548.

In this case, the trial court ruled on the exception of no cause of action after striking numerous allegations of the petition pursuant to the exception of no right of action. In order to determine whether the petition states a cause of action, we must first determine whether the trial court erred in striking nearly all of the

allegations regarding Mr. Hebert's conduct contained in Paragraph 7 of the amended petition.

In support of its exception of no right of action, the Department argues that the bulk of the allegations in Paragraph 7 were not made by Mr. Kling, but were made by the other ATC employees who joined in the complaint. The Department contends that if Mr. Kling intended to complain about matters set forth in Paragraph 7, such as sexual harassment towards female employees, Mr. Kling should have raised those complaints in his subsequent letters to Ms. Everett. The Department insists that Mr. Kling's failure to assert the complaints set forth in the group complaint portion of the letter in his subsequent letters is proof that Mr. Kling did not actually complain about the matters set forth in Paragraph 7 of the petition. It argues that because Mr. Kling did not actually make the bulk of the complaints, he has no right to assert those complaints in his retaliation lawsuit.

The March 10, 2011 letter sent to Secretary Bridges contains two sections. In the first, the "Command Staff and Employees" of the ATC expressed concerns as a group regarding Mr. Hebert's alleged dangerous directives and behavior, as well as numerous violations of ATC policy, Department policy, and state law. The letter notes that the ATC employees are required by the Department to report misconduct, violations of policies and rules, and violations of law, and that as commissioned law enforcement officers, they have a duty to uphold the laws and Constitution of this state and the United States. The letter then sets forth forty-three violations of policy, procedure, rules, and laws allegedly precipitated by Mr. Hebert. Thereafter, the letter states that "in addition to the alleged infractions listed above, a number of employees have been the direct recipient[s] of Mr. Hebert's aggressive behavior." The letter goes on to list the individual employees' complaints in this respect, including Mr. Kling's.

To prevail on the exception of no right of action, the Department had the burden of establishing that Mr. Kling does not have an interest in the subject matter of the lawsuit or the legal capacity to proceed with the lawsuit. See Robertson, 40 So.3d at 512. The Department does not claim that Mr. Kling is not one of the members of the “Command Staff and Employees” of ATC whose complaints are set forth in the first portion of the letter and which appear in Paragraph 7 of the amended petition. Nor did it prove that Mr. Kling had no interest in any of the complaints set forth in Paragraph 7 of his amended petition. The letter makes it clear that the ATC employees as a group alleged violations of policy and law by Mr. Hebert. In addition to the group complaints, the employees set forth their individual claims of mistreatment by Mr. Hebert. The mere fact that Mr. Kling’s subsequent letters do not specifically mention the majority of the allegations in Paragraph 7 does not prove that he did not actually complain of the conduct described in that portion of the amended petition. Furthermore, in order to have an interest in asserting a retaliatory discharge claim, Mr. Kling does not have to be a direct recipient of the conduct complained of in Paragraph 7. Mr. Kling claims that he was terminated from his position in retaliation for the exercise of his constitutionally protected right of free speech. His interest in prosecuting this lawsuit is not as a victim of harassment or discrimination, but as an employee who was fired in retaliation for complaining about Mr. Hebert’s conduct. Thus, the fact that he may not individually have been a victim of some of the complaints in the amended petition, such as gender discrimination, is of no moment in determining whether he has a right of action to assert a retaliatory discharge claim. We find that the Department failed to meet its burden of establishing that Mr. Kling had no interest in prosecuting this retaliation claim based on the allegations set forth in Paragraph 7 of the complaint. Therefore, we find that the trial court committed legal error in granting the exception of no right of action and striking

Subparagraphs B, C, E, G, H, I, J, K, L, M, N, P, Q, R, S, T, U, V, and W from the amended petition.²

Having concluded that the trial court erred in striking the above allegations from the amended petition, we must now determine whether the allegations of Mr. Kling's amended petition set forth a cause of action for retaliatory discharge. The First Amendment to the United States Constitution and Article I, Section 7 of the Louisiana Constitution protect the right of free speech. In particular, Article I, Section 7, on which Mr. Kling's lawsuit is based, gives Louisiana citizens the right to speak, write, and publish their sentiments on any subject. It is well settled that an employee of a public entity may not be discharged for exercising his constitutionally protected right to freedom of expression despite his at-will status. **Harrison v. Parker**, 31,844 (La. App. 2nd Cir. 5/5/99), 737 So.2d 160, 163, writ denied, 99-1597 (La. 9/17/99), 747 So.2d 565. To prevail in a retaliation claim, a public employee must allege facts demonstrating that his speech involved a matter of public concern, that he has suffered an adverse employment action for exercising his right to free speech, and that the exercise of free speech was a substantial or motivating factor in the adverse employment action. **Johnson v. Southern University**, 2000-2615 (La. App. 1st Cir. 12/28/01), 803 So.2d 1140, 1146.

Generally, whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the record as a whole. **Connick v. Myers**, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). The law has recognized that there are some types of speech, which by their very nature, address matters of public concern. For instance, the disclosure of misbehavior by public officials is a matter

² Because of our ruling, we pretermitted discussion of Mr. Kling's second assignment of error, wherein he challenges the trial court's refusal to allow him to participate in or testify at the hearing on the exception of no right of action.

of public concern and is therefore entitled to constitutional protection. See Ray v. City of Bossier City, 37,708 (La. App. 2nd Cir. 10/24/03), 859 So.2d 264, 273, writs denied, 2003-3214, 2003-3254 (La. 2/13/04), 867 So.2d 697; **Harrison**, 737 So.2d at 163; **Charles v. Grief**, 522 F.3d 508, 514 (5th Cir. 2008). In **Harrison**, the court held that the plaintiff's reports of allegedly illegal or unethical conduct in a sheriff's office, giving rise to questions concerning the misuse of public funds or possible malfeasance in office, dealt with matters of public importance.

In the amended petition, Mr. Kling alleged that he and the other ATC employees complained to Secretary Bridges concerning Mr. Hebert's numerous violations of policies of the ATC and the Department and state law. Specifically, the complaint to Secretary Bridges accused Mr. Hebert of sexual harassment, discrimination on the basis of gender, using state resources for personal and political gain and in furtherance of his plan to seek elective office, undermining ethics laws by attempting to form a non-profit entity to obtain funding for his proposed new office suite at the ATC, scheming to build a new office in a manner to avoid oversight by the legislature and the Division of Administration, and harassing employees who cooperated with official investigations into another individual's conduct. These allegations of unethical and perhaps illegal conduct on Mr. Hebert's part clearly are matters of public concern. Mr. Kling alleged that he was terminated in retaliation for his participation in levying these complaints against Mr. Hebert. We find that Mr. Kling's petition does set forth a cause of action for retaliatory discharge and reverse the trial court's judgment sustaining the exception of no cause of action and dismissing this lawsuit with prejudice.

CONCLUSION

For the foregoing reasons, the judgment sustaining the peremptory exception of no right of action and ordering that enumerated Subparagraphs be stricken from Paragraph 7 of the petition is reversed. The judgment sustaining the peremptory

exception raising the objection of no cause of action is also hereby reversed. This matter is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal, in the amount of \$1,152.32, are assessed to appellee, the Louisiana Department of Revenue.

REVERSED AND REMANDED.