

SUPREME COURT GRANTED DISCRETIONARY REVIEW MARCH 14, 2007
(FILE NO. 2005-SC-0965-DG)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001146-MR

MARY C. GAINES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 02-CI-01523

WORKFORCE DEVELOPMENT CABINET,
DEPARTMENT FOR EMPLOYMENT SERVICES,
DIVISION OF UNEMPLOYMENT INSURANCE;
RALPH HUNT; DEBORAH REDMON; CHARLES BELL;
TONY DENAME; AND JAMES THOMPSON

APPELLEES

OPINION
AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.¹

McANULTY, JUDGE: This is an appeal from the partial summary judgment issued by the Franklin Circuit Court that dismissed Mary C. Gaines's (Gaines) claim against the Workforce Development Cabinet, Department for Employment Services,

¹ Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

Division of Unemployment Insurance (the Cabinet), and individual employees of the Cabinet, Ralph Hunt, Debera Redmon,² Charles Bell, Tony DeName and James Thompson, for violations of the Kentucky Whistleblower Act. The trial court granted partial summary judgment because it did not believe that Gaines qualified as a whistleblower. Because we conclude that under the facts alleged, Gaines did blow the whistle internally, we vacate and remand the partial summary judgment in favor of the Cabinet. The Kentucky Supreme Court recently concluded, however, that the language of KRS 61.101(2) does not impose individual civil liability under Kentucky's Whistleblower Act. So, we must affirm the summary judgment as to individual appellants Hunt, Redmon, DeName and Thompson.

In her brief, Gaines notes that Charles Bell should not have been named as an appellee in this appeal because Gaines voluntarily dismissed him as a defendant in the underlying action.

Gaines has been an employee of the Department for Employment Services (DES) since 1972. Her position at the time of this lawsuit was an Auditor IV in the DES Division of Unemployment Insurance.

In May of 1998, Gaines filed a lawsuit against the Cabinet in which she alleged gender discrimination and retaliation. A little over two years after she filed the action, she and the Cabinet reached a settlement in that action.

² According to Redmon's deposition, the correct spelling of her first name is "Debera."

Gaines filed this lawsuit in November of 2002. She alleged that the illegal gender discrimination by DES had been renewed. In addition, Gaines alleged that DES retaliated against her after she filed and settled her first lawsuit.

About three months after Gaines filed her second lawsuit, she observed her immediate supervisor throwing files in a dumpster that was accessible to the public from a nearby street. According to Gaines, the discarded materials included employer documents, which contained confidential and proprietary information pertaining to various employers and their employees.

Gaines called her attorney and informed him of what she observed. In turn, her attorney wrote a letter the same day to the Cabinet's Office of the General Counsel to alert him that Gaines's supervisor was throwing files in a dumpster in violation of KRS 341.190. One week later, the Assistant General Counsel from the Office of the General Counsel for the Cabinet wrote a letter to Gaines's attorney to inform him that the Cabinet promptly investigated the allegations. The letter went on to state that the allegations were unsubstantiated.

Between the time Gaines's attorney sent notification of the dumpster incident and the time the Cabinet responded to the allegations, three members of DES management traveled from Frankfort to Gaines's downtown Louisville office to inform her that they were transferring her to an outlying Louisville office. According to Gaines, her manager gave her about an hour and a half to pack her office. The move occurred two days

later. When she arrived at her new work location, the office they had assigned her was still occupied by someone else.

Less than three weeks after the dumpster incident, Gaines made a motion to amend her complaint to include a claim of retaliation in violation of KRS 61.101 *et seq.*, Kentucky's Whistleblower Act, against the Cabinet and five members of its management staff. The trial court permitted Gaines to amend her complaint to include this claim. So at this point, Gaines's lawsuit consists of a gender discrimination claim against the Cabinet, a retaliation claim against the Cabinet, and a whistleblower claim against the Cabinet and several of its individual management employees.

The Cabinet filed a motion for summary judgment and dismissal of all of Gaines's claims. As to Gaines's whistleblower claim, the Cabinet argued that Gaines could not establish the necessary elements of the claim because (1) she failed to make a good faith report to any of the entities specified in KRS 61.102; (2) the individual employees that she named did not constitute her "employer" within the meaning of the statute; and (3) her assignment to a different work location was not an act of reprisal prohibited by KRS 61.102.

The trial court granted partial summary judgment on the whistleblower claim in favor of the Cabinet. The trial court informed the parties in a hearing held on May 10, 2004, of its decision to grant summary judgment on the whistleblower claim. In the hearing, the trial court articulated its reason

for doing so as follows: "As a matter of law, the facts alleged in the complaint do not constitute whistleblowing under the statute." Later in the hearing, in response to a question by Gaines's counsel, the trial court was more explicit in expressing which fact that it believed hurt Gaines's claim. The fact of consequence was that Gaines's attorney reported the alleged illegal disposal of files to in-house counsel for the Cabinet in the course of her litigation with the Cabinet. The trial court did not believe that this constituted whistleblowing under KRS 61.102.

Because the trial court found that Gaines would be unable to prevail, as a matter of law, on her whistleblower claim, it dismissed the claim against all defendants. In addition, the trial court granted summary judgment in favor of the Cabinet on Gaines's gender discrimination claim. A jury heard the remaining claim of retaliation and found for the Cabinet.

On appeal, Gaines's arguments pertain only to the propriety of the trial court's partial summary judgment in favor of the Cabinet on the whistleblower claim.

The standard of review of a trial court's granting 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 warranting a judgment in its favor. See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., 814 S.W.2d 273, 276 (Ky. 1991). In considering a motion for summary judgment, the court must view all the facts and inferences drawn therefrom in the light most favorable to the party opposing the motion. See Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." See id.

In this appeal, Gaines argues that the circuit court erred as a matter of law when it dismissed her whistleblower claim because she established the requisite elements. The following section of KRS 61.102 is essential to the issue in this case:

(1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or

authority, 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. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

As the Kentucky Supreme Court interpreted and applied KRS 61.102 in Woodward v. Commonwealth, 984 S.W.2d 477, 480-81 (Ky. 1998), an employee must establish the following four elements to demonstrate a violation of the statute: (1) the employer is an officer of the state or one of its political subdivisions; (2) the employee is employed by the state; (3) the employee made a good faith report of a suspected violation of a state statute or administrative regulation to an appropriate body or authority; and (4) the employer took action or threatened to take action to punish the employee for making this report or to discourage the employee from making this report.

Here, the trial court essentially found that Gaines failed as a matter of law to establish the third element. Gaines argues, however, that she properly reported the violation through her attorney to counsel for the director of DES, and the DES has oversight of the Department of Unemployment Insurance.

In response to Gaines's argument, the Cabinet argues that Gaines simply failed to make a report to one of the third

parties designated in the statute. The Cabinet contends that in-house counsel for DES is not somehow an "other appropriate body or authority" under KRS 61.102(1). According to the Cabinet, the clear intention of the whistleblower statute is to protect public employees from reprisal in the event of reports to third parties that could sanction or investigate the alleged wrongful conduct by the public employer. The Cabinet does not believe that the statute can be construed to expand whistleblower protection to direct communication between litigants. We disagree with the Cabinet's effectuation of the statute.

The purpose of Kentucky's Whistleblower Act is to protect from retaliatory action by the employer employees who possess knowledge of wrongdoing that is concealed or not publicly known and who step forward to help uncover and disclose that information. See Davidson v. Com., Dept. of Military Affairs, 152 S.W.3d 247, 255 (Ky.App. 2004). Whistleblower acts, such as Kentucky's, are remedial in nature. See Davis v. Ector County, Texas, 40 F.3d 777, 785 (5th Cir. 1994) (construing the Texas whistleblower statute). Statutes that are remedial in nature are entitled to a liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute. Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers, 13 S.W.3d 606, 611 (Ky. 2000) (quoting 73 Am.Jur.2d *Statutes*, § 278 (1974)).

Turning to the facts of this case, we believe that Gaines's report blew the whistle internally. Although an employee is not required to give notice to the employer before making a report, we do not construe the statute as denying protection because the employee chose to handle the matter within the organization, which is a state agency. Thus, we vacate and remand the partial summary judgment as to the Cabinet.

In light of the holding in Cabinet for Families and Children v. Cummings, 163 S.W.3d 425, 430 (Ky. 2005), we must affirm, however, the summary judgment as to the individual defendants, who were employees of the Cabinet. In Cummings, the court held that, in enacting KRS 61.102, our Legislature did not intend for managers to be individually liable. See id. at 431.

For the foregoing reasons, the partial summary judgment in favor of the individual employees of the Cabinet is affirmed, but the partial summary judgment in favor of the Cabinet on the whistleblower claim is vacated and remanded for further proceedings.

ALL CONCUR.

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