

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002232-MR

MORRIS H. MOOR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CI-00150

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Morris H. Moor appeals the July 27, 2006, opinion and order granting summary judgment in favor of Lexington-Fayette Urban County Government (“LFUCG”)² in Moor’s wrongful termination action. We affirm.

Moor was employed by the LFUCG as a plumber assigned to the Division of Parks and Recreation. In January of 2003, he was instructed to replace a 40-gallon

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² This appeal was originally brought against appellees LFUCG, William F. Carman and Ed Chaney. Carman and Chaney were dismissed as parties to the appeal by an order of this Court on May 22, 2007, per appellant’s and appellee’s joint motion to dismiss.

water heater at a local golf course. Instead of replacing the 40-gallon water heater, with another 40-gallon heater, Moor installed a 30-gallon heater. The installation of the 30-gallon water heater required re-plumbing the tank connection and resulted in additional costs to LFUCG as well as a violation of the State plumbing code.

Moor was not disciplined regarding the water heater installation. However, on March 3, 2003, a memo was issued to Moor from Bill Carman, the Deputy Director of Parks and Recreation. The memo instructed Moor to discuss questions regarding his work assignments with his supervisor and stated specifically:

[i]f you have a question about any assignment or perceive a method of completing an assignment that may be better but different than your assigned method, you must discuss it with your supervisor. Failure to do this will result in discipline for insubordination and, eventually, if this behavior continues, dismissal.

On September 5, 2003, Moor's immediate supervisor, Ed Chaney, provided Moor with a work order to replace a broken drinking fountain at a local park. While assessing what he would need to complete the job, Moor questioned whether the location of the drinking fountain was appropriate. Moor then contacted Michelle Kosieniak, a park designer, to discuss his concerns regarding the location of the water fountain.

Carman then met with Moor to inquire as to why he had violated the March 3 directive and gone outside his chain of command to question his work assignment. Unsatisfied with Moor's reason for failing to follow the March 3 directive, Carman prepared a memorandum, with the assistance of LFCUG Department of Human Resources employee, Leslie Jarvis, requesting dismissal charges of Moor. The memo outlined the water heater incident, the drinking fountain incident, and several other disciplinary actions taken against Moor during his employment with LFUCG. The memo

was sent to the LFUCG Commissioner with supervision over the Department of Parks and Recreation, Kathy DeBoer, who then forwarded it to the LFUCG Department of Law for preparation of formal charges. Once formal charges had been prepared by the legal department, they were sent to DeBoer, who, along with Parks and Recreation Director, Chuck Ellis, approved them. They were then referred to Mayor Isaac, who filed them with the Civil Service Commission (“Commission”). The Commission conducted a hearing and voted to terminate Moor. Moor chose not to participate in the Commission hearings. He also failed to appeal the decision of the Commission.

Following his termination, Moor filed for unemployment benefits. LFUCG opposed Moor’s request for benefits, claiming that he was terminated for insubordination. A hearing was held and Moor’s request was denied by the referee assigned to his case. The denial was adopted by the Kentucky Unemployment Insurance Commission and affirmed by the Fayette Circuit Court as well as this Court.³

On January 13, 2004, Moor filed a complaint with the Fayette Circuit Court claiming that he was terminated in violation of the Kentucky Whistleblower Act, KRS⁴ Chapter 61, for complaints he made against LFUCG. In the complaint, Moor named LFUCG, Carman, and Chaney as defendants. In their defense, LFUCG maintained that Moor was terminated for insubordination. The case continued for two years, during which time discovery was conducted and depositions were taken. LFUCG moved for summary judgment and on July 27, 2006, the trial court, by an opinion and order, granted LFUCG summary judgment. Moor filed a motion to alter, amend or vacate, which was denied in an order entered September 26, 2006. This appeal followed.

³ See *Moor v. Kentucky Unemployment Insurance Commission*, 2004-CA-002623 (not to be published).

⁴ Kentucky Revised Statutes.

On appeal, Moor makes the following arguments: 1) it is possible for a reasonable jury to find that his whistle-blowing activities were a contributing factor but for which he would not have been terminated; 2) the trial court erred in ruling that the Civil Service Commission was a superseding cause of Moor's termination; 3) KRS 61.103(2) does not require him to litigate his whistle-blowing claim before the Commission; and 4) the trial court improperly relied on unemployment compensation proceedings.

The standard of review of a trial court's grant of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky.1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

Moor argues that it is possible for a reasonable jury to find that his whistle-blowing activities were a contributing factor but for which he would not have been terminated and that the trial court erred in ruling that the Commission was a superseding cause of his termination. Whistle-blowing activities are protected by KRS 61.102.

In order to demonstrate a violation of KRS 61.102, an employee must establish the following four elements: (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to

make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

Davidson v. Com., Dept. of Military Affairs, 152 S.W.3d 247,251 (Ky.App. 2004) (citing *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998).

KRS 61.102 protects reports of the following: any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. . . . *A report of simple negligence is not listed among the types of information protected by the statute.*

Id. at 254 (emphasis added).

In its order, the trial court stated:

[p]ursuant to KRS 67A.210 and KRS 67A.280, Moor could only be terminated after formal charges were presented to the Commission and the Commission determined, following an evidentiary hearing before it, that termination was warranted. The Commission, as an independent body, has the discretion to accept or reject formal charges brought against an employee. KRS 67A.280. . . .

The fact that Moor could not be terminated without a decision by the Commission makes their involvement a superseding cause of his termination.

The actions which Moor claims were his whistle-blowing acts are approximately 25 complaints he made against LFUCG over a four-year period of time. It is admitted by Carman that his initial memorandum in support of Moor's termination contained several of Moor's alleged whistle-blowing actions. Specifically, the

memorandum contained a report made by Moor to the Urban County Council regarding a fountain leak and a report filed by Moor to OSHA regarding unsafe working conditions. However, it is clear that any references to those activities were removed from the memo before it was submitted to the Commission. In fact, any reference to Moor's alleged whistle-blowing activities was removed before the memo was given to DeBoer, the legal department or Mayor Isaac. Moor conceded in his deposition that he could not produce any evidence that the Commission had knowledge of the alleged whistle-blowing activities. He failed to produce any evidence that the Commission ever saw Carman's initial draft of the memo, that it was aware of any whistle-blowing allegations, that the alleged whistle-blowing activities were ever presented to the Commission, in any form, by any person. In fact, Moor did not even participate in the Commission proceedings. In order to prove that the actions were a cause of his termination, Moor "must show by a preponderance of evidence that 'the disclosure was a contributing factor in the personnel action.'" *Davidson v. Com., Dept. of Military Affairs*, 152 S.W.3d 247,251 (Ky.App.2004) (citing KRS 61.103(3)). According to KRS 61.103(1)(b), a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision." It cannot be argued that the Commission considered information unless it is also shown that they were provided that information. Therefore, Moor has failed to prove that his alleged whistle-blowing activities contributed to his termination, much less that they were a material factor in his termination.

Moor next argues that KRS 61.103(2) does not require him to litigate his whistle-blowing claim before the Commission. KRS 61.103(2) states:

Notwithstanding the administrative remedies granted by KRS Chapters 16, 18A, 78, 90, 95, 156, and other chapters of the

Kentucky Revised Statutes, employees alleging a violation of KRS 61.102(1) or (2) may bring a civil action for appropriate injunctive relief or punitive damages, or both, within ninety (90) days after the occurrence of the alleged violation. The action may be filed in the Circuit Court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his principal place of business.

KRS 61.103(2) pertains to a party's ability to bring a claim, not to succeed at one. While it is not required that he litigate his whistle-blowing claim before the Commission in order to bring a claim, it is required that he show his alleged whistle-blowing actions were a contributing factor in his termination in order to be successful. Because it was the decision of the Commission to terminate, there is no way Moor can show his actions were a contributing factor without also showing that the Commission had knowledge of them. Therefore, this argument fails. The fact that Moor did not participate in the Commission hearings and failed to submit any proof of his whistle-blowing claims to the Commission is further proof that it was unaware of any such claims.

Lastly, Moor argues that the trial court improperly relied on the unemployment proceedings when making its decision. We do not agree. In the trial court's eighteen-page opinion and order, Moor's unemployment proceedings receive two brief mentions. At the end of its legal analysis, the trial court references the unemployment proceeding and states "[a]lthough the decisions of these administrative agencies are not in and of themselves decisive on this issue, they are persuasive." This language follows a lengthy analysis of why summary judgment for LFUCG was

appropriate. It does not appear to us that the trial court put much, if any, emphasis on the unemployment proceedings when deciding to grant summary judgment to LFUCG.

For the foregoing reasons, the July 27, 2006, opinion and order of the Fayette Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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