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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001880-MR

JON BRUMFIELD — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 03-CI-00290

CITY OF GRAYSON, KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: Jon Brumfield appeals from a summary judgment of the Carter Circuit Court, entered August 19, 2004, dismissing his claims for wrongful termination, retaliatory discharge, and discrimination. Brumfield alleges that the City of Grayson wrongfully terminated him from his position as police officer in violation of his statutory and constitutional rights to due process; discriminated against him in violation of KRS 344.040,

a section of the Kentucky Civil Rights Act; and retaliated against him in violation of KRS 342.197 for having filed a workers' compensation claim. Convinced that Brumfield's termination was not illegal for any of these alleged reasons, we affirm.

As the parties note, this Court reviews summary judgments by asking, as did the trial court, whether "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 judgment as a matter of law."[1] Although reasonable doubts must be resolved in his or her favor,[2] the "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."[3]

Construed favorably to Brumfield, the record indicates that he began working as an officer for the Grayson police force in November 1999. In October 2000, he suffered a work-related back injury, which rendered him temporarily totally disabled.

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[1] CR 56.03.

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

[3] *Id.* at 482.

His ensuing workers' compensation claim was settled upon terms that do not appear in the record in December 2001 or January 2002. In the meantime, near the beginning of October 2001, he was released to return to work with restrictions. Although the record does not specify the restrictions, apparently they precluded Brumfield's wearing the patrolman's heavy bullet-proof vest and gun belt, his sitting for extended periods in the patrol car, and his attempting to restrain a recalcitrant arrestee. Brumfield does not dispute that these are essential functions of a patrolman's job or that his restrictions thus disqualified him for that position.

On December 15, 2001, Brumfield received a letter from his health insurer informing him that as of November 30, 2001, the City of Grayson had terminated his health insurance. When the then Chief of Police, Greg Wilburn, could not or would not explain the City's action, Brumfield's attorney attended the June 4, 2002, meeting of the Grayson City Council and asked the Mayor, George Waggoner, if Brumfield was not still an employee of the City entitled to health insurance. The minutes from the meeting appear in the record and provide in part as follows:

> Chief Wilburn [apparently present at the meeting and speaking] informed Mr. Rowady [Brumfield's attorney] that as long as he [Brumfield] was on W/C, he could draw his incentive pay from the State. Once W/C quit paying, he would need to submit a form to the State that he was terminating his Police Officer certification. That was when he was terminated on his

> insurance. We [unspecified speaker, possibly the Mayor or possibly Chief Wilburn] were basically told that we risk losing incentive pay for all officers. He turned in all his things and his Doctor advised him that he could not take a hit to his back. Would be at risk. When we do [sic] these things we officially terminated him.

Based on this evidence, Brumfield claims that the Mayor acknowledged having unilaterally terminated Brumfield because Brumfield's injured back rendered him both unfit for duty and an unacceptable insurance risk.

In August 2003, Brumfield brought the present action seeking damages. He claims first that his termination without notice and a hearing violated his due process rights under the Grayson City Ordinances and under Section 2 of the Constitution of Kentucky, which, like the 14th Amendment to the United States Constitution, prohibits governmental actions that arbitrarily deprive one of a protected liberty or property interest.[4]

Although Brumfield has failed to specify the ordinance or ordinances upon which he purports to rely, the City has referred us to the City of Grayson Police Department General Order G-4, and Brumfield has not contested that reference. As the City notes, General Order G-4, which announces a policy "to investigate all complaints of alleged officer misconduct, and to equitably determine whether the allegations are valid or invalid

[4] Kentucky Milk Marketing & Antimonopoly Commission v. Kroger Company, 691 S.W.3d 893 (Ky. 1985); Shelton v. Brown, 71 F.Supp.2d 708 (W.D.Ky. 1998).

and to take appropriate action," is a local version of KRS 15.520, the Police Officer's Bill of Rights. Like that statute, it provides that police officers are entitled to notice and a hearing before being disciplined or discharged for misconduct. On its face, the General Order, like the statute, does not apply to discharges for other reasons, such as Brumfield's discharge for incapacity.[5]

Brumfield also does not contest the City's assertion that at the time of Brumfield's discharge, Grayson, a fourth class city, had not adopted the civil service provisions of KRS 95.761 – 95-765. Grayson police officers such as Brumfield were, therefore, apart from misconduct cases, at-will employees subject to summary dismissal by the mayor.[6] Because Brumfield's discharge thus did not implicate any provision giving Brumfield a property interest in his job, his discharge cannot be deemed arbitrary for the purposes of Section 2 of our Constitution.

Brumfield next contends that he was wrongfully terminated in retaliation for having pursued workers' compensation benefits. As he correctly notes, KRS 342.197 prohibits such retaliation. That statute provides in part that "[n]o employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and

[5] McCloud v. Whitt, 639 S.W.2d 375 (Ky.App. 1982).

[6] KRS 83A.080; McCloud v. Whitt, *supra.*

pursuing a lawful claim under this chapter [KRS Chapter 342]." It is also true that "[o]ne of the primary purposes of [Chapter 342] shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment."[7] Nevertheless, the law recognizes that injured employees will sometimes be rendered incapable of returning to their former jobs, and when that is the case, although they may be entitled to rehabilitation and to enhanced disability benefits,[8] they are lawfully subject to discharge.[9] A discharge may not be deemed retaliatory unless the employee proves that the workers' compensation claim was a "substantial and motivating factor but for which the employee would not have been discharged."[10]

We agree with Brumfield that under KRS 342.197 an employer may not discharge an injured employee with a meritorious workers' compensation claim solely because retaining him or her would adversely affect the employer's insurance

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[7] KRS 342.710(1).

[8] KRS 342.710 and KRS 342.730(1)(c).

[9] Daniels v. R.E. Michel Company, Inc., 941 F.Supp. 629 (E.D.Ky. 1996).

[10] First Property Management Corporation v. Zarebidaki, 867 S.W.2d 185, 188 (Ky. 1994).

rates. Although our Supreme Court has held that a subsequent employer may discharge for this reason,[11] permitting discharge by the present employer, at least absent a showing of extreme and ruinous rate increases, would essentially negate the statute, since an insurance claim and the employee's altered health status will typically affect the rates.[12]

Here, however, we agree with the trial court that Brumfield has failed to raise a material dispute that but for the mayor's allegedly improper insurance motive he would not have been discharged. It is clear rather that even aside from the City's financial concerns, Brumfield was discharged because he could no longer perform the essential functions of his job. Because this is a legitimate reason for discharge independent of Brumfield's having pursued his workers' compensation benefits, his claim for retaliation damages must fail.

Finally, Brumfield contends that, even if he could not return to his patrolman duties, the City discriminated against him in violation of section 344.040 of the Kentucky Civil Rights Act when it failed to accommodate his actual or perceived disability by assigning him to another job within his work

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[11] Nelson Steel Corporation v. McDaniel, 898 S.W.2d 66 (Ky. 1995).

[12] *Cf.* Bruner v. GC-GW, Inc., 880 So.2d 1244 (Fla.App. 2004) (holding that even subsequent employers may not discharge for that reason).

restrictions. KRS 344.040 provides in pertinent part that "[i]t is an unlawful practice for an employer: (1) . . . to discharge any individual, . . . because the person is a qualified individual with a disability." As Brumfield notes, under this statute covered employers are obliged to make reasonable accommodations to retain employees with qualifying disabilities.[13] Reasonable accommodations include "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position."[14] Employers are not required, however, "to keep an employee on staff indefinitely in the hope that some position may become available some time in the future."[15] Nor are they required "to create new positions for disabled employees."[16] Even assuming that Brumfield is disabled for the purposes of the statute, moreover, in an accommodation case it was his burden to "propos[e] an accommodation and show[] that *that* accommodation is objectively

[13] Noel v. Elk Brand Manufacturing Company, 53 S.W.3d 95 (Ky.App. 2000).

[14] *Id.* at 103 (citation and internal quotation marks omitted.).

[15] Monette v. Electronic Data Systems Corporation, 90 F.3d 1173, 1187 (6th Cir. 1996).

[16] *Id.*

reasonable . . . in the sense both of efficacious and of proportional to costs."[17] He has not met that burden.

According to Brumfield's deposition, some time after Brumfield's termination Chief Wilburn suggested that it might be possible to return him to a clerical position or to a position as a detective. Brumfield claims that the City discriminated against him when it ultimately failed to provide him with one of those jobs. He has not, however, offered any proof that there were particular positions available for which he was qualified both physically and otherwise and which thus could form the basis for an objectively reasonable accommodation. Nor has he met his burden of coming forward with affirmative evidence to dispute the City's proof that on the small Grayson Police Department there are no officer desk jobs and that detectives must regularly serve as patrolmen, a job function Brumfield cannot perform even if he were otherwise qualified to be a detective. The trial court did not err, therefore, by ruling that as a matter of law Brumfield's proposed accommodation was not objectively reasonable and that therefore his discharge from the Grayson police force did not constitute disability discrimination as outlawed by KRS 344.040.

[17] Monette v. Electronic Data Systems Corporation, 90 F.3d at 1183; Noel v. Elk Brand Manufacturing Company, *supra.*

In sum, as an at-will employee Brumfield was not entitled to a hearing prior to being discharged; the City was not required under the workers' compensation act to retain him in a job he could no longer perform; and the Civil Rights Act does not require the City to accommodate Brumfield's disability where accommodation, as here, is not reasonably feasible. Summary judgment for the City was thus appropriate. Accordingly, we affirm the August 19, 2004, judgment of the Carter Circuit Court.

ALL CONCUR.

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