

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000045-MR

ROBERT RELFORD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE VANMETER, JUDGE
ACTION NO. 97-CI-03837

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT CIVIL
SERVICE COMMISSION

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.¹

POTTER, SPECIAL JUDGE: Robert Relford appeals from an order of the Fayette Circuit Court denying his motion for reinstatement to his former civil service position and reimbursement of backpay. For the reasons stated below, we affirm.

In 1997 Relford was employed as a civil service employee of the Lexington-Fayette Urban County Government

¹ Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

(LFUCG) as an electrician in the Division of City Maintenance. On May 29, 1997, Relford was arrested for possession of drug paraphernalia. The next morning, while still incarcerated, Relford had a relative call-in that he was sick. On June 20, 1997, after the arrest came to the attention of his supervisor, Relford was served with a "Notification of Reasonable Cause Testing" requiring him to undergo a drug test. The notification erroneously stated that Relford had been charged with both possession of a controlled substance and possession of drug paraphernalia in the May 29 incident. In fact, Relford had not been charged with possession of a controlled substance.

Before undergoing the test Relford sought the advice of counsel. His attorney noted that the reasonable cause notice stated that Relford had been arrested for possession of a controlled substance. At his attorney's suggestion, Relford requested that the reasonable cause notice be reissued to reflect the correct charges.² The supervisor refused the request and Relford refused to take the drug test. On July 2, 1997, LFUCG filed charges against Relford seeking to dismiss him for refusing to take the test. A hearing on the charges was conducted before the LFUCG Civil Service Commission (Commission) on October 15, 1997.

² There is some dispute regarding whether Relford requested that the charges be changed; however, since we are treating the trial court's denial of Relford's claim for constructive discharge as a summary judgment ruling, we accept Relford's version of the facts.

On December 15, 1997, the Commission issued an opinion and order concerning the charges. The Commission found that reasonable grounds existed for the request that Relford submit to a drug test and, as a result of his refusal to take the test, grounds existed for his immediate dismissal. However, the Commission determined that there were procedural deficiencies involved in the case, including the failure by LFUCG to adequately advise Relford of the reasons he was requested to take the test, and ordered that his dismissal be reduced to a 30-day suspension. The Commission also ordered that "Mr. Relford submit forthwith to the Employee Assistance Program [EAP] for evaluation for drug dependency," and that "Mr. Relford comply with the EAP's resulting recommendation." Because under the LFUCG Alcohol and Drug Free Workplace Guidelines (Guidelines) employees who are participating in a drug treatment program are required to submit to random drug testing, the order of the Commission was tantamount to ordering additional drug testing of Relford.

Relford subsequently appealed the Commission's decision to the Fayette Circuit Court pursuant to KRS 67A.290. On July 15, 1998, the Circuit Court entered an opinion and order reversing the Commission's order on the basis that requiring Relford to submit to drug testing based upon his May 29 arrest for possession of drug paraphernalia did not satisfy the

criteria for ordering drug testing under LFUCG's own drug policy and that, therefore, the decision of the Commission was arbitrary.

The Commission subsequently appealed the Circuit Court's decision to this Court. On December 3, 1999, this Court rendered an opinion affirming the Circuit Court's decision. On October 18, 2000, the Supreme Court entered an order denying appellate review.

KRS 67A.290 provides, in part, that the enforcement of the Commission's order shall not be suspended pending appeal. Therefore, in the meantime, even though the Commission's decision was to be eventually overturned, pursuant to the Commission's October 15, 1997, order, Relford entered the EAP program and became subject to random drug testing. On December 1, 1997, Relford was ordered to undergo a random drug test. Relford submitted to the test and tested positive for cocaine.

As a result, on December 9, 1997, LFUCG filed a four-count notification of charges against Relford. Count I cited the positive drug test; Count II cited that this amounted to a second violation of the drug policies (the first apparently being his refusal to take the first test); and Count III noted Relford's refusal to take the initial drug test. The notification requested that the Commission dismiss Relford pursuant to KRS 67A.280 and Sections 21 - 44 of the Code of

Ordinances. As a result of the charges, Relford was also suspended without pay pending a hearing before the Commission on the charges.

On January 21, 1998, prior to any additional hearing before the Commission on the new charges and dismissal notification, Relford tendered a resignation letter to the LFUCG which stated as follows: "I Robert Relford having found another job with better & less stressful working conditions do resign effective Wendsday [sic] Jan. 21, 1998."

Following the conclusion of Relford's successful appeal of the Commission's October 15, 1997, order, on July 3, 2001, Relford filed a motion in Fayette Circuit Court, under the same docket number as the former appeal proceedings, seeking reimbursement of all employee benefits and pay lost as a result of the Commission's now overturned order and reinstatement to his former position. As the new round of litigation proceeded, Relford adopted the position that because the Commission's order resulted in the eventual December 1, 1997, positive random drug test, that that test should be considered illegal, null, and void; that the LFUCG's consideration of his refusal to take the first test in its December 9, 1997, notice of dismissal should be considered illegal, null, and void; and that his January 21, 1998, resignation should not be considered as a voluntary

resignation but, rather, should be considered as a constructive discharge.

On October 2, 2001, the Circuit Court issued an opinion and order requiring LFUCG to reimburse Relford for the suspension period ordered by the Commission in its October 15, 1997 order; however, the Circuit Court denied the motion for reinstatement and backpay concerning his termination of service, holding that Relford voluntarily resigned his position and that there was no constructive discharge. This appeal followed.

Relford contends that the Circuit Court erred by concluding that KRS³ 67A.290 permits a public agency to deny a public employee's request for reinstatement and backpay based upon evidence that the agency obtained under the auspices of an order that was subsequently declared to be invalid; that the trial court erred in concluding that LFUCG's actions in improperly drug testing Relford and in issuing charges for Relford's termination based upon the improper drug-testing did not constitute a constructive discharge; and that the Circuit Court's decision is inconsistent with the purpose of the goal of successful administrative appeals that the aggrieved party be placed in the situation he would have been in had the agency not acted erroneously. Rather than address these arguments

³ Kentucky Revised Statutes.

individually, we will address the claims of error by way of a general discussion of the issues.

We agree with the appellant that, as a general principle, a successful appellant in an administrative law case should be placed in at least the same position he would have occupied had the administrative agency not acted erroneously. See Getty v. Federal Savings & Loan Insurance Corp., 805 F.2d 1050, 1061 (D.C. Cir. 1986). In this respect, we agree that Relford's successful appeal would entitle him not to incur a punishment for his refusal to take the initial drug test. It is the law of the case that LFUCG's request for Relford to take the initial test was improper. Ranier v. Kiger Ins., Inc., Ky. App., 998 S.W.2d 515, 518 (1999). It follows that, at minimum, Relford is entitled to the remedy that his refusal to take the test not be held against him post-appeal.

We reach a different conclusion, however, regarding the provision of the Commission's October 15, 1997, order requiring Relford to enter the EAP program which, in turn, made him subject to random drug testing. Though but for Relford's entry into the program he would not have been random drug tested and would not have incurred the positive drug-test violation which resulted in the second round of charges and notice of termination, nevertheless, KRS 67A.290 unambiguously provides that "the enforcement of the judgment of the civil service

commission shall not be suspended pending appeal." Though the positive drug test was ultimately the fruit of a reversed Commission decision, the test was conducted pursuant to a valid and enforceable order, and Relford was subject to punishment for the positive drug test in accordance with the Guidelines. In light of KRS 67A.290, Relford may not rely upon the fact that the Commission's order was eventually overturned to avoid the positive drug test.

Turning now to Relford's constructive discharge claim, this claim was brought before the Circuit Court in a case originally docketed as an appeal from the Commission's decision pursuant to KRS 67A.290. While we have some concern that a KRS 67A.290 proceeding is not a proper forum in which to litigate a constructive discharge claim, for purposes of judicial economy, we will address the issue on the merits.

The first issue to resolve is the standard under which we should review the Circuit Court's dismissal of Relford's constructive discharge claim. Analogizing the present proceedings to a usual constructive discharge civil lawsuit, we conclude that, for purposes of our review, the Circuit Court's dismissal of Relford's constructive discharge claim should be regarded as effectively a grant of summary judgment to LFUCG. We will accordingly review the Circuit Court's dismissal of the claim under the guidelines for summary judgment.

The 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. CR⁴ 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., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances." Id. (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]" Steelvest, 807 S.W.2d at 482.

The commonly accepted standard for constructive discharge is "whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign." Northeast Health Management, Inc. v. Cotton, Ky. App., 56 S.W.3d 440, 445 (2001). (citing Commonwealth, Tourism Cabinet v. Stosberg, Ky. App., 948 S.W.2d 425, 427 (1997); Darnell v.

⁴ Kentucky Rules of Civil Procedure.

Campbell County Fiscal Court, 731 F.Supp. 1309 (E.D.Ky. 1990);
and Humana, Inc. v. Fairchild, Ky. App., 603 S.W.2d 918 (1980)).

In this case, Relford contends that his resignation amounted to a constructive discharge because LFUCG (1) improperly ordered him to take the first drug test in contravention of its own drug testing policies; (2) ordered him into EAP in contravention of its own drug testing policies; and (3) because the positive drug test was a product of its contravention of its own drug testing policies.

In conjunction with his constructive discharge claim, Relford filed an Affidavit which states, in relevant part, as follows:

2. During the course of my employment with the Lexington-Fayette Urban County Government, I was ordered to take two separate drug tests, each of which were ultimately determined by this Court to be illegal and improper. I refused to take the first such test and was suspended by the LFUCG for refusing to take the test. I was then forced to take the second test because of the Civil Service Commission's Opinion/Order which was then declared improper.

3. After the illegal drug testing, the LFUCG began taking steps to fire me from my position because of the results of the illegally-obtained drug-test. They advised me that I was being terminated and filed a request that the Civil Service Commission approve my discharge. Having already been through the Civil Service Commission process and having seen first hand that it would simply rubber-stamp the LFUCG's request, I

realized that my choices were very limited. In other words, I knew that I was going to ultimately be fired. Rather than put up with any more of the stress which I was experiencing because of the LFUCG's ongoing retaliation toward me after filing suit against the LFUCG, and because of my financial inability to again go without pay pending a decision from the Commission or a Court, I was forced to resign.

4. But for the illegally-obtained drug-test results, I would have never resigned my position and would not have lost my position. I had been with the LFUCG a number of years, was making good money, and was getting close to reaching pension level. I had never used drugs on LFUCG property, was never under the influence of drugs while at work, and had never done anything that would have placed my job in jeopardy. But for the LFUCG's illegal demand that I undergo a drug test, I would never have been subjected to the drug test that resulted in the LFUCG demanding my discharge because there was never any basis for a suspicionless test.

5. When I couldn't handle the stress of knowing that my termination was only a matter of time, I had no choice but to resign. As long as the matter was pending before the Commission, I would not be paid although I was still technically "employed." While still employed by the LFUCG, I was barred from working another full-time job. Faced with either resigning or going without any pay, I was forced to tell the LFUCG that I had decided to resign in favor of a better job - - one where I would not be under so much stress and retaliation. It was obvious that the LFUCG would never leave me alone until it forced me out like it did to other employees who complained.

6. The LFUCG's constant harassing and embarrassing drug-testing resulted in the

loss of my employment, loss of income, and loss of benefits to which I otherwise would have been entitled.

7. I feel as though I am entitled to reimbursement and reinstatement inasmuch as this Court has already issued an Order that declared that the Commission's Opinion/Order was set aside because it was arbitrary and capricious. Since the LFUCG's entire "basis" for the second drug-test was the Opinion/Order that has been declared improper, the LFUCG should not be allowed to use that Opinion/Order to "justify" ordering me to undergo random drug testing just as if the first test had been proper. Without the first test and illegal Order from the Commission subjecting me to random drug-testing, there would never have been a second, and I would still have my job at the LFUCG.

Accepting Relford's version of the facts (but not his legal conclusions) as true, based upon objective criteria, the conditions created by the LFUCG were not actions so intolerable that a reasonable person would feel compelled to resign. While it is now settled that the initial order requiring Relford to take a drug test was improper, it is clear from the record that this error was the product of a poorly drafted drug policy rather than a deliberately arbitrary action. Relford had been arrested for possession of drug paraphernalia, and, though ultimately proven wrong, LFUCG interpreted such an arrest as triggering drug testing under the policies. While in fact an arrest for possession of drug paraphernalia did not trigger drug testing, LFUCG's interpretation was clearly not based upon

oppressive motives, but, rather, was based upon a legitimate misunderstanding of its own policies.

With regard to the implementation of the order requiring Relford to enter EAP and the subsequent drug testing in accordance with that program, as previously noted, those actions were in full accordance with the provision of KRS 67A.290 that an order of the Commission not be suspended pending appeal. As the LFUCG was acting lawfully in requiring Relford to attend EAP and to be subject to random drug testing, those actions cannot be considered as actions so intolerable that a reasonable person would feel compelled to resign.

Further, Relford's claim that the Commission "would simply rubber-stamp the LFUCG request" is not objectively reasonable. The Commission did not do so on the occasion of Relford's refusal to take the initial drug test; instead, it reduced the punishment from dismissal to a 30 day-suspension and entry into the EAP program.

In summary, the factors cited by Relford are not actions which would compel a reasonable person to resign from his job. We agree with the Circuit Court Relford has failed to state intolerable working conditions that would constitute a constructive discharge. Applying summary judgment guidelines, there are no genuine issues of material fact, and Relford's

resignation was not a constructive discharge as a matter of law.
Thus, we affirm the trial court's dismissal as to this issue.

For the foregoing reasons the judgment of the Fayette
Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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