

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001457-MR

HELEN MITCHELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 95-CI-004016

JEFFERSON COUNTY, KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

BARBER, JUDGE: The Appellant, Helen Mitchell, seeks review of an Opinion and Order of the Jefferson Circuit Court setting aside an order granting summary judgment in her favor, and effectively granting summary judgment for the Appellee, Jefferson County, Kentucky. Finding no error, we affirm.

Mitchell was employed by the Appellee as a public education specialist. In 1993, Dr. David Cundiff, director of health services for the Jefferson County Department of Health,

recommended Mitchell's termination. Genon G. Hensley, counsel for the County-Judge Executive, was appointed to investigate the matter. Hensley submitted a report recommending that Mitchell's employment be terminated. The recommendation was approved by the Fiscal Court to become effective November 19, 1993.

Mitchell appealed to the Jefferson County Merit Board. A hearing was conducted on September 8, 1994.¹ On September 19, 1994, the Merit Board issued findings and recommendations that the decision to terminate Mitchell should be set aside and that she should receive a 90-day suspension without pay. By letter dated October 6, 1994, the County Judge-Executive rejected the Merit Board's recommendations and affirmed Mitchell's termination, as approved by the Fiscal Court.

On September 1, 1995, Mitchell filed a civil action in the Jefferson Circuit Court claiming that she was wrongfully terminated and seeking injunctive relief to reinstate her to her job. On November 8, 1996, Mitchell filed a motion for summary judgment asserting that the County Judge-Executive's action was undertaken without procedural due process and that it was not supported by substantial evidence.

¹The Merit Board declined to hear any testimony from Hensley about her investigation or consider her report. According to the affidavit of Larry Ethridge, an attorney employed to assist the Merit Board during the hearing, the Board felt it might be unduly swayed by the testimony and report of its regular Board counsel, Genon G. Hensley.

On June 10, 1998,² the trial court entered an order remanding the matter to Jefferson County government for compliance with the recommendations of the Merit Board, noting that the case was much like its recent decision in Mark Friedman v. Armstrong, et al, then pending on appeal. On June 22, 1998, the Appellee filed a motion to alter, amend or vacate judgment. On July 21, 1998, the trial court entered an order, noting that a response had not been filed to Appellee's motion to alter, amend or vacate and that no hearing date had been set. The trial court remanded the matter pending further action by counsel, advising that "[a] hearing date may be obtained by conference call, or the matter submitted, after a response has been filed if desires, [sic]. . . . No further action will be taken by the Court pending further word from counsel."

On or about May 8, 2002, Mitchell's counsel filed a Form AOC-280 for final submission and a letter, explaining that he had never received the July 21, 1998 order and doubted that opposing counsel had either. Appellee filed a response asserting that *Friedman v. Armstrong*,³ upon which the trial court had relied, was now final and dispositive of the issue of the County Judge-Executive's authority.

² On April 29, 1998, the trial court entered an order denying Appellee's CR 41.02 motion to dismiss for failure to prosecute.

³ Ky., 59 S.W.3d 875 (2001).

Ultimately, the trial court entered an Opinion and Order on June 24, 2002:

This Court granted summary judgment to Mitchell on the grounds that the Jefferson County Judge Executive had exceeded the scope of his authority in rejecting the recommendation of the Jefferson County Merit Board. However, our Supreme Court has recently made clear that ultimate authority for termination of county employees resides in the Judge-Executive, not the Merit Board. Friedman v. Armstrong, Ky., 59 S.W.3d 875, 878 (2001). Thus, the Court cannot conclude that the Judge-Executive exceeded his authority, and must set aside its earlier grant of summary judgment.

This Court now turns to the merits of Mitchell's motion for summary judgment. . . .

Mitchell claims to be entitled to summary judgment because the Judge-Executive denied her due process rights. . . .

. . . .

Here, Mitchell's right to retention is provided by Kentucky statutes, which provide that she has a right to appeal an adverse determination to the Merit Board, which will make a *recommendation* as to termination; however, the County Judge-Executive has ultimate authority to fire or retain her. Mitchell has not produced any evidence that she had a contractual or other right to continued employment. Thus, she had no property interest in her job. Since Mitchell was neither deprived of liberty nor property, the County did not violate her due process rights.

Mitchell has also argued that the County Judge-Executive's rejection of the Merit Board's recommendation was arbitrary and capricious. However, where, as here, as the termination was not based upon a constitutionally impermissible reason, the constitutional prohibition on arbitrariness is not implicated. Bowlin v. Thomas, Ky. App., 515, 519 (1977). In any event,

based upon the seventeen-page report prepared by the Merit Board, the Court cannot conclude that the County Judge-Executive acted arbitrarily in terminating Mitchell. Accordingly, for the reasons set forth above,

IT IS HEREBY ORDERED that Defendant Jefferson County, Kentucky's Motion to Alter, Amend or Vacate Judgment is **GRANTED**. . . . Plaintiff, Helen Mitchell's Motion for Summary Judgment is hereby **DENIED**. (Emphasis original)

On July 3, 2002, Mitchell filed a notice of appeal to this Court. On appeal, Mitchell asserts that she had a property interest in her job, because she had a right to appeal her termination and a concomitant right to due process. Mitchell also contends that the County Judge-Executive's actions were arbitrary as a matter of law.

We agree with the trial court that Mitchell failed to demonstrate a contractual or other right to continued employment. Mitchell exercised her right to appeal, and was afforded due process in her Merit Board hearing. As explained by the Supreme Court in *Friedman*,⁴ "[u]nder the rules and regulations of the Jefferson County Merit Board, the final authority to remove covered employees rests with the Jefferson County Judge-Executive conditioned on the Jefferson County Fiscal Court's approval[.]"

We also reject Mitchell's argument that the County Judge-Executive was required to make findings of basic evidentiary facts to explain why he rejected the Merit Board's

⁴ *supra*

recommendations. The cases cited by Mitchell have no application here.

Mitchell argues that the County Judge-Executive acted arbitrarily towards her, citing *Reis v. Campbell County Board of Education*.⁵ *Reis* is inapposite. We find no error in the trial court's conclusion that the County Judge-Executive did not act arbitrarily in terminating Mitchell, based upon the Merit Board's report. The County Judge-Executive has the final say under KRS 67.710(7), and is not required to defer to the Merit Board's recommendations.

The Merit Board's findings reflect that Dr. Cundiff believed Mitchell should be terminated, because of problems with time and attendance, insubordination, job performance and dishonesty. The Board noted Derek Reed's testimony. Reed, Assistant Director for the Department of Health, testified about Mitchell's suspension over a "sticking incident" at a health fair. The Board erroneously stated that there was no mention of the specific incident or resulting suspension in the termination letter. However, our review of the November 19, 1993 termination letter, which was made an exhibit at the Merit Board hearing, reflects:

On May 11, 1993, you asked for and were granted sick leave from 8:00 a.m. until 1:00 p.m. You were scheduled to conduct cholesterol screening

⁵ Ky., 938 S.W.2d 880 (1996).

at a health fair that evening, beginning at 6:00 p.m. You did not return to the office until after 4:00 p.m. and had to rush to prepare for the fair. Essential items were omitted from your materials and one person was subsequently stuck with an unprotected needle. You were given a suspension for which you filed a grievance.

Cottingham, the Community Health Services Coordinator, testified about repeated problems she had with Mitchell about last minute requests for supplies and equipment to be used at health fairs, and the failure to return equipment. Moreover, the Board found that Mitchell had admitted to at least one act of dishonesty by taking sick leave when she had not visited her doctor's office as reported.

Accordingly, we affirm the Opinion and Order of the Jefferson Circuit Court entered June 24, 2002.

All CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Susan P. Spickard
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