

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001601-MR

PATRICIA JOANNE DAULEY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 99-CI-00921

HOPS OF BOWLING GREEN, LTD.;
and TODD ALEXANDER

APPELLEES

OPINION
AFIRMING

** ** *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Patricia Joanne Dauley ("Dauley"), seeks review of a summary judgment of the Warren Circuit Court entered in favor of the Appellees, Hops of Bowling Green, Ltd., ("Hops") and Todd Alexander, ("Alexander"). The trial court concluded that Dauley, a part-time server at Hops, was an employee-at-will, that she did not have a fiduciary relationship with Hops, and that she had failed to state a claim for wrongful

discharge under the public policy exception to the terminable-at-will doctrine. Finding no error, we affirm.

The essential facts are not in dispute. Dauley was employed by Hops restaurant as a part-time server. At that time, Todd Alexander was the manager. When Dauley was hired, she received a copy of the restaurant's "zero-tolerance" sexual harassment policy. In June 1999, after receiving complaints from several female employees that Dauley had behaved towards them in a sexually-offensive manner, Alexander met privately with Dauley and advised he would have to let her go. Later the same day, Alexander contacted Dauley and offered her the opportunity to return to work, pending investigation. Dauley elected not to return to Hops, and later filed this action alleging breach of fiduciary duty and retaliatory discharge.

On May 8, 2001, the Warren Circuit Court entered an order granting summary judgment in favor of the Appellees, Hops and Alexander:

Hops contends that it is entitled to summary judgment as a matter of law because Dauley will be unable to present any evidence at trial that a fiduciary relationship existed between Hops and herself. Hops further argues that Dauley is unable to present a prima facie case of retaliation.

* * *

Dauley argues that Hops owes her a fiduciary duty based on their employment relationship. She claims that Hops violated its fiduciary

duties when it failed to inform her of the charges against her and the sources of said charges. She also claims that Hops, as a fiduciary, was required to inform her at the time she was hired that she would not be entitled to an investigation of any allegations of sexual harassment or be offered an opportunity to rebut such charges.

Kentucky has generally recognized that an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible. Production Oil Co. v. Johnson, Ky., 313 S.W.2d 411 (1958). However, the Kentucky Supreme Court has recognized an exception to this rule for wrongful discharge based on public policy. Firestone Textile Co. Div. v. Meadow, Ky., 666 S.W.2d 730 (1984). This is a narrow exception and in order for it to apply, the public policy must be "clearly defined by statute and directed at providing a statutory protection to the worker in his employment situation." Grzyb v. Evans, Ky., 700 S.W.2d 399, 400 (1985).

* * *

Both . . . [Firestone and Grzyb] involved specific statutory provisions upon which the plaintiff based their claims [of retaliatory discharge]. In this case, Dauley proposes that she was terminated in violation of KRS 344.280, which states as follows:

It shall be unlawful practice for a person, or for two (2) or more persons to conspire:

(1) To 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 participated in any manner in any investigation, proceeding or hearing under this chapter . . .

The Court finds that KRS 344.280(1) was intended to protect individuals who bring charges of sexual harassment, not individuals who are charged with committing the offense. Dauley has failed to cite any statutory or constitutional provision which addresses the rights of employees accused of sexual harassment. Further, Dauley has failed to present any evidence of sexual discrimination. Therefore, the Court finds Dauley was an employee-at-will and that she has failed to state a claim for wrongful discharge under the public policy exception to the terminable-at-will doctrine.

Regarding Dauley's claim of breach of fiduciary duty, the Court finds that Dauley has failed to present sufficient evidence that a fiduciary duty existed between herself and Hops. A fiduciary relationship is "one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking." St. Martin v. KFC Corp., 935 F.Supp. 898, 908 (W.D.Ky. 1996) (quoting Steelvest, Inc. v. Scansteel Serv. Ctr. Inc., Ky., 807 S.W.2d 476, 485 (1991)). Dauley has not presented any evidence that she enjoyed a special, protected relationship with Hops or that Hops undertook to act primarily for her benefit. To the contrary, Dauley was an employee at will and could have been terminated at any time and for any reason not otherwise prohibited by law.

The Court has given the plaintiff every opportunity to fully present her grievances. However, this Court is convinced that it

would be impossible in a practical sense for her to produce evidence at trial warranting judgment in her favor. See, Steelvest, 807 S.W.2d at 476. Defendants are thus entitled to judgment as a matter of law. CR 56.

On June 25, 2001, the trial court entered an order denying Dauley's motion to set aside the order granting the defendants' motion for summary judgment.

Dauley raises several issues on appeal. We are not persuaded by her argument that the trial court "abused its discretion by not following the summary judgment standard." The truthfulness of the complaints against Dauley is not at issue. The issue is whether Hops wrongfully terminated Dauley's employment. The material facts regarding her termination are not in dispute. Dauley also maintains that material facts regarding Hops' fiduciary duty to her are in dispute; however, she does not explain what those facts are.

Dauley claims that Hops' fiduciary duty to her, as set forth in its "sexual harassment policy," was breached, because she was terminated before an investigation was conducted.¹ We agree with the trial court that there was no evidence that Dauley "enjoyed a special, protected relationship with Hops or that Hops undertook to act primarily for her benefit."

¹ Dauley's reliance, in her reply brief, upon *Bank One, Kentucky, N.A. v. Murphy*, Ky., 52 S.W.3d 540 (2001), is misplaced; *Murphy* dealt with whether an employer defending a sexual harassment lawsuit is entitled to prevail on an affirmative defense that it made significant efforts to correct and prevent sexual harassment in the workplace. (2001).

Dauley would have us believe that "Hops had an obligation to never terminate [her] . . . prior to an investigation." However, she testified by deposition that she understood her employment was at will, subject to termination at any time. The trial correctly determined that "Dauley was an employee-at-will and could have been terminated at any time and for any reason not otherwise prohibited by law."

Next, Dauley attempts to convince us that KRS 344.280(1) applies, and that the legislature intended to protect persons "wrongfully accused of sexual harassment." We disagree. The language of the statute is straightforward, and is intended to protect persons bringing charges of sexual harassment, not those accused of the offense.

Dauley also asserts that a "special trust" relationship was written into Hops' "sexual harassment policy," because the policy refers to "all parties involved." Clearly, Hops' "sexual harassment policy" was for the protection of its employees, not for those accused of sexually harassing its employees.

Dauley claims that she was wrongfully discharged in violation of public policy. *Firestone Textile Co. v. Meadows*² holds that:

An employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined

² Ky., 666 S.W.2d 730 (1984).

public policy as evidenced by existing law The public policy must be evidenced by a constitutional or statutory provision. An employee cannot be fired for refusing to violate the constitution or a statute. Employers will be held liable for those terminations that effectuate an unlawful end." [citing *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834, 835 (Wis. 1983).]³

As the trial court noted, this is a narrow exception to the employment at will doctrine. "[P]rotection of the employee should not extend beyond 'constitutionally protected activity' or 'public policy' as established by 'legislative determination.'"⁴ In *Grzyb v. Evans*,⁵ cited by the trial court, the Supreme Court cautioned:

We adopt, as an appropriate caveat to our decision in *Firestone* . . . , the position of the Michigan Supreme Court in *Suchodolski v. Michigan Consolidated Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1981). The Michigan court held that only two situations exist where "grounds for discharging an employee are so contrary to public policy as to be actionable" absent "explicit legislative statements prohibiting the discharge." 316 N.W.2d at 711. First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by well-

³ *Id.*, at 731.

⁴ *Id.*, at 732-33, citing *Scroghan v. Kraftco Corp.*, Ky. App., 551 S.W.2d 811, 812 (1977).

⁵ Ky., 700 S.W.2d 399 (1985)

established legislative enactment." 316
N.W.2d at 711-12.⁶

The trial court correctly concluded that Dauley failed to state a claim under the public policy exception to the terminable-at-will doctrine.

In summary, we find no error in the trial court's determination that Dauley failed to state a claim for breach of fiduciary duty or for retaliatory discharge. Accordingly, we do not reach the argument that she was entitled to punitive damages or attorney fees.

We affirm the May 8, 2001 Order of the Warren Circuit Court granting summary judgment in favor of the Appellees, Hops and Todd Alexander, and the June 25, 2001 Order denying Dauley's motion to set aside same.

ALL CONCUR.

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⁶ *Id.*, at 402.