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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001284-MR

MICHAEL R. SHANNON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 99-CI-007344

CITY OF LYNNVIEW — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, McANULTY AND TACKETT, JUDGES.

McANULTY, JUDGE. Michael Shannon (hereinafter appellant) sued the City of Lynnview following the termination of his employment as a part-time police officer. Appellant sought, in separate counts of the complaint, a declaration of rights and reinstatement, a writ of mandamus, and monetary damages. He appeals the Jefferson Circuit Court's entry of summary judgment for the City. Having reviewed the trial court's opinion and order, and the record below, we affirm.

The trial court initially granted a motion for summary judgment from the City on June 10, 2001. Appellant filed a motion to vacate that order, which the trial court granted on November 20, 2001. The trial court thereafter entered conclusions of law. The court concluded that appellant agreed to accept a sixty day probationary period as a condition of reinstatement by the City Council. An employee of the City of Lynnview was not entitled to appeal a dismissal during the probationary period, whether or not cause was shown. The court stated that for a probation period to begin, the starting time of employment must be clear. The court concluded that this was an issue of fact which remained to be resolved, since the witnesses' testimony conflicted regarding when appellant was to report to work on September 1, 1999. Finally, the court denied the writ of mandamus on grounds that appellant showed no extraordinary circumstances for its issuance.

The City moved for summary judgment a second time in February 2002. The trial court entered an order granting summary judgment on May 17, 2002. This time, the trial court attributed importance to the ruling of the City Council that appellant was "to return to work on September 1, 1999 on his ***regular schedule*** as a probationary employee." (Emphasis in original). The trial court concluded from appellant's June and July work schedules that his regular schedule was Monday,

Wednesday and Friday from 5:00 p.m. to 9:00 p.m.; September 1st was a Wednesday. The court found that appellant knew he had been directed by the mayor to contact her on September 1, 1999. The court further found appellant called the mayor at a different time than he had been told, according to appellant's recollection. The trial court concluded that the City's termination of appellant was proper because he could have either shown up for work at the regularly scheduled time or phoned the mayor at the appointed time, neither of which he did. The court found no material issues of fact remaining to resolve, and granted summary judgment for the City.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact, and that the moving party was entitled to judgment as a matter of law. CR 56.03. An appellate court is not required to defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).[1] 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 that party's favor. Steelvest, Inc. v. Scansteel

[1] Appellee argues that the clearly erroneous standard should be applied to the fact findings of the trial court. However, this case was not tried by the court pursuant to CR 39.02. Rather, the trial court entered summary judgment. Therefore the issue is whether there is no genuine issue as to any material fact. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment must be granted only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. Id. at 483.

On appeal, appellant first asserts that the trial court ignored his argument that there is no provision in the Lynnview personnel ordinances for an additional probationary period for employees who have been reappointed. We believe the trial court correctly concluded as a matter of law that appellant accepted the condition of a probationary period in order to return to work. Appellant stated in his deposition that he understood from the City Council's ruling that he was to come back to work with a 60 day probation, like a new officer coming to work for the city would have. Appellant did not challenge the Council's authority at the time of the hearing to impose probation under his circumstances. We agree that by his acceptance of the probationary period, appellant is now precluded from asserting a right to a hearing upon dismissal.

Next, appellant believes that the mayor's actions were arbitrary and capricious under Section 2 of the Kentucky Constitution. However, the trial court properly found for the City since the mayor acted pursuant to her authority over personnel matters in the City ordinances. Taking appellant's version of events as true, appellant was informed of the need to

call the mayor on September 1 and did not do so. Appellant consequently did not work for the next month, at which time the City terminated his employment pursuant to the mayor's authority to dismiss employees. We agree that arbitrary government action was not shown.

Finally, appellant alleges that the trial court improperly determined and resolved material issues of fact regarding the circumstances surrounding appellant's efforts to return to work. Appellant argues that he had not assumed his new status as a probationary employee because he had not yet returned to work. We agree that the trial court correctly found no material issues of fact remaining.

The City was required to allow appellant to report to work as of the date fixed by the City Council. The City was prepared to receive appellant as an employee on that date. However, appellant did not arrive at the appointed date or time, and did not make himself available to work on his regular schedule as the City Council had anticipated. There was nothing more required of the City at that point. Thus, the City was within its rights in terminating appellant for failure to work. We do not believe that the other phone calls appellant made or the letter sent from his attorney change the critical fact that appellant did not show up for work when he was told to, or indeed thereafter. Thus, we agree that there were no issues of

material fact to be resolved, and the trial court correctly entered a summary judgment for the City.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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