RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002230-MR

ERIC GARDNER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NOS. 98-CI-00517, 98-CI-02417, 98-CI-03481

JAMES LEE; CLARENCE STEELE;
LEE WILSON; KEVIN BENNETT;
CLIFTON GAY, JR.,;
STEVE FEESE;
LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
CIVIL SERVICE COMMISSION;
AND LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: Eric Gardner appeals from a judgment of the Fayette Circuit Court reflecting a jury verdict in favor of Lexington-Fayette Urban County Government, Lexington-Fayette Urban County Government Civil Service Commission and other defendants. In a consolidated action, Gardner argued that he

was denied a job promotion in violation of KRS Chapter 344 as a result of religious and racial discrimination. He now raises several claims of error and seeks a new trial. For the reasons stated herein, we reverse the judgment on appeal and remand the matter to the Fayette Circuit Court.

At the time of filing of the consolidated actions, Gardner was a "senior equipment operator" with the Lexington-Fayette Urban County Government Division of Solid Waste. His primary job duty was to operate a sanitation vehicle.

In January, 1997, Gardner, a black male, was eligible for a promotion to a supervisory position with the Department of Sanitation. James Lee, the acting director of the Department of Sanitation, promoted Clarence Steele, a white male, to the position.

On February 11, 1998, Gardner filed the first of a series of lawsuits in Fayette Circuit Court against Lexington-Fayette Urban County Government, the Civil Service Commission, and various Department of Sanitation and Public Works employees. He alleged that Lee created a "religiously hostile" work environment and refused to promote him because of his race; that Steele engaged in unspecified wrongful acts facilitating Lee's conduct; and, that Jeff Wilson, the Commissioner of Public Works, improperly approved Lee's wrongful conduct. Gardner

alleged that these acts constituted a violation of KRS Chapter 344. He sought a jury trial and damages.

On July 2, 1998, Gardner filed a second action in Fayette Circuit Court. On December 8, 1997, Lee had reprimanded Gardner for failing to show up for work on November 26, 1997, without calling in. Two months later, on February 9, 1998, Clifton Gay suspended Gardner for failing to show up for work on January 26, 1998, without calling. Gardner appealed the reprimand and suspension to the Civil Service Commission. On June 5, 1998, the Commission rendered an opinion and order upholding the suspension. Gardner's July 2, 1998, complaint alleged that the Commission wrongfully upheld the suspension in violation of KRS Chapter 344.

On September 25, 1998, Gardner filed a third action in Fayette Circuit Court against the Commission and various Department of Sanitation and Public Works employees. This action alleged that the Commission improperly denied Gardner's appeal from a June 19, 1998, reprimand. This reprimand was issued when Gardner failed to attend a June 18, 1998, safety meeting. Gardner had unsuccessfully contended that he was not required to attend the meeting and that the reprimand was therefore unsupported.

The three actions were prosecuted independently. In May of 2000, the trial court entered an order consolidating the

actions. After a protracted procedural history, a jury trial on the consolidated actions commenced on February 24, 2003. After the proof was heard, the jury returned a verdict in favor of the defendants. A judgment reflecting the verdict was rendered on July 11, 2003. Gardner's subsequent motion under CR 59.05 to alter, amend or vacate the judgment was denied, and this appeal followed.

Gardner now argues that the trial court erred in rendering a judgment in favor of the defendants, and raises a litany of alleged errors in support of his contention. He maintains that the trial judge should have recused herself because she is a cousin of the mayor of Lexington-Fayette Urban County Government, and because she had once shared office space with the government's outside counsel. He argues that under KRS Chapter 67A, only the mayor and the "head of the executive unit" are authorized to engage in disciplinary matters; that Gardner's suspension on July 8, 1998, was brought about without due process; that he was entitled to a new hearing before the Commission because the recordings it provided were unintelligible; and, that he is entitled to a judgment or a new trial because he made a prima facie case of racial discrimination. Gardner goes on to argue that he should have been permitted to present evidence showing that the discipline to which he was subjected was unsupported by fact and was

discriminatory; that the trial court erred in refusing to permit the introduction of evidence that a document had been altered and racial words had been used; that the trial court erred in refusing to allow evidence showing that the government's failure to re-hire him after his discharge constituted unlawful retaliation under KRS Chapter 344; that the court erred in allowing the government to introduce evidence that Gardner had committed an assault; and, that the trial court erred in directing the jury to disregard a statement made by Gardner during the closing argument. In sum, Gardner seeks a new trial with directions that the former trial judge recuse herself. He also seeks a declaration resolving the issues raised herein.

Gardner first argues that Judge Isaac committed reversible error in failing to recuse herself from the case. He relies on KRS 26A.015(2), which states that "[A]ny justice or judge of the Court of Justice . . . shall disqualify himself in any proceeding: (a) Where he has a personal bias or prejudice concerning a party . . . [or] (e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned." He cites a number of cases wherein the trial judge did recuse himself/herself, or where it was held on appeal that a recusal should have occurred. He argues that Judge Isaac's impartiality might reasonably be questioned because she

is a first cousin of the mayor. Gardner maintains that he sustained substantial prejudice and is entitled to a new trial.

The Kentucky Supreme Court has established rules governing the operation of the Court of Justice.[1] The promulgation of these rules is authorized by the Kentucky Constitution.[2]

In particular, SCR 4.300 Canon(3)(E) ("Kentucky Code of Judicial Conduct") states:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: . . . (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) is a party to the proceeding, or an officer, director or trustee of a party; [or] . . . (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding . . . .[3]

The SCR calculates the degree of relationship according to the civil law system.[4] Under the civil law method, degrees of relationship are counted up from one party to the common

[1] See generally, Rules of the Supreme Court (SCR) 4.300.
[2] Ky. Const § 116 ("The Supreme Court shall have the power to prescribe rules governing [the] practice and procedure for the Court of Justice.").
[3] SCR 4.300 Canon(3)(E)(1) is codified in KRS 26A.015.
[4] Middle States Coal Co., Inc. v. Cornett, 584 S.W.2d 593 (Ky.App. 1979). See also 46 Am.Jur.2d Judges 142.

ancestor and then down to the other party.[5] A parent is the first degree of relationship, a grandparent is the second degree of relationship; a parent's sibling (an aunt or uncle) is the third degree, and the sibling's child (a cousin) is the fourth degree of relationship.[6] As such, Judge Isaac is the fourth degree of relationship to Mayor Isaac and is not subject to the authority of SCR 4.300 Canon 3(E)(1)(d) and KRS 26A.015.

However, this is not the end of the matter. The issue then becomes whether Judge Isaacs should disqualify herself in this matter because her impartiality might reasonably be questioned. We believe she should have disqualified herself from this case. This became clear when during the oral argument in this case the attorney for the appellees admitted that Judge Isaacs had recently recused herself from another case in which the city and the Mayor were named parties.[7] When asked to address why the Judge would recuse from one case involving the Mayor and not all cases involving her first cousin, the response given can be paraphrased as because that was an important case, and a high profile case. We do not believe the nature of the case nor the public awareness of the case dictates when recusal

[5] Middle States Coal Co., Inc., supra.
[6] Id.
[7] The reason apparently given for Judge Isaac's recusal in the case of Lexington-Fayette Urban County Government v. Kentucky-American Water Company, et al, Fayette Circuit Court Action 03-CI-3804, as stated in Appellees' brief was because the case had been one of "great public interest" and had been "the subject of much public and political debate and was a key issue dividing the candidates in the recent mayoral election." Appellees' brief p. 8.

shall occur. If there is an appearance of bias, prejudice or impartiality present because of a relationship, it is present in all cases involving the same parties.

Appellees argue that recusal was not required because the relationship between the judge and the mayor was well known and that the affidavit alleging lack of knowledge of this relationship was signed by only one of Gardner's attorneys, not both. However, in Abell v. Oliver, 117 S.W.3d 661 (Ky.App. 2003), this Court cited SCR 4.300, Canon 3F, relating to remittal of disqualification, and held that "the language is clear that any waiver must be signed by 'all parties and lawyers,' and included in the record."[8] We believe the problem presented herein could have easily been remedied. We believe the following portion of the concurring opinion by Judge David Buckingham in Abell best states how simple it is for a judge to avoid this potential problem:

> This unfortunate situation could have been avoided had the trial judge either allowed the case to be transferred to another Fayette Circuit Court judge or disclosed the relationship prior to the trial. Neither of those circumstances occurred, and I concur with the majority that the judgment must be vacated and the case remanded for a new trial.

Id. at 663.

[8] Id. at 663.

Judge Buckingham's concurring opinion continues on and addressed the de minimis issue which had been addressed in the majority opinion and in Middle States Coal Co., Inc., supra. This theory is defined in Judge Buckingham's opinion when he again addresses why the judge should have recused in the Abell case as follows:

> However, under the definition of "de minimis" in the terminology section of the Kentucky Code of Judicial Conduct, I conclude that the judge's husband in this case had more than a de minimis interest. "De minimis" is defined as "an insignificant interest that could not raise reasonable question as to a judge's impartiality." The definition focuses on whether the interest is so insignificant as not to raise a reasonable question as to the judge's impartiality. I believe the judge's husband's interest could clearly raise a reasonable question as to the judge's impartiality in this case.
>
> Regardless of whether or not the interest of the judge's husband was de minimis, the judge was required to disqualify because of the appearance of impropriety. Canon 3E(1) requires disqualification where the judge's impartiality might reasonable be questioned. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity impartiality and competence is impaired." Commentary to Canon 2A of the Kentucky Code of Judicial Conduct. I believe the relationship created in reasonable minds a perception that the judge's impartiality was impaired. Even though there may have been no real basis for disqualification, "[a] judge should disclose on the record information that the judge

> believes the parties or their lawyers might consider relevant to the question of disqualification….” See commentary to Canon 3E(1). In short, the trial judge should have disqualified herself for this additional reason even if her husband’s interest in the proceeding was only de minimis. (Footnotes omitted).

Abell, 117 S.W.3d at 664.

While not necessary to our determination of whether or not Judge Isaac’s should have recused from this case, we do believe the Mayor as chief executive officer of the executive branch of Lexington-Fayette Urban County Government has a significant interest in the outcome of a civil action against said governmental entity. As set forth in both Middle States Coal Co., Inc. and Abell when more than a de minimis interest exist that could be substantially affected by the proceedings any potential conflicts of interests or potential appearances of impropriety should be disclosed. Every party to an action has the right to expect an unbiased and impartial judge determine the various legal issues to be presented throughout the procedure. To require anything less brings into question the integrity of the entire process and weakens the judicial system.

Gardner raises a number of additional claims of error. In light of our reversal of the judgment on the issue of disqualification/recusal, these additional arguments are moot. However, we would be remiss if we did not state that upon remand

the new judge should revisit the many issues raised by Gardner and is not bound by Judge Isaac's rulings.

For the foregoing reasons, we reverse the judgment of the Fayette Circuit Court and remand the matter for further proceedings in accordance with this opinion.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

William C. Jacobs
Lexington, KY

Matthew L. Mooney
Lexington, KY

ORAL ARGUMENT FOR APPELLANT:

William C. Jacobs
Lexington, KY

BRIEF FOR APPELLEES

Terry Sellars
Lexington, KY

Theresa L. Holmes
Lexington-Fayette Urban County Government
Lexington, KY

ORAL ARGUMENT FOR APPELLEES:

Terry Sellars
Lexington, KY