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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001058-MR

GARY WEITER, SR. AND
MARGIE WEITER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 11-CI-000626

JOSEPH KURTZ, ROMAN CATHOLIC
BISHOP/ARCHBISHOP OF LOUISVILLE;
ANTHONY OLGES; JAMES R. SCHOOK;
AND BRUCE EWING — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE; JUDGES.

LAMBERT, JUDGE: Gary and Margie Weiter appeal from the Jefferson Circuit Court's opinion and order dismissing their complaint against the defendants and

the Appellees herein. After careful review, we affirm the trial court's order dismissing the Weiters' complaint.

Gary and Margie Weiter (collectively the Weiters) initially filed their complaint on January 27, 2011. The Weiters amended their complaint on February 11, 2011, and alleged claims of outrage, intentional infliction of emotional distress, trespass, and punitive damages. Margie alleged a separate claim for wrongful discharge.

The Weiters' claims center around their employment with, membership in, or association with the Archdiocese of Louisville, its current Archbishop, St. Therese Parish, its current parish priest, one other priest, and a former priest.[1]

Margie was employed in 2002 by the Archdiocese as a bookkeeper/receptionist at the St. Therese Parish in Germantown, Louisville. She did not have an employment contract with the Archdiocese and was therefore an employee at will under Kentucky law. Her duties were purely clerical with no religious duties or responsibilities. While in this position, she became aware of how the Archdiocese intended to respond to instances of alleged and actual child sex abuse charges against priests. She further alleged that while in this position,

[1] Appellee Joseph Kurtz is the current Archbishop of the Archdiocese of Louisville. Anthony Olges is the pastor of St. Therese and the former supervisor of Margie. At the time of the filing of the complaint, Bruce Ewing, a convicted child rapist, had resigned from the priesthood, but was on the Parish Council. Since the dismissal of the case at bar, Appellee James R. Schook has been indicted and charged in the Jefferson Circuit Court with multiple counts of felonious child molestation while a priest for the Archdiocese. He had worked as a pastor for several churches within the diocese. Appellees Kurtz and Olges are represented by separate counsel from Appellees Schook and Ewing.

she became aware of two such instances involving appellees, Bruce O. Ewing and James R. Schook. After she divulged her knowledge of the two priests, she alleges she was terminated from employment with the Archdiocese.

Gary was sexually abused as a child by a Catholic priest, and he subsequently participated as a plaintiff in an unrelated civil action against some of the same defendants in this case. In 2004, he was paid a monetary amount in settlement of those claims. Gary contends that as a result of that settlement, the Archdiocese of Louisville created policies and procedures regarding how the Archdiocese would administratively handle employee sex abuse matters.

The Weiters allege that it had been the practice of the Archdiocese to transfer employee priests from a parish where complaints of child sexual abuse were made to another parish where other employees and parishioners were unaware that the priest was accused of sexual abuse or that allegations had been substantiated regarding such child abuse. After the 2004 settlement mentioned above, the Archdiocese and the U.S. Catholic Church announced that as employers, they would not tolerate employee sexual abuse of children.[2]

In July 2009, the Archdiocese announced publically that another of its employee priests, Appellee Schook, had been criminally accused of child sexual abuse and was to be removed as priest from St. Ignatius Church. After the

[2] The Weiters attached a handbook with Archdiocese policies and procedures to their response to the motion to dismiss as evidence that the Archdiocese, as an employer, did not include child sexual abuse as a church policy or dogma and instead maintained a stated "no tolerance" policy for priest's abuse of children as well as the transfer of accused abuser priests/employees. Appellees never alleged that priest child abuse was a policy or dogma of the church, nor that reporting that potential would involve an investigation into church dogma.

announcement, Margie learned that Appellee Olges had moved Schook into the Rectory apartment at St. Therese. Schook and Olges had served together at St. Polycarp Church and St. Rita, where it was alleged Schook abused at least one child from each church. Margie claims that she was instructed by the diocese that priests accused of child sexual abuse, or against whom child sexual abuse claims had been substantiated, or who had been convicted of child sexual abuse, were not to be around children, and that employees were responsible for reporting potential abuse. She claims the Archdiocese stated that it would ensure that its employees accused of sexual abuse were not around children.

In furtherance of what Margie believed to be the responsibilities of her employment, and because she feared for the potential abuse of unsuspecting children exposed to Schook, she reported to at least three employees in supervisory positions for the Archdiocese, including Olges, her concern that children present at the church would be endangered as a result of Schook's unsupervised presence. In response, Olges instructed Margie that as a condition of her continued employment, she was not to reveal Schook's identity as an abuser priest or his presence at St. Therese to anyone, as no one was to know he was there.

While Margie continued to voice her concerns to Olges and various employees of the Archdiocese, she obeyed the directive to keep quiet for a period of time and did not tell anyone about Schook's presence, including her husband, Gary. In her complaint, she alleged that this caused her serious physical and emotional distress. Margie also alleged that during this time, Olges frequently told

her that the abused victims who had sued the Archdiocese, including her husband, were the cause of the church's financial woes and the reason parishioners did not have the church personnel they needed.

Eventually Margie confessed all of this to Gary. He alleged in the complaint that learning Olges and the Archdiocese were permitting another abusive priest to frequent the church and his wife's office wearing swimming trunks and sandals in the presence of unsuspecting children and parents, and the realization that his wife's future employment depended upon her non-divulgence of the identity of the abusive priest, resurrected the horror he had experienced as an adolescent when another priest had abused him.

After her continued objections to Schook's presence went unaddressed, Margie began to tell various parishioners who had small children that they should keep their children away from the rectory premises. On May 11, 2010, Olges called a meeting of the St. Therese Finance Committee to discuss the declining financial condition of St. Therese. At that meeting, no discussion was had about Margie's firing, but upon Olges' departure from that meeting, he informed her that her position had been eliminated.

After her position was eliminated, Margie inquired with the church and the Archdiocese about how to handle her complaints. The Archdiocese directed her to utilize internal appeal procedures within the church to protest the termination. As a result, the Weiters appealed to the Parish Council, the Archbishop's office, the Chancellor, and the Archdiocese's H.R. Department.

Instead of being provided the stated avenues for appeal, the Weiters allege they were rebuffed or ignored. Appellees Ewing and Olges did permit Gary five minutes before the Parish Council to protest the termination. But unbeknownst to the Weiters, the council was chaired by Ewing, a former priest on probation for raping a fourteen-year-old girl. After his five minutes, Ewing ordered Gary out of the church and off the premises. Olges then told the Weiters their avenue of appeal was before the "Due Process Board," but other agents of the Archdiocese affirmed there was no such board. Finally, the Weiters were told by the Archdiocese's H.R. Department that the only solution available to them was to find another church. As a result, the Weiters brought the instant action.

In their complaint, the Weiters allege that Margie's termination was in retaliation for her complaints to the Archdiocese and Olges concerning Schook's residency at the rectory, coupled with her alerts to other parishioners about Schook's presence. The Appellees' position is that Margie's termination was a financial decision. The Weiters believe that explanation to be pretextual and they support that argument with evidence that the Appellees took no comparable fiscal measures at the clustered churches, and other similarly situated employees were permitted additional hours with corresponding increases in wages during the same time period.

The Weiters further allege that the day after they filed their complaint, Olges barged into Margie's new office at another church where Olges was not employed, shouting and bearing a letter firing both she and Gary from their

volunteer positions as the bingo coordinators for St. Therese, citing the subject lawsuit as cause. Olges then delivered the same letter to Gary at home and allegedly stated to Gary, "Now you'll see what your wife has done!" The Weiters allege that the retaliation did not stop there, as Olges and the Archdiocese publically announced that the St. Therese bingo would be terminated, allowing parishioners to believe its demise was the Weiters' fault, subjecting them to further scorn from the parishioners.

On February 28, 2010, the Archdiocese filed a motion to dismiss the Weiters' complaint, arguing that because the complaint challenged church policy —allowing Schook to remain on church property—the claims were barred by the First Amendment to the United States Constitution. The Archdiocese also argued that the Weiters' wrongful termination and outrage claims failed as a matter of state law. In response, the Weiters argued to the trial court that their claims were grounded in the Archdiocese's failure to comply with its own policies, and a copy of those policies was attached to the Weiters' responsive memorandum.

On May 16, 2011, the trial court issued its opinion granting the Archdiocese's motion to dismiss, stating:

> At its core, this case revolves around the [Weiters'] disagreement with how the Archdiocese of Louisville has chosen to deal with its clergy members who have either been criminally convicted of sexual misconduct ([] Ewing) or informally accused on [sic] sexual misconduct ([] Schook)…. With regard to members of the clergy who have been administratively, but not criminally accused of misconduct, authority to discipline that member is solely vested within the ecclesiastical structure of the governing

> body of the church. In this case, that is the Archdiocese of Louisville. Thus, the [Weiters'] tort claims for outrage, intentional infliction of emotional distress, and punitive damages fail as a matter of law.

The trial court then reviewed the law and held that Margie's wrongful termination claim should also be dismissed:

> Because any review of her employer's actions would necessarily require an analysis of its internal ecclesiastical decision-making processes (which is prohibited…) this court declines to create a new public policy exception to Kentucky's at-will jurisprudence.

The Weiters filed the instant appeal on June 13, 2011.

> A motion to dismiss for failure to state a claim upon which relief may be granted 'admits as true the material facts of the complaint.' So a court should not grant such a motion 'unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved....' Accordingly, 'the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true.' This exacting standard of review eliminates any need by the trial court to make findings of fact; 'rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?' Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo. Of course, in determining de novo whether Fox's complaint stated a claim upon which relief may be given, 'we must give words [in the Kentucky Constitution] their plain and ordinary meanings.'

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010), reh'g denied (Aug. 26, 2010) (internal citations and footnotes omitted).

The Weiters present several arguments on appeal. First, Margie argues that the trial court's dismissal of her outrage and wrongful termination claims on First Amendment grounds was in error. Margie argues that the trial court improperly reframed her claim of outrage for retaliation for reporting the presence of an abuser priest as a disagreement with how the church has chosen to discipline its child abuser priests. While arguing that the trial court improperly framed her arguments in a light most favorable to the Appellees, Margie fails to articulate how her claims for outrage were not really a disagreement with how the church had chosen to deal with priests accused of child sexual abuse.

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. The United States Supreme Court has long recognized a First Amendment right for religious organizations to control their own internal affairs, including the hiring and firing of their religious leaders. In essence, the Weiters sought to control the internal affairs of the Archdiocese by determining where a priest under investigation may live. Because these allegations relate to internal church affairs, the trial court correctly held that it lacked jurisdiction to adjudicate the Weiters' claims.

As early as 1872, the U.S. Supreme Court ruled that it is impermissible for the government to intervene in internal matters of the church. Since then, the Court has reaffirmed these First Amendment principles in cases such as *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S.

696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976) and *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S.Ct. 694 (2012). In *Hosanna-Tabor*, the Court explicitly reaffirmed that a church has an absolute right under the First Amendment to hire and fire ministers and, by necessity, investigate and punish ministers without judicial intervention.

Hosanna-Tabor involved the Hosanna-Tabor Evangelical Lutheran Church and School, an affiliate of the Lutheran Church-Missouri Synod. *Hosanna-Tabor, supra*, at 695. The school hired Cherly Perich to teach kindergarten as a contract teacher. Ms. Perich was diagnosed with narcolepsy and took a leave for the following year. *Id*. at 696. In January 2005, she told the school she would be cleared to return to work. However, the school decided that her health would not permit her return and hired a replacement teacher. When Ms. Perich tried to return, she was fired and told that she was let go because of her threat to sue, which violated a Lutheran religious tenet that members of the faith should resolve their disagreements internally. Ms. Perich then filed charges with the Equal Employment Opportunity Commission (EEOC), claiming retaliation under the Americans with Disabilities Act (ADA). The EEOC sued the school, and Perich joined in the lawsuit.

Tracing the constitutional history of allowing religious organizations the independent right to control their internal affairs, Chief Justice Roberts' opinion explained that the string of Court rulings going back to *Watson v. Jones*, 80 U.S. 679, 20 L.Ed. 666, 13 Wall. 679 (1872), "confirm that it is impermissible for the

government to contradict a church's determination of who can act as its ministers." *Id.* at 697. The court said that religious organizations have that freedom from official interference for matters of church government as well as matters of faith and doctrine.

The U.S. Supreme Court's reasoning and the long-standing history of the First Amendment requires that the claims in the present case be dismissed. According to the Weiters' Amended Complaint, the Archdiocese initiated an investigation of Schook, placed him on leave of absence from St. Ignatius Catholic Church, relocated him to St. Therese's, and instructed employees of St. Therese not to spread the unproven allegations against Schook among its parishioners. In order to prove their claims of outrage, the Weiters must demonstrate that these internal church decisions relating to the employment of a priest were "outrageous." Similarly, to prove her wrongful termination claim, Margie must demonstrate that the internal decisions regarding where to temporarily locate Schook during the church's investigation were illegal or in violation of well-established public policy. Thus, the Weiters' allegations directly address the internal discipline and government of the Archdiocese, and therefore the First and Fourteenth Amendments preclude the court from exercising jurisdiction over this case. The trial court properly dismissed the Weiters' claims in this regard.

The Weiters argue that the First Amendment does not immunize the Archdiocese from liability for Margie's wrongful termination claim because she was a secular employee. Margie is correct that the "ministerial exception" to the

ADA and the Federal Civil Rights Act does not apply to the typical wrongful termination claim filed by a secular employee because a typical wrongful termination case does not require a court to resolve theological matters or matters of church government. *Hosanna-Tabor*, *supra*.

McCallum v. Billy Graham Evangelistic Ass'n, 824 F.Supp.2d 644 (W.D. N.C. 2011), a case on which Margie relies heavily in her brief to this Court, involved an African-American administrative assistant who sued her employer, the Billy Graham Evangelistic Association (BGEA), claiming that the BGEA eliminated her position because of her race. The court held that the "ministerial exception" to the Civil Rights Act did not bar McCallum's claim as a matter of law. As the court explained, McCallum, a lay employee who performed simple administrative tasks, could make a prima facie case of race discrimination without introducing a single piece of evidence relating to matters of church governance. However, the court recognized that the First Amendment could affect the scope of her claim to the extent that McCallum ultimately relied on matters of church policy:

> As a practical matter, the Court contemplates that as the case proceeds there will be certain doctrinal topics that will, in fact, remain "off-limits." *See e.g., Hopkins v. DeVeaux*, 781 F.Supp.2d at 1291 ("[A]lthough [the ministerial exception] might imply an absolute exception, it is not always a complete barrier to suit; for example a case may proceed if it involves a limited inquiry that, 'combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters.' ") (citations omitted); *see also Rayburn* at 1165 (noting that the district court

> permitted limited discovery focused on the nature of the job at issue). Discovery concerning the facts surrounding Plaintiff's separation from BGEA will be allowed subject to BGEA's First Amendment rights. Discovery of matters relating to BGEA's internal governance and administration will be prohibited. As a result, BGEA cannot be required to explain its decision-making process with respect to its missions ministry (including global outreach generally; Dare To Be A Daniel Program). BGEA is not entirely shielded, however, from having to respond and provide any legitimate, non-discriminatory reason for the elimination of Plaintiff's position and subsequent separation from employment.

Id. at 652.

The *McCallum* decision recognizes that there are constitutional limits to wrongful termination claims against religious organizations, even when those claims are raised by secular employees. The First and Fourteenth Amendments depend on the nature of the issues sought to be decided, not the identity of the parties asking the Court to decide them.

Although Margie is a secular employee, her wrongful termination claim necessarily depends on matters of church governance and church administration and is therefore barred by the First Amendment. The root of Margie's wrongful termination claim is her disagreement with church policy. She claims that the Archdiocese eliminated her position in retaliation for speaking out against decisions made by the Archdiocese's governing body; *i.e.,* where Schook should be allowed to reside pending the outcome of the investigation. Margie's complaint cites Archdiocese policies and procedures. Accordingly, to adjudicate that claim, the court would be forced to decide whether the Church acted in accordance with

its policies and whether those policies were appropriate matters that the First Amendment commits solely to the Church. The trial court properly held Margie's claims for outrage and wrongful termination were barred by the First Amendment.

Margie also claims that the trial court erred in holding that her wrongful termination claim fails as a matter of law. Again, we discern no error on the part of the trial court in this regard. Margie did not claim that she had an express or implied contract of employment. Therefore, even assuming the allegations contained in the First Amended Complaint are true, Margie was an at-will employee. Margie argues that her discharge violated a clear expression of public policy and that, therefore, her discharge falls within the public policy exception to the at-will employment rule.

Ordinarily, an employer has the legal authority to discharge an at-will employee "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983) (internal citation omitted). Courts have carved out two narrow exceptions to this general rule, commonly referred to as the "public policy exception" to the at-will employment doctrine. First, an at-will employee cannot be lawfully discharged "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." *Grzyb v. Evans*, 700 S.W.2d 399, 402 (Ky. 1985) (internal quotations omitted). Second, an at-will employee cannot be lawfully discharged "when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative

enactment." *Id*. We agree that as a matter of law, Margie cannot establish that either of these two exceptions to the employment at-will doctrine applies in this case.

Margie's complaint does not allege that she was fired for her failure or refusal to violate any law in the course of her employment. She alleges that she refused to keep Schook's transfer to St. Therese a secret and that she had a legal duty under Kentucky Revised Statutes (KRS) 620.030 to disclose Schook's presence at St. Therese in order to protect children from abuse. We agree with the Appellees that KRS 620.030 does not impose such a broad duty. The statute requires a person who has reasonable cause to believe that a child has been abused to make an immediate report to law enforcement. Margie never alleged that she had any reasonable cause to believe a child at St. Therese had been abused. Instead, she simply believed that Schook should not be in the vicinity of children after having been accused of abusing children at a different parish in the past. While we certainly do not fault Margie for such a belief, ultimately the statute does not lend itself to such a broad reading. Even assuming Margie did have such abuse to report, she did not comply with KRS 620.030, which provides:

> Any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Department of Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise.

Margie did not notify the police, the Cabinet, the Commonwealth Attorney, or the county attorney. Instead, according to the Amended Complaint, she told her fellow parishioners about Schook's presence at St. Therese. Thus, even if there was a causal connection between her speaking out and the termination of her position, neither KRS 620.030 nor any of the other statutes cited by the Weiters would prevent the Archdiocese from terminating her.

Finally, Margie cannot establish a nexus between the statutes relating to sex abuse and her status as an employee. *Grzyb*, 700 S.W.2d at 402. Kentucky courts insist that wrongful termination claimants cite to legislation "directed at providing statutory protection to the worker in his employment situation." *Shrout v. The TFE Group*, 161 S.W.3d 351, 355 (Ky. App. 2005). In fact, employee protection must be the legislation's "primary purpose." *Id*. The statutes Margie cites do not relate even tangentially to the protection of workers in the employment context. Therefore, the trial court correctly dismissed her termination claim.

In summation, the Weiters' claims for outrage and wrongful termination involve ecclesiastical concerns and are not appropriate for courts of law to determine under the First Amendment. Further, the trial court also properly held that Margie's claim for wrongful termination fails as a matter of law. Discerning no reversible error, we affirm the trial court's May 16, 2011, order granting the Appellees' motion to dismiss the Weiters' claims.

CAPERTON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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