

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001280-MR

DR. ROBERT L. MONTGOMERY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 94-CI-00015

COMMONWEALTH OF KENTUCKY,
CABINET FOR WORKFORCE DEVELOPMENT,
DEPARTMENT FOR VOCATIONAL REHABILITATION

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Dr. Robert L. Montgomery has appealed from a judgment entered by the Franklin Circuit Court on June 13, 2003, which granted summary judgment to the Department for Vocational Rehabilitation (DVR). Having concluded that there is no genuine issue as to any material fact, and that as a matter of law Montgomery is not entitled to DVR funding, we affirm.

The DVR assists eligible individuals with disabilities to prepare for, secure, retain, or regain employment.¹ The federal government provides grants for this program under the Rehabilitation Act of 1973.² The specified purpose of this program is to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society"³

The Commonwealth of Kentucky participates⁴ in the federal vocational rehabilitation program through the DVR, an

¹ 29 U.S.C.A. § 722(a)(1) states:

An individual is eligible for assistance under this subchapter . . . if the individual-

- (A) is an individual with a disability under section 705(20)(A) of this title; and
- (B) requires vocational rehabilitation services to prepare for, secure, retain, or regain employment.

29 U.S.C.A. §705(20)(A) states:

Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who-

- (i) has a physical or mental impairment which for such individual constitutes or results in substantial impediment to employment; and
- (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter

² 29 U.S.C. § 701(b)(1).

³ Id. at (b)(1).

⁴ See Kentucky Revised Statutes (KRS) 151B.200, stating:

This state accepts and agrees to comply with all the provisions of the Acts of Congress of the United States approved June 2, 1920 (41 Stat. 735) relating to vocational rehabilitation and all subsequent acts when such acts apply

Executive Branch agency of the state government administratively organized within the Cabinet for Workforce Development pursuant to KRS 12.020(II)(13)(c). The General Assembly has empowered the DVR

to provide for and improve the vocational rehabilitation of citizens of the Commonwealth of Kentucky with physical and mental disabilities in order that they may increase their social and economic well-being and the productive capacity of the Commonwealth and nation.⁵

Participation in this service is based on the eligibility of the applicant.

Montgomery suffers from Erb Palsy, which renders his left arm unusable unless his arm can be placed in a certain position, such as by propping it on another object. While receiving funds through the DVR, Montgomery attended Xavier University, in Cincinnati, Ohio, where he earned a B.S. degree in business administration in 1979. Prior to graduation from this institution, Montgomery met with his DVR counselor and explained that he wished to change his Individualized Written Rehabilitation Program (IWRP)⁶ from pre-law to physician. Accordingly, that change was made in Montgomery's IWRP in a plan of services dated September 10, 1978. Montgomery then wanted to take additional courses in the pre-medical field, and requested funding from the

to joint state and federally funded vocational rehabilitation programs.

⁵ KRS 151B.180.

⁶ See 29 U.S.C.A. § 722(b).

DVR. The DVR denied his request for additional funds for his education beyond the undergraduate degree in business administration. An administrative review hearing was conducted in August 1981, and the fair hearing officer upheld the decision not to fund what the DVR had determined to be post-baccalaureate course work that provided little assurance that Montgomery would be admitted to medical school. The administrative decision was based upon the guidelines set forth in the Rehabilitation Act of 1973.⁷

Thereafter, Montgomery attended Northern Kentucky University on his own and in 1984 he obtained a B.S. degree in biological sciences. The DVR did not fund any of the expenses incurred by Montgomery while he attended Northern Kentucky; instead he relied upon financial support from his family and student loans to finance his education. After graduating from Northern Kentucky, Montgomery applied for admission to medical school at the University of Kentucky and the University of Louisville, but he was denied admission to both institutions. However, he did obtain admission to the masters program in anatomy at the University of Kentucky. He attended U.K. without financial support from the DVR, until he received notification of his acceptance to the American University of the Caribbean Medical School (AUC) to begin in January 1985. Montgomery graduated from

⁷ See 29 U.S.C.A. § 722(c).

AUC in October 1991. The DVR funded Montgomery's final semester in medical school and his graduation expenses, but it provided no other financial assistance for Montgomery to attend AUC.

Montgomery now maintains that the DVR is responsible for the debt he incurred as a result of his attending medical school.

After a fair hearing decision was rendered on May 6, 1993, Montgomery filed a civil action in the Jefferson Circuit Court. Essentially, Montgomery challenged in circuit court the implementation by the DVR of the hearing officer's decision. Montgomery asked the trial court to grant injunctive relief on January 4, 1994, and to award him \$33,030.00⁸ for his medical school expenses. The trial court denied Montgomery's request for relief in an order entered January 26, 1994.

After the action languished in circuit court for some eight years, on October 15, 2002, the DVR finally moved the trial court for a summary judgment. The trial court granted summary judgment to the DVR on June 13, 2003, stating "[i]n the matter before the Court the Plaintiff has not alleged any evidence, not already contained in the record, which creates any issue of material fact." This appeal followed.

⁸ In Montgomery's motion for temporary injunction, he requested that the trial court grant a temporary injunction requiring the defendant to "(a) immediately forward the sums of \$5,810.00 and \$27,220.00 to the plaintiff to cover services to which he appears entitled." Montgomery does not provide any details regarding how he arrived at the sums he requested the trial court to award.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.⁹ Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹⁰ In Paintsville Hospital Co. v. Rose,¹¹ the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor" [citation omitted].¹² There is no requirement that the appellate court defer to the trial court since factual findings are not at

⁹ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

¹⁰ Kentucky Rules of Civil Procedure (CR) 56.03.

¹¹ 683 S.W.2d 255, 256 (Ky. 1985).

¹² Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

issue.¹³ "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."¹⁴ Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."¹⁵

In this appeal, Montgomery claims that the DVR did not comply with the hearing officer's decision when it refused to authorize funds to pay for his medical school expenses. However, the hearing officer's decision, which is 17 pages in length, did not award Montgomery any specific services and it did not identify any appropriate services or enumerate expenses for which he is eligible. Instead, the hearing officer stated:

Immediate attention should be given to determining Dr. Montgomery's status in the board exams he took in 1992. In [the] event he passed and becomes licensed, [the] DVR should assist in accordance within the regulatory guidelines of [the] DVR to assist Dr. Montgomery to finally achieve the chosen vocational objective as a licensed practicing physician.

¹³ Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992).

¹⁴ Steelvest, 807 S.W.2d at 480.

¹⁵ Id. at 482. See also Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

From the record, there is no documentation to indicate that Montgomery passed the board exams in 1992, or since then. In fact, Montgomery failed the exams referenced by the hearing officer in the above passage. In addition, the record contains numerous offers by the DVR of assistance to Montgomery, but there is no indication that any of these offers were accepted. According to the hearing officer's decision, for Montgomery to receive services from the DVR he was required to pass the board exams and to become licensed. Thus, since these conditions were not met, Montgomery is not entitled to receive further financial assistance from the DVR.

In his brief, Montgomery accused numerous employees of the DVR of conspiracy and collusion. Additionally, in his reply brief, he claims that the brief supplied by the DVR was an attempt "to protect Cabinet employees, past and present, whom [sic] willfully and knowingly, directly or indirectly . . . participated and/or were responsible for the diversion of federal and state monies in this case." He further claimed that he "plans to present an ocean of evidence and approximately forty witnesses that in fact the DVR employees did conspire and were in collusion." Yet, this "ocean of evidence" was never presented to

the trial court, nor were the conspiracy theories he referred to supported by any evidence.¹⁶

Based on the record before the trial court, there exists no genuine issue as to any material fact to support the claims asserted by Montgomery. The crux of Montgomery's argument in this appeal alleges the DVR's non-compliance with the hearing officer's recommendation; however, it was Montgomery who failed to comply with the requirements contained in the recommendation. Since Montgomery did not pass his board exams as was required in the hearing officer's recommendation, he did not qualify for further participation in the program offered by the DVR and he is not entitled to further funding from the DVR. Thus, the trial court did not err by granting the DVR's motion for summary judgment.

Based on the foregoing, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dr. Robert L. Montgomery,
Pro Se
Fort Mitchell, Kentucky

BRIEF FOR APPELLEE:

Sue G. Simon
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¹⁶ Montgomery also complained in his reply brief of the five-page limitation under the rules, yet in his initial brief, he only used 11 pages.