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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000862-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET AND
LINDA JUSTICE — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 01-CI-00150

DAN HALL — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

ABRAMSON, JUDGE: This appeal presents this Court with the first opportunity to consider whether Kentucky should allow the interlocutory appeal of an order denying as a matter of law immunity claims raised by the Commonwealth of Kentucky, its agencies or officials in defense of litigation. The United States Supreme Court has charted a procedural course for the federal courts which allows for immediate appeal of orders

denying either absolute or qualified immunity claims before the party claiming that immunity is subjected to the burden and expense of trial. Finding the rationale of those cases equally persuasive for cases pursued in Kentucky courts, we hold that an order denying summary judgment on absolute or qualified immunity grounds is subject to immediate appellate review to the extent that it raises purely legal issues. After reviewing the merits of the pending action, we reverse that portion of the trial court's order denying the absolute immunity claim of the Appellant Commonwealth of Kentucky, Transportation Cabinet, but affirm that portion of the order denying summary judgment on the qualified immunity claim of Appellant Linda Justice.

RELEVANT FACTS AND PRIOR PROCEEDINGS

On February 18, 2000, the Transportation Cabinet placed Dan Hall, an Equal Employment Opportunity Officer at the Cabinet's Pikeville office, on involuntary administrative leave. Hall's leave was described more specifically as "sick leave for medical evaluation." According to the Cabinet, Hall had responded angrily and inappropriately to the denial of his request for permission to work on a holiday, to a change in office security measures, and to an unfavorable performance review. Because of Hall's uncharacteristically angry behavior, Cabinet officials were allegedly concerned that he posed a danger to himself or others in the office. The Cabinet required

Hall to take sick leave and conditioned his return to work upon his being psychologically evaluated and found fit.

On Hall's appeal, the Personnel Board upheld the Cabinet's order. However, the Franklin Circuit Court, by order rendered June 13, 2001, ruled that though the Cabinet had authority pursuant to 101 KAR 2:102 § 2(2)(a)(4) to order Hall to use his paid sick leave, the Cabinet did not have authority to compel either a psychological evaluation or sick leave without pay. Accordingly, the circuit court ordered the Cabinet to return Hall to his former position.[1] The Cabinet appealed that ruling and this Court, in an unpublished opinion, affirmed, noting that the Cabinet was not authorized to substitute involuntary sick leave for disciplinary proceedings. *Commonwealth of Kentucky, Transportation Cabinet v. Hall,* 2001-CA-002244-MR (rendered November 22, 2002).

In the meantime, on February 15, 2001, Hall filed suit in the Floyd Circuit Court against the Cabinet and his former supervisor, Linda Justice, the Chief District Engineer for the Pikeville district. Alleging that the Cabinet and Justice (the Defendants) undertook the February 2000 personnel action against him in retaliation for his having reported Justice's possible ethical violations, Hall seeks damages under KRS 61.101 – KRS 61.103, the so-called Whistleblower Statutes, and under 42

[1]Notwithstanding the circuit court order, Hall remained on unpaid, involuntary sick leave until January 30, 2002, when the Cabinet terminated him for having exhausted his one year unpaid leave allowance. Apparently Hall's administrative appeal of his termination is still pending.

U.S.C. § 1983, a federal civil rights statute.[2] In February 2005, the Defendants moved for summary judgment on the ground, among others, that they are both immune to Hall's federal civil rights claim: the Cabinet because it is not a "person" subject to 42 U.S.C. § 1983 liability, and Justice because she is entitled to qualified immunity. By order entered April 8, 2005, the circuit court denied the motion.

This Court entered an order requiring the Defendants to show cause why their appeal should not be dismissed due to the absence of a final and appealable order. In their response, Defendants urged this Court to follow the lead of the federal courts and permit interlocutory appeals from orders denying summary judgment on immunity grounds. A motion panel of the Court passed this procedural issue to the merits panel for full consideration of this issue of first impression.

APPEALABILITY OF THE ORDER DENYING SUMMARY JUDGMENT ON IMMUNITY GROUNDS

Only judgments entered pursuant to a final order may be reviewed on appeal, CR 54.01, and generally an order overruling a motion for summary judgment is interlocutory and not appealable. *Gumm v. Combs,* 302 S.W.2d 616 (Ky. 1957). While this appeal appears to run afoul of that general rule, as the Defendants aptly note, immunity claims are unlike other defenses. Immunity is not merely a defense against liability,

[2] Although Hall's complaint does not refer to 42 U.S.C. § 1983, it does seek damages for the alleged violation of his First Amendment rights, a claim the parties have apparently agreed to construe as a 42 U.S.C. § 1983 claim.

but is a shield against suit itself, meant to protect the state and to a lesser extent its individual officers from the expense and harassment of trial. *Lexington-Fayette Urban County Government v. Smolcic,* 142 S.W.3d 128, 135 (Ky. 2004). Because that interest in avoiding the burden of litigation is lost if immunity is improperly denied and the claimant is subjected to trial, an appeal from the final judgment comes too late to afford meaningful relief. For that reason, the United States Supreme Court has held that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment[.]" *Mitchell v. Forsyth,* 472 U.S. 511, 525, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (citing *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)). Similarly, the Supreme Court has held "that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 [the appellate jurisdiction statute] notwithstanding the absence of a final judgment." *Mitchell v. Forsyth,* 472 U.S. at 530, 105 S.Ct. at 2817. *See also Johnson v. Jones,* 515 U.S. 304, 313, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995) (emphasizing that to be immediately appealable the qualified immunity issue must not involve a genuine factual dispute, but rather must be "a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." (citation and internal quotation

marks omitted)).

The Defendants maintain that the trial court's denial of their summary judgment motions should similarly be deemed a final order for the purposes of CR 54, thereby permitting immediate review of their immunity claims. We agree. Otherwise, as explained by the Supreme Court, meaningful review is impossible. Accordingly, notwithstanding the absence of a final judgment, the Defendants have appropriately invoked this Court's jurisdiction, and we may entertain their appeal to the extent that it raises purely legal grounds for challenging the trial court's order denying their immunity claims. *Cf. Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005) ("[A] denial of qualified immunity on purely legal grounds is immediately appealable. A denial of qualified immunity that turns on evidentiary issues is not." (citation and internal quotation marks omitted)). Because our review is limited to issues of law, the scope of that review is *de novo*. *Id.*

THE CABINET IS NOT A "PERSON" SUBJECT TO SUIT UNDER 42 U.S.C. § 1983

Turning then to the merits of the appeal, 42 U.S.C. § 1983 provides that "every person" who, under color of state law,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

As the Cabinet correctly observes, the United States Supreme Court has held that the States are not "persons" within the purview of § 1983, *Will v. Michigan Department of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), nor are proxies of the State such as its agencies and its officials acting in their official capacities. *Id.; Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984). In *Jefferson Co. Fiscal Court v. Peerce*, 132 S.W.3d 824, 835 (Ky. 2004), the Kentucky Supreme Court noted that it is "well-established" that governmental entities which enjoy Eleventh Amendment immunity are not "persons" subject to suit under § 1983. Because the Cabinet's immunity precludes that portion of Hall's 42 U.S.C. § 1983 suit, the trial court erred by denying its motion for summary judgment. Accordingly, we must reverse the trial court's order in that respect, and remand for entry of a new order dismissing Hall's § 1983 claim against the Cabinet.

JUSTICE IS SUBJECT TO SUIT BECAUSE QUALIFIED IMMUNITY DOES NOT APPLY

A state official, such as Justice, performing discretionary duties and sued in her individual capacity for monetary relief under 42 U.S.C. § 1983, may assert a qualified immunity defense. As the Kentucky Supreme Court recently explained:

> Qualified immunity protects state and local officials who carry out executive and administrative functions from personal liability so long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982.) The *Harlow* objective reasonableness standard "is intended to provide government officials with the ability to 'reasonably anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton,* 483 U.S. 635 647, 107 S. Ct. 3034, 3043, 97 L. Ed. 2d 523 (1987) (*quoting Davis v. Scherer,* 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139 (1984)). In *Hope v. Pelzer,* 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the Supreme Court held the objective reasonableness standard requires a determination as to whether the defendant official had "fair warning" that his/her conduct violated federal law.

Lamb v. Holmes, 162 S.W.3d 902, 907-08 (Ky. 2005). In making that determination, the United States Court of Appeals for the Sixth Circuit has ruled, courts are to employ a three-step inquiry:

> First, we determine whether, based upon the applicable law, the facts viewed in the

> light most favorable to the plaintiff[] show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Sample v. Bailey, 409 F.3d at 695-96. (emphasis supplied). Thus, the qualified immunity determination is *not* about the merits of the underlying § 1983 claim, but rather is a threshold determination based on the facts as viewed in the light most favorable to plaintiff. The plaintiff must make a satisfactory showing as to each of these three elements to defeat the public official's qualified immunity defense. *Id.* at 696.

According to Hall's deposition testimony, in early 1999 he informed the Secretary of the Cabinet that Justice had promoted a relatively inexperienced office worker over a significantly more experienced one and, further, the promoted employee had fraudulent academic credentials. Later, in December 1999, he complained to the Secretary that Justice had approved encroachment permits[3] for companies which then hired Justice's husband to provide construction services. Hall alleges that his relationship with Justice became strained following the first complaint. He further alleges that in January 2000, soon after his complaint about the encroachment permits, Justice gave him the first unsatisfactory performance

[3] Encroachment permits grant adjoining landowners permission to build access ways to state-controlled roads.

rating in his thirteen years as a State employee. Justice insists that Hall's allegedly angry response to the performance rating led to his administrative suspension and eventually to his termination. However, Hall maintains that the poor performance rating and his suspension were in fact retaliation for his reports to Justice's superiors concerning her potentially unethical hiring and permitting decisions. That retaliation, he claims, violated his clearly established First Amendment right to speak out on matters of public concern and entitles him to damages pursuant to 42 U.S.C. § 1983.

Construing the record in the light most favorable to Hall, as we must, we agree that he has adequately alleged a constitutional violation. As Hall correctly notes, his speech as a public employee is protected if it "may be fairly characterized as constituting speech on a matter of public concern[,]" and if his interest in speaking freely is not "outweighed by the state's interest in promoting the efficiency of public services." *Williams v. Commonwealth of Kentucky,* 24 F.3d 1526, 1534 (6th Cir. 1994) (citing *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); internal quotation marks omitted). Speech disclosing public corruption, moreover, "is a matter of public interest," *id.* at 1535 (citation omitted), and the "disclosure" of that alleged corruption need not be made to the public at large, but may be made privately to an employer or superior. *Givhan v. Western*

Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

Here, Hall's report concerning the promotion of an inexperienced employee with allegedly fraudulent academic credentials could perhaps be characterized as an internal office matter, rather than an issue of public concern. However, his report that some of the encroachment permits Justice approved may have violated KRS 11A.020(1)(a) and (c) -- provisions of the Executive Branch Code of Ethics prohibiting officials from using their offices for private gain -- clearly addressed an issue of malfeasance that was of public concern. There is no indication, furthermore, and Justice does not claim, that Hall's report was likely to, or did, interfere in any way with the efficient operation of the Cabinet's Pikeville office. We agree with Hall, therefore, that his report concerning potentially unethical encroachment permits was constitutionally protected and any adverse actions taken against him by Justice for having made that report, if proven, violate his First Amendment rights.

We further agree with Hall that the First Amendment rights on which he premises his claim were clearly established by January 2000, the time of the alleged violation. As just noted, by 1983 the United States Supreme Court had established that public employees retain their First Amendment rights to speak out on matters of public concern. *Connick v. Myers, supra.* In 1994, in *Williams v. Commonwealth of Kentucky, supra,* the Sixth Circuit Court of Appeals recognized that a field

office manager's criticism of potentially corrupt or unlawful hiring practices in her state agency came within that First Amendment protection. In light of those cases, a reasonable public official in Justice's position would have realized that similar criticism of potentially unethical decisions regarding encroachment permits was likewise a matter of legitimate public concern protected under the First Amendment.

Finally, in light of Hall's clearly established First Amendment right to inform the Secretary of what he believed to be Justice's improper involvement with encroachment permits inuring to the benefit of her husband's construction company, Justice's alleged response -- her allegedly pretextual performance review and her role in Hall's allegedly illegal suspension -- were, if proven, objectively unreasonable. A reasonable official had "fair warning" that Hall's First Amendment right to speak out on matters of public interest was not to be sanctioned at all, much less sanctioned by suspension from his job.

Thus, viewing the record in the light most favorable to Hall, he has met the three-part test and Justice is precluded from asserting qualified immunity. At a trial on the merits of Hall's § 1983 action, the jury may reject his claim that his poor performance review and suspension were unlawful retaliation for the lawful exercise of his First Amendment rights and may find instead that these were lawful actions taken for legitimate reasons, wholly unrelated to Hall's reports to Justice's

superiors. For purposes of defeating qualified immunity and securing his right to present his case to a jury, however, Hall has met his threshold burden.

In sum, Justice is not entitled to qualified immunity and thus the trial court did not err in denying her motion for summary judgment. The trial court did err in failing to recognize that the Cabinet is immune to Hall's 42 U.S.C. § 1983 claim. Accordingly, we reverse the April 8, 2005, order of the Floyd Circuit Court to the extent that it denied summary judgment to the Cabinet, but affirm that order's denial of relief to Justice, and remand for additional proceedings.

ALL CONCUR.

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