

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001503-MR

DONNA P. SOLLY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-00456

COMMONWEALTH OF KENTUCKY
EDUCATION CABINET (FORMERLY
CABINET FOR WORKFORCE DEVELOPMENT);
DEPARTMENT FOR TECHNICAL EDUCATION; AND
KENTUCKY TECHNICAL EDUCATION
PERSONNEL BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; SCHRODER, JUDGE; ROSENBLUM,¹
SENIOR JUDGE.

SCHRODER, JUDGE: This is an appeal from a judgment of the
Franklin Circuit Court upholding an order of the Kentucky
Technical Education Personnel Board determining that the
termination of appellant, a technical instructor at the Caldwell

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.

County Area Center, was proper due to appellant's DUI conviction and was not the result of sex discrimination. We adjudge that appellant established a *prima facie* case of sex discrimination and that, in light of KRS 151B.052, appellee could not meet its burden of showing a legitimate nondiscriminatory reason for its dismissal of appellant because the DUI conviction was not a felony and not job-related. Thus, we reverse the order upholding appellant's dismissal and remand for proceedings consistent with this opinion.

Appellant, Donna Solly, was hired as a Rank III Kentucky Tech Instructor at the Caldwell County Area Center ("Caldwell") on October 1, 1998, to teach electricity technology. In June of 2002, Solly was a limited status employee under KRS 151B.010(15), meaning her employment could be terminated without cause. Under KRS 151B.070(2), if the employee works four years without incident, he or she becomes a continuing status employee who can only be removed for cause. Solly was scheduled to become a continuing status employee in October 2002.

On June 12, 2002, Solly was notified by her employer, Cabinet for Workforce Development, Department for Technical Education (the "Cabinet") that it was not renewing her limited status employment contract. No reason was given at the time for the decision. Solly later learned that her principal at

Caldwell, Arthur Dunn, had recommended to the Commissioner of the Cabinet, Emil Jezik, that her contract not be renewed because Solly was regularly tardy, absent, and having an affair with a fellow teacher. It is undisputed that Solly had an affair, which ended sometime in late 2000 or early 2001, with Mickey Bayer, an instructor at Caldwell who had continuing employment status, and that no disciplinary action or other action affecting Bayer's employment was taken against him as a result of the affair. Solly appealed her non-renewal, alleging discrimination on the basis of sex. On June 28, 2002, the case was settled by agreement after other Cabinet officials and attorneys became involved. Pursuant to the settlement, Solly was reinstated to her instructor position.

Instructors at Caldwell were to report back for the beginning of the school year on July 29, 2002, although the students were not scheduled to return until a later date. On that date, Solly did not show up for work. Solly's sister, Elizabeth Wilson, called Mr. Dunn at 8:50 a.m. and told him Solly would not be at school that day. When asked for the reason, Wilson stated that she was not at liberty to discuss it. Solly returned to work the next day and sent Dunn a note stating that the previous day's absence was unavoidable, without any further explanation, and assuring him that she would be at work from now on.

Subsequently, Dunn learned from a local newspaper that Solly had been arrested and charged with Driving Under the Influence ("DUI") on July 29. It is undisputed that Solly pled guilty to first offense DUI and possession of an open alcoholic beverage container in a motor vehicle for which she was fined \$250 and sentenced to two days in jail. It is further undisputed that the offense occurred off school grounds and was not committed within the scope of her employment.

On August 1, 2002, Dunn wrote to Commissioner Jezik informing him that he had learned that Solly had been charged with DUI on July 29, and attached a copy of a local newspaper clipping which reported the charge against Solly, her guilty plea, and her sentence. Dunn also advised Jezik about Solly missing school on July 29 and attached a copy of his notes regarding the matter and a copy of Solly's letter to Dunn stating that her absence was unavoidable. Dunn expressed concern in the letter that the school would receive undue negative publicity as a result of the situation and that the students would have a field day with the news.

On August 8, 2002, Dunn followed up with a letter to Jezik informing him of an anonymous letter he had received regarding Solly. The anonymous letter, which was attached, stated that a lot of people in the community were concerned about the school, specifically noting affairs among the teachers

and the DUI of a teacher who missed school because she was in jail. On that same date, Dunn met with Solly and she asked for his help in remedying the situation. According to Solly, Dunn promised to help her. However, later that day Dunn faxed a letter to Jezik requesting the dismissal of Solly without cause. On August 9, 2002, Jezik sent a letter to Solly informing her that her employment would not be renewed and that she was being separated from her position as an instructor at Caldwell effective August 22, 2002.

Solly filed an appeal to the Kentucky Technical Education Personnel Board pursuant to KRS 151B.055(10) alleging that she was dismissed as a result of sex discrimination. Specifically, Solly maintained that she was fired because she had an affair with a male teacher who was not similarly disciplined for the conduct. An evidentiary hearing was held over the course of four days in March and April 2003, in which Solly, Jezik, Dunn, Mickey Bayer, Stephen Young (a co-worker of Solly's), Willie Lile (Executive Director of the Cabinet's Office of Quality and Human Resources), and Charles Solly (Solly's husband) testified. On January 16, 2004, the hearing officer filed his findings of fact, conclusions of law, and recommended order wherein he recommended dismissal of Solly's appeal. The hearing officer found that Solly was not terminated because of the affair with the male teacher, but because of her

DUI conviction. Solly thereafter filed exceptions with the Kentucky Technical Education Personnel Board (the "Board"). On March 8, 2004, the Board adopted the hearing officer's recommendation and denied Solly's appeal.

Solly subsequently filed a petition for review in the Franklin Circuit Court. On June 21, 2005, the circuit court entered its judgment sustaining the Board's decision. This appeal by Solly followed.

At the outset, we address why Solly is entitled to an appeal in this case even though she was a limited status employee who could be dismissed without cause. KRS 151B.070(1) provides:

All certified and equivalent employees shall serve a one (1) year probationary period for renewal of limited status. An employee may be separated from the position or reduced in class during this initial probationary period and shall not have a right to appeal except as provided in KRS 151B.055. If the employee is separated from the position, notice in writing shall be received at least ten (10) working days prior to separation. A copy of the notification shall be forwarded to the commissioner. Unless the commissioner notifies the employee of separation prior to the end of the initial probationary period, the employee shall be eligible for renewable limited status. Limited status employees are subject to reemployment on an annual basis. Limited status employees may be dismissed without cause before the annual anniversary date.

Although the above provision does not state whether a limited status employee has a right to an appeal and states that such employees may be dismissed without cause, even the probationary period employees have a right to appeal a dismissal under KRS 151B.055 if discrimination is alleged. KRS 151B.055(10)

provides:

Any certified, equivalent, or unclassified employee may appeal an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age to the board. Nothing in this section shall be construed to preclude any employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

In our view, once the employee alleges that the employment action was based on discrimination, the employee has the right to challenge the action and appeal the decision, notwithstanding the fact that he or she could be dismissed without cause. KRS 151B.090(1) specifically prohibits discrimination against any certified or equivalent employee in the Cabinet on the basis of religion, ethnic origin, political affiliation, sex, disability or age. See also KRS 344.040. KRS 151B.090(1) would be rendered meaningless if the employee had no way to challenge the discriminatory action. See Martin v. Corrections Cabinet of Commonwealth, 822 S.W.2d 858 (Ky. 1991)

(Unclassified employee, who could be discharged for no reason or a bad reason, was entitled to appeal her dismissal for allegedly refusing to violate the prohibitions in KRS 18A.140 against political favoritism as to a classified employee.); See also KRS 18A.095(13) and KRS 344.025.

Solly argues that the hearing officer's ruling was not supported by substantial evidence and that it was erroneous as a matter of law. In claims of employment discrimination, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). The plaintiff establishes a *prima facie* case of discrimination either by presenting direct evidence of intentional discrimination or by presenting circumstantial evidence which creates an inference of discrimination. Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995). In the latter approach, as applies to the case at hand, the plaintiff must show (1) that he is a member of a protected class; (2) that he was subject to adverse employment action; (3) that he was qualified for the position; and (4) that a similarly situated non-protected employee was treated more favorably. Talley, 61 F.3d at 1246. Once a *prima facie* case of discrimination has been made, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the

employee's action. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. If the employer offers a legitimate reason, the plaintiff then has the ultimate burden of proving that the proffered reason for the employment action was a pretext for discrimination, that discrimination was the determinative factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 804-5, 93 S. Ct. at 1825-6; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 508, 113 S. Ct. 2742, 2748, 125 L. Ed. 2d 407 (1993).

As the discrimination claim here was brought before an administrative body, this Court's judicial review will be concerned with the question of arbitrariness. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964). If the findings of the administrative agency are supported by substantial evidence of probative value, they must be accepted as binding on the reviewing court and then it must be determined whether the agency misapplied the correct rule of law to the facts so found. H & S Hardware v. Cecil, 655 S.W.2d 38 (Ky.App. 1983); Kentucky Retirement Systems v. Heavrin, 172 S.W.3d 808 (Ky.App. 2005).

The hearing officer in the present case found that Solly did not succeed in establishing a *prima facie* case of sex discrimination because she and Mickey Bayer, the other teacher with whom she had the affair and who she claims was treated more

favorably by the employer, were not similarly situated. The hearing officer found that the distinguishing factor was that Bayer was a continuing status employee and that Solly was a limited status employee. The hearing officer further found that the employer demonstrated that it had a legitimate nondiscriminatory reason to dismiss Solly, her DUI conviction. Finally, the hearing officer found that Solly did not prove that the stated reason was a pretext for discrimination. The Franklin Circuit Court agreed that Solly's DUI and her subsequent incarceration legitimately supported her termination and that there was substantial evidence supporting the hearing officer's finding that the reason was not pre-textual. The court specifically noted the testimony of Commissioner Jezik that he did not consider Solly's affair in deciding to dismiss Solly, rather only her DUI, her absence from work as a result of the incarceration, and the initial lack of an explanation for the absence.

As to whether Solly established a *prima facie* case of sex discrimination, neither party disputes the fact that Solly was a member of a protected class, that adverse employment action was taken against her and not against Bayer, and that she was qualified for the position from which she was dismissed. Solly contends that the Cabinet's finding that she was not

similarly situated with Bayer because of Bayer's continuing status versus her limited status was in error. We agree.

It has been held that in order to prove that employees are similarly situated for purposes of establishing a *prima facie* case of discrimination, the plaintiff must show that all of the relevant aspects of her employment situation were nearly identical to those of the non-minority's employment situation. Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994) (emphasis added). In Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998), the Court adjudged that for employees to be considered similarly situated in a case alleging discriminatory discipline, the employees must have "dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Id. at 352 (quoting Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992)). In the instant case, the evidence established that Bayer was also a technical instructor at Caldwell, that Bayer and Solly both had the same principal (Dunn), they both engaged in the same conduct (the affair), and there was no evidence that they were subject to different standards relative to having an affair (the conduct which was the claimed reason for the dismissal). As for their differing

employment statuses - Bayer having continuing employment status and Solly having limited employment status - we do not believe that is a relevant consideration because disparate treatment regarding the affair would not be justified simply because one employee could be dismissed without cause and one employee could only be dismissed for cause. As stated earlier, although Solly was a limited status employee who could be dismissed without cause, she nevertheless could not be fired for a discriminatory reason.

The hearing officer also found that Solly and Bayer were not similarly situated because Solly had a DUI conviction and Bayer did not. Solly's DUI conviction would come into play in the second prong of the analysis, as that was the nondiscriminatory reason given by Jezik for Solly's dismissal. Accordingly, we conclude that the Cabinet applied the incorrect rule of law to the facts in this case regarding the "similarly-situated" prong of the *prima facie* analysis. We adjudge that Solly established a *prima facie* case of gender discrimination in this case.

The next question is whether the Cabinet met its burden of proof to articulate a legitimate nondiscriminatory reason for dismissing Solly. Solly argues that her DUI conviction was not a legitimate reason for her dismissal. Solly cites to KRS 335B.020(1) which provides as follows:

No person shall be disqualified from public employment, nor shall a person be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely because of a prior conviction of a crime, unless the crime for which convicted is one described in KRS 335B.010(4) or otherwise directly relates to the position of employment sought or the occupation for which the license is sought.

KRS 335B.010(4) provides:

"Conviction of crime" shall be limited to convictions of felonies, high misdemeanors, and misdemeanors for which a jail sentence may be imposed. No other criminal conviction shall be considered unless moral turpitude is involved.

Solly argues, pursuant to the language at the end of KRS 335B.020(1), that her DUI did not otherwise directly relate to her job as an electricity instructor. Under the above statutes, however, whether the crime directly relates to the job is not material in this case because a first offense DUI is a misdemeanor for which a jail sentence may be imposed. See KRS 189A.010(5)(a). Accordingly, KRS 335B.020(1) would not prohibit a dismissal based on a DUI conviction.

The Cabinet argues that the following language in KRS 161.790(1)(b) would permit Solly's dismissal based on her DUI conviction:

The contract of a teacher shall remain in full force during good behavior and efficient and competent service by the

teacher and shall not be terminated except for any of the following causes:

. . .

b) Immoral conduct or conduct unbecoming a teacher;

Solly maintains that KRS 161.790(1) would not apply to her because she was not a "teacher" as defined in KRS 161.720(1) which provides:

The term "teacher" for the purpose of KRS 161.730 to 161.810 shall mean any person for whom certification is required as a basis of employment in the public schools of the state, with the exception of the superintendent.

Solly claims, rather, that her employment would fall under the dictates of KRS Chapter 151B, the Cabinet for Workforce Development, because she was employed by the Department for Technical Education which was attached to the Cabinet. KRS 151B.025(1). We agree that KRS Chapter 151B would apply to Solly's employment, and not KRS 161.790, because the evidence established that Solly was a technical instructor for the Department for Technical Education and not a public school teacher within the meaning of KRS 161.720(1).

Solly specifically contends that KRS 151B.052 is controlling on the issue of what crimes a Cabinet employee can be disciplined for committing. KRS 151B.052, entitled "Criminal conviction as grounds for disciplinary action," states:

Subject to the provisions of KRS 151B.055, any certified or equivalent employee who is convicted of a felony or job-related misdemeanor may be subject to any disciplinary action deemed appropriate, including dismissal.

It is Solly's position that because her first offense DUI conviction was not a felony, nor was it job-related, she could not be disciplined by the Cabinet for it. The Cabinet argues that the above provision would not apply to Solly because the reference in the statute to KRS 151B.055 shows that it was intended to apply only to continuing status employees. We do not agree. The statute explicitly applies to "any certified or equivalent employee," which would encompass Solly. See KRS 151B.010(4) and (11) for the definitions of "certified employees" and "equivalent employees". From our reading of KRS 151B.052, the "subject to the provisions of KRS 151B.055" language is meant only to clarify that the procedural requirements in KRS 151B.055 must be met in order to dismiss a continuing status employee for a felony or job-related misdemeanor conviction.

The Cabinet argues in the alternative that even if KRS 151B.052 does apply to limited status employees, 780 KAR 3:110, Section 1(2) would justify dismissal on the basis of Solly's DUI conviction because it constitutes immoral character or unbecoming conduct. 780 KAR 3:110, Section 1(2) provides:

Section 1. Except as otherwise provided in these administrative regulations, the tenure of an employee in the certified or equivalent personnel system shall be during good behavior and the satisfactory performance of his duties. The appointing authority may discipline employees for lack of good behavior or the unsatisfactory performance of duties. Lack of good behavior or the unsatisfactory performance of duties include but are not limited to the following:

. . .

(2) Immoral character or unbecoming conduct;

KRS 151B.035, which allows for the promulgation of regulations for the administration of personnel in the Department for Technical Education, is the statutory authority for the above regulation. KRS 151B.035(2) states, however, that said regulations must be consistent with the provisions of this chapter, which would include KRS 151B.052. Regulations are valid as subordinate rules only when found to be within the framework of the policy defined in the legislation because an administrative agency's authority is limited to that expressly granted by statute. United Sign, Ltd. v. Commonwealth, 44 S.W.3d 794, 798 (Ky.App. 2000) (citing Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, Dept. of Hwys., 928 S.W.2d 344, 347 (Ky. 1996)). An administrative regulation cannot conflict with legislative policy as expressed in the statutes.

Kentucky Alcoholic Beverage Control Board v. Anheuser-Busch, Inc., 574 S.W.2d 344, 345 (Ky.App. 1978).

Regardless of whether a DUI conviction would constitute immoral or unbecoming conduct, we believe there is a question of whether 780 KAR 3:110, Section 1(2) is in conflict with KRS 151B.052, to the extent that the regulation could allow for the dismissal of a Cabinet employee for a criminal conviction when the crime is not a felony or job-related. It is a general rule of statutory construction that the enumeration of a particular thing excludes that which is not specifically mentioned. Schwindel v. Meade County, 113 S.W.3d 159 (Ky. 2003). Applying that rule to KRS 151B.052, we believe the legislature intended, relative to criminal convictions, that a Cabinet employee can only be dismissed for a conviction if it is a felony or a job-related misdemeanor. It follows then that the Cabinet could not rely on 780 KAR 3:110, Section 1(2) to dismiss an employee for a criminal conviction which is neither a felony nor job-related.

As to the apparent conflict between KRS 335B.020(1) and KRS 151B.052 relative to what crimes an employee can be dismissed for, we adjudge that KRS 151B.052 would control because that statute applies specifically to employees of the Cabinet for Workforce Development, whereas KRS 335B.020 applies to the general category of public employees. It is an

established rule of statutory construction that where there is both a specific statute and a general statute applicable to the same subject, the specific statute controls. Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005).

Accordingly, we conclude that, as a matter of law, the Cabinet could not have legitimately dismissed Solly for her first offense DUI conviction because it was not a felony and not a job-related misdemeanor. Thus, because the Cabinet could not assert a legitimate nondiscriminatory reason for its dismissal of Solly and Solly established a *prima facie* case of sex discrimination, we reverse the order upholding Solly's dismissal and remand for further proceedings.

For the reasons stated above, the judgment of the Franklin Circuit Court is reversed and the matter is remanded to the Board for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Donald Duff
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE COMMONWEALTH OF
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