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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0665-MR

MITCHEL WEAFER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 23-CI-00023

HERITAGE INSTALLATIONS I, LLC — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CALDWELL, ECKERLE, AND MCNEILL, JUDGES.

MCNEILL, JUDGE: Appellant, Mitchel Weafer ("Weafer"), worked installing doors and windows for Appellee, Heritage Installations I, LLC ("Heritage"). His duties included driving a truck and trailer provided by Heritage. Weafer informed his supervisors that the trailer had defective brakes and brake lights requiring repair. When the repairs were not made, Weafer refused to drive the vehicles. Heritage subsequently terminated his employment.

Weafer filed suit in Fayette Circuit Court alleging common law wrongful discharge. The amended complaint alleges that he was fired after refusing Heritage's directive to violate the law in the course of his employment. Heritage filed a motion to dismiss pursuant to CR[1] 12.02(f), which was granted. Weafer appeals to this Court as a matter of right. For the following reasons, we reverse and remand.

STANDARD OF REVIEW

"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.*" *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citation omitted). Accordingly, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." *Id.* With this standard in mind, we return to the present issue.[2]

[1] Kentucky Rules of Civil Procedure.

[2] The present case discusses federal and state law, which will be referenced throughout as follows: The United States Constitution ("U.S. CONST."); the United States Code Annotated ("USC"); the United States Code of Federal Regulations ("CFR"); Kentucky Revised Statutes ("KRS"); and the Kentucky Administrative Regulations ("KAR"). We also note the well-reasoned and well-cited briefs submitted by the parties, which have been most welcome in navigating these various laws.

ANALYSIS

Kentucky is an at-will employment state. Therefore, an employer may generally discharge an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983) (citations omitted). However, there is a "public policy" exception to the at-will doctrine. It must be established as follows:

> 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
>
> 2) That policy must be evidenced by a constitutional or statutory provision.
>
> 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985). Furthermore, an employment-related nexus should exist within the public policy. *Id*. at 402. Two specific types of situations have been recognized under this exception:

> First, where the alleged reason for the discharge of the employee was the employee's failure or refusal to violate a law in the course of employment.
>
> Second, when the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment.

Id. (internal quotation marks and citation omitted). The present case concerns the first situation. *See Ne. Health Mgmt., Inc. v. Cotton*, 56 S.W.3d 440, 447 (Ky. App. 2001) (holding that an employee who was fired for refusing employer's request to commit perjury satisfied the first situation described in *Grzyb*). More recently, in *Hill v. Kentucky Lottery Corporation*, the Kentucky Supreme Court applied *Cotton* and held in part that "KRS Chapter 344 does not preempt the Hills' common law claims for wrongful discharge based on the public policy against perjured testimony." 327 S.W.3d 412, 423 (Ky. 2010), *as modified on denial of reh'g* (Dec. 16, 2010). Based on these decisions, Weafer summarizes his central argument as follows:

> Considering the allegations in the amended complaint as true, as required, Heritage had no better right to direct Weafer to illegally operate the defective trailer in violation of KRS 189.055 (requiring brake lights for all motorists), KRS 189.090(1)-(2) (prohibiting defective brakes and requiring adequate brakes for all motorists), and KRS 189.080(4), KRS 281.600 and 601 KAR 1:005 (defining standards specific to commercial motor carriers) than the defendants in *Hill* and *Cotton* had to direct their employees to violate general perjury statutes.

In contrast, the circuit court summarized the perceived overlap of state and federal law in the present case:

> Heritage is a private motor carrier as defined by the Federal Motor Carrier Safety Administration ("FMCSA"), 49 C.F.R. 390.5, and is subject to federal motor carrier safety regulations. 49 C.F.R. 393.1(a). This includes but is not limited to, 49 C.F.R. Part 393,

> which regulates brakes on commercial motor vehicles. KRS 189 confirms the mandatory application of 49 C.F.R. Part 393 to Heritage. It states that a commercial motor vehicle . . . with a declared gross weight of over ten thousand (10,000) pounds must meet the federal motor carrier safety standards in 49 C.F.R. pt. 393.
>
> The Kentucky Court of Appeals has held that the protection of Kentucky's public policy exception does not extend to the violation of a federal regulation. Kentucky federal courts interpreting Kentucky wrongful discharge claims have followed suit.

(Cleaned up).[3] *See, e.g., Shrout v. The TFE Group*, 161 S.W.3d 351, 355 (Ky. App. 2005) (citation omitted) (observing that the protection of the public policy exception "does not extend to the violation of a federal regulation"); *Barlow v. The Martin-Brower Co.*, 202 F.3d 267, 2000 WL 32027 (6th Cir. Jan. 5, 2000) (unpublished table opinion holding that federal transportation regulations could not form the basis for a wrongful discharge suit under Kentucky law). Before considering additional case law, we must first address the statutory provisions at issue.

Weafer's complaint cites three statutes in support of his wrongful discharge claim. KRS 281.600; KRS 189.090; and KRS 189.055.[4] We will focus

[3] This Opinion uses "cleaned up" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 JOURNAL OF APPELLATE PRACTICE AND PROCESS 143 (2017).

[4] 601 KAR 1:005 is also cited. However, we will not consider regulatory authority because we are directed to consider public policy "evidenced by a constitutional or statutory provision." *Grzyb*, 700 S.W.2d at 401. The complaint does not cite any federal authority.

our analysis on the latter two provisions. KRS 189.090(1) directs that "[n]o owner shall knowingly operate or permit to be operated on a highway a motor vehicle upon which the brakes are defective." Similarly succinct, KRS 189.055 mandates that "[a] person shall not operate any vehicle by law to be licensed upon a highway unless it is equipped with . . . at least two (2) red lights on the rear of the vehicle . . . ." This language demonstrates a clear legislative intent in ensuring the safe operation of vehicles at the most basic level. Indeed, "[s]hall means shall." *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 796 (Ky. 2003). Chapter 189 also contains penalty provisions. KRS 189.990 and KRS 189.993. The legislature was not silent and made it clear that brakes and brake lights are required to operate a vehicle in Kentucky. At this point in history, it is a challenge to imagine a public policy pronouncement to the contrary. An employment-related nexus is also evident. *Grzyb*, 700 S.W.2d at 402. We need not stray too far from this statutory lane to see where the rubber meets the road.

For example, two of our sister states – with whom we share borders and thoroughfares – have recognized similar public policies. *See Lilly v. Overnight Transp. Co.*, 425 S.E.2d 214, 217 (W. Va. 1992) ("[W]e hold that a cause of action for wrongful discharge may exist under West Virginia [statutes] where an employee is discharged from employment in retaliation for refusing to operate a motor vehicle with brakes that are in such an unsafe working condition that

operation of the vehicle would create a substantial danger to the safety of the public."); *Lawson v. Adams*, 338 S.W.3d 486, 498 (Tenn. Ct. App. 2010) (reversing and remanding in wrongful discharge case where "the statutes and regulations Plaintiff claims were violated establish, at a minimum, public policy that motor vehicles have properly working brakes"). Moreover, a recent unpublished case from a panel of this Court also proves instructive. *Ft. Mitchell Construction, LLC v. Justinic*, No. 2022-CA-0386-MR, 2024 WL 1335245 (Ky. App. Mar. 29, 2024).[5] In *Justinic*, the Court analyzed whether KRS 183.100 (compliance with air traffic rules), was sufficient to support Appellee's claims of wrongful termination. KRS 183.100 states in its entirety:

> No person shall operate any aircraft within the state in any form of navigation whatsoever in violation of the air traffic rules promulgated by the cabinet or the Federal Aviation Administration [(FAA)]. For enforcement purposes, cabinet personnel shall have access at all reasonable times to appropriate books, records, and logs of any person operating aircraft in the state.

In analyzing this provision, the Court reasoned that "[w]e cannot agree that the statute fails to outline a well-defined policy[,]" and that "[w]e have little doubt that KRS 183.100 has a nexus to [Appellee's] employment." *Justinic*, 2024 WL 1335245, at *3. The Court ultimately concluded that "this statute

[5] The parties' briefs in the present case were submitted months before *Justinic* was rendered. Therefore, neither they, nor the circuit court, had the benefit of this decision.

expresses Kentucky's public policy in favor of air safety." *Id*. In support, the Court relied in part on *McGill v. DHL Airways, Inc*., 12 F. App'x 247 (6th Cir. 2001) (applying KRS 183.100 and holding that the employee's termination violated public policy).

On balance, we believe that the present case is most like *Justinic*, *Lilly*, and *Lawson*. In the absence of binding Kentucky authority to the contrary, we find the reasoning advanced in these decisions to be persuasive. To be clear, however, our decision is premised upon the relevant statutory provisions themselves. And we reiterate that "[t]he decision of whether the public policy asserted meets [the necessary] criteria is a question of law for the court to decide, not a question of fact." *Grzyb*, 700 S.W.2d at 401. Therefore, any discussion of *Justinic*, *Lilly*, *Lawson*, or other nonbinding authority buttresses our decision – but does not dictate it. Accordingly, we hold that the statutory provisions cited in the present case express Kentucky's public policy in favor of vehicle safety, specifically concerning brakes and brake lights.

Finally, in granting the underlying motion to dismiss, the circuit court also relied in part on the Supremacy Clause, U.S. CONST. art. VI, cl. 2. With this authority, the circuit court summarily held that Weafer's claim is preempted by the Federal Aviation Administration Authorization Act ("F4A"). More precisely, "[t]he [F4A] preempts any state law [that] relate[s] to a price, route, or service of

any motor carrier . . . with respect to the transportation of property." *California Trucking Association v. Bonta*, 996 F.3d 644, 649 (9th Cir. 2021) (citing 49 U.S.C. § 14501, Federal authority over intrastate transportation) (internal quotation marks omitted). *See also Niehoff v. Surgidev Corp*., 950 S.W.2d 816, 821 (Ky. 1997), *cert. denied* 523 U.S. 1005 (1998) (There "is a presumption against the preemption of state regulations" considering "the historic primacy of state regulation of matters of health and safety."); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (A "court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption."); *and Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014) ("[G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations are not preempted . . . .").

Critically, no Kentucky appellate court has addressed this issue. Furthermore, we have not been presented with any other clear directive that federal law supersedes the relevant provisions of KRS Chapter 189, as it applies to the facts and legal questions at issue here. Accordingly, we reverse the circuit court's dismissal order on this issue as well.

CONCLUSION

For the foregoing reasons, we REVERSE the Fayette Circuit Court's order of dismissal and REMAND for further proceedings.

ALL CONCUR.

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