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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002559-MR

APPELLANT

RAYMOND BEACH, JR.

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 03-CI-010610

RESCARE, INC.

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

ROSENBLUM, SENIOR JUDGE: Raymond Beach appeals the dismissal of his wrongful termination claim against appellee ResCare Incorporated alleging: 1) that the existence of genuine issues of material fact precluded summary disposition of the matters asserted in his complaint; and 2) that ResCare's failure to

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

adhere to its own policies concerning appeals of employee discipline cases required entry of partial summary judgment in his favor. Finding no error in the well-reasoned analysis of the trial court, we affirm the entry of summary judgment in this case.

Appellant Beach had been employed in the maintenance department of the Whitney M. Young Job Corps Center for approximately twenty-eight years when appellee ResCare assumed management responsibility for the Center in October 2000. Although appellant retained his same position, he then became an employee of ResCare and there appears to be no dispute that until the incident which precipitated his termination appellant had been an excellent employee. According to appellant's version of the events in question, on November 16, 2002 he drove to property owned by the Lincoln Foundation which is adjacent to the Job Corps Center for the purpose of going hunting. Appellant maintains that he first drove his truck onto the Lincoln Foundation property, hid his rifle in a remote area known only to him, and then drove his truck to the adjacent Job Corps Center property. After parking near the maintenance building, appellant proceeded on foot to retrieve the hidden rifle and commence hunting. Appellant emphasized that he took these steps to avoid bringing his rifle onto Job Corps Center

property because he was aware that possession of firearms on the property was strictly forbidden.

While appellant's truck was parked near the Job Corps Center maintenance building, a security officer observed an empty rifle case in it. Upon returning to his truck, appellant was approached by Job Corps security officers who asked to search the truck as part of an investigation into whether he had possessed a prohibited firearm on the property. In the course of this search, one of the officers noticed a gun case in the back seat of the truck. Although the officer did not open the case, he stated that he felt it and was certain that a rifle of some sort was inside the case.

Appellant was terminated on November 20, 2002 for violating the Job Corps Center's prohibition on possession of firearms on its property. After unsuccessfully exhausting ResCare's various administrative appeal procedures, appellant filed a complaint in circuit court alleging that his discharge was wrongful in that he had not possessed a firearm on ResCare property and due to ResCare's failure to timely respond to one of his internal administrative appeals. Appellant also maintained that his termination was the direct result of retaliation by security officers against whom he had previously filed complaints.

In granting ResCare's motion for summary judgment, the trial judge accepted appellant's version of the facts as true, but nevertheless concluded that because appellant was an at-will employee, Kentucky law permitted his employer to discharge him "for good cause, for no cause, or for a cause that some might view as morally indefensible." Wymer v. JH Properties, Inc., 50 S.W.3d 195, 198 (Ky. 2001). The trial judge noted that in light of the terminable-at-will doctrine, appellant could establish a cause for action for wrongful discharge only by demonstrating that his firing was contrary to a fundamental and well-defined public policy evidenced by a constitutional or statutory provision, Firestone Textile Co. Division, Firestone Tire and Rubber Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983), or otherwise violated fundamental public policy by showing that the discharge was a direct result of his refusal to violate the law in the course of his employment or stemmed from the exercise of a right conferred in a well-established legislative enactment. Boykins v. Housing Authority of Louisville, 842 S.W.2d 527 (Ky. 1992). Citing appellant's failure to place his discharge within the ambit of any of these exceptions to the terminable-at-will doctrine, the trial judge reasoned that he had failed to establish a claim cognizable under Kentucky law. We fully concur in that analysis.

Appellant insists, however, that the ResCare employee handbook created a 5-step disciplinary process upon which employees had a right to rely, thereby transforming his at-will status into a contractual "discharge for cause only" form of employment. Like the trial judge, we find precise language in the handbook dispositive of appellant's contention:

> This handbook is not, however, an employment contract. It is not intended to give any expressed or implied right of continued employment. You or the company can terminate your employment with ResCare at any time. [Emphasis added.]

In Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95 (Ky.App. 2000), this Court rejected an assertion almost identical to that pressed by appellant concerning the effect of language in an employee handbook. Emphasizing the long-standing rule that intent of the parties is controlling as to the type of employment relationship created, the Court offered the following rationale which we find fatal to appellant's claim:

> In Nork [Nork v. Fetter Printing Company, 738 S.W.2d 824 (Ky.App. 1987)] we declined to nullify a clearly stated disclaimer because we could not do so without "totally annihilating Shah's [Shah v. American Synthetic Rubber Co., 655 S.W.2d 849 (Ky. 1983)] holding of 'clear intention.'" In order for Noel to prevail on her breach of contract claim, we would have to disregard a disclaimer and create a "discharge only for cause" employment contract in the absence of the intent of both parties to do so. This we may not do. Noel does not claim that there was any

> contractual agreement between her and Elk Brand other than the Employee Manual. Accordingly, we agree with the circuit court that there is no genuine issue of material fact as to the existence of an employment contract between the parties and that Elk Brand was entitled to judgment as a matter of law on her claim.

Id, at 99. Appellant's argument with respect to the employee handbook is virtually indistinguishable from that advanced by the appellant in Noel and we find it equally unavailing. Even if appellant did not possess a firearm on the Job Corps premises and his firing did in fact result from retaliatory conduct on the part of certain security officers at the site, neither of these factors qualifies as an exception to Kentucky's at-will employment doctrine. Thus, the trial judge did not err in summarily dismissing his complaint on the basis of that doctrine.

Appellant also maintains that he is entitled to relief based upon ResCare's failure to meet its own stated appeal process deadline. We do not agree. As the trial judge properly concluded, appellant cannot show any prejudice stemming from this procedural shortcoming. ResCare's failure to timely respond to one level of its internal appeal process in no way impacted the nature of appellant's at-will employment status, nor did it serve to frustrate his ability to mount a judicial challenge to his employer's actions.

Finally, appellant raises for the first time in his reply brief the assertion that he is entitled to the protections against retaliatory discharge contained in KRS 61.102, Kentucky's "Whistle-Blower" statute. This contention proves unavailing for a variety of reasons, not the least of which are the procedural impediments of having failed to list the applicability of KRS 61.102 as a contested issue in his pre-hearing statement, (CR 76.03(8)); having failed to address the issue in his initial appellant's brief, (Milby v. Mears, 580 S.W.2d 724 (Ky. 1979)); and having failed to obtain a ruling by the trial judge on this point. Nevertheless, in the interest of judicial economy, we will briefly address the matter.

KRS 61.102 protects public employees from reprisal for reporting information regarding an employer's violations of the law, actual or suspected fraud, waste, mismanagement, etc. to appropriate authorities. In Woodward v. Commonwealth, 984 S.W.2d 477, 480-81 (1999), the Supreme Court of Kentucky clarified the elements essential to establishment of a prima facie case under the act:

> Four elements must necessarily be met in order for this crime to have occurred. First, from the context of this chapter, the employer must be an officer of the state or one of its political subdivisions. Second, the employee must be a state employee or an employee of a political subdivision. Third, the employee must make a good faith report of a violation of state or local statute or

> administrative regulation to an appropriate body or authority. Fourth, the defendant must be shown to act to punish the employee for making this report or to act in such a manner so as to discourage the making of this report.

Accepting as true appellant's factual allegations concerning his discharge, he cannot establish even one of these criteria: ResCare is not an officer of the state; appellant is not a public employee; he did not report his **employer's** violations to an appropriate body; and he was not discharged for making a report regarding his employer. Thus, even if the matter were properly before us, we could conclude only that appellant does not fall within the purview of the statute and it therefore provides no relief from his discharge.

Accordingly, the summary judgment entered by the Jefferson Circuit Court is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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