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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001508-MR (DIRECT APPEAL)
AND
NO. 2004-CA-001563-MR (CROSS-APPEAL)

CONSOLIDATED INFRASTRUCTURE MANAGEMENT AUTHORITY, INC. — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 03-CI-00072

THOMAS EVERETTE ALLEN — APPELLEE/CROSS-APPELLANT

AND NO. 2005-CA-000440-MR

THOMAS EVERETTE ALLEN — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 03-CI-00072

CONSOLIDATED INFRASTRUCTURE MANAGEMENT AUTHORITY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is a "whistleblower" case. Consolidated Infrastructure Management Authority, Inc. (hereinafter CIMA) appeals the jury verdict in the Logan Circuit Court in favor of appellee Thomas Everette Allen which awarded him back pay. CIMA questions the sufficiency of the evidence and the application of the statute of limitations. Allen cross-appeals on the court's reduction of the judgment by the amount he received in unemployment compensation. In addition, Allen argues on cross-appeal that CIMA should have been required to post a supersedeas bond, despite being a governmental unit, because CIMA is being or has been dissolved as a corporate entity. We affirm as to the direct appeal, and the cross-appeal.

Allen was a safety director for the City of Russellville beginning in the year 2000. In May 2001, the City of Russellville joined with the City of Auburn to form CIMA in order to administer the cities' water and sewer services. Upon CIMA's creation, Allen transferred to the agency to work as the agency's Safety Director. Allen performed a walk-through of CIMA's Auburn facility plants and made a list of the safety violations he observed. He gave copies of the list to the executive director of CIMA, Charles McCollum, and the Assistant Executive Director, Wayne Thomas. Allen considered the violations very serious. He cited items such as lack of

railings, broken fans, electrical equipment violations, and a torn-down fence as serious safety hazards to the employees and public. Allen testified that he made little headway that summer in getting the safety violations addressed by management. He was told there was no money to fix the hazards he had cited.

Allen sent a letter to Mr. McCollum, Mr. Thomas, the chairman of the Board of Directors, and the financial director of CIMA reporting on the safety violations and equipment that needed to be purchased, and the failure to fulfill those needs. He stated in this letter that "if the violations and safety equipment that is needed is not in place" by September 10, 2001, he would "request a survey from Frankfort OSHA." Allen appeared before the CIMA Board of Directors in September and October 2001, to report on safety violations, and again told the Board that he was considering reporting the violations to Kentucky OSHA. At the October meeting, the Board voted to repair the fence, which was done about a month thereafter.

In February 2002, Allen was informed that CIMA would be cutting back on employees and that Allen would be among those laid off. On February 18, 2002, Allen was given his formal notice of termination reportedly due to financial constraints. On February 25, 2002, Allen sent a letter to Tony Long at the Kentucky Labor Cabinet stating that safety hazards existed in CIMA facilities, and enclosed photographs. He requested a

surprise inspection of the water treatment plant and wastewater plant. It did result in a surprise inspection, and the issuance of violation notices and penalties. Allen also reported safety concerns to the City of Russellville's liability carrier in the month of February 2002, which resulted in an inspection and demand to correct the violations.

Approximately a year later, Allen sued CIMA for violation of the Kentucky Whistleblower Act, wrongful termination and intentional infliction of emotional distress. The case went to trial. Allen withdrew his claim for intentional infliction of emotional distress at the close of his case in chief following CIMA's motion for directed verdict. The court ruled that there was no cause of action available for wrongful discharge apart from the whistleblower claim, and dismissed the wrongful discharge claim. In addition, the court determined that Allen was precluded from receiving punitive damages or injunctive relief under KRS 61.103 since he filed his suit more than 90 days after his termination, but compensatory damages were not barred by the limitation.

After hearing all the evidence, the jury found in favor of Allen. The jury determined that Allen's disclosure of safety violations to OSHA was a contributing factor in CIMA's decision to discharge him from employment. The jury reported in its verdict that it was unconvinced that CIMA would have

discharged Allen even if he had not reported safety violations. The jury awarded Allen $40,000 in back pay. The trial court granted Allen's motion for attorney fees and expenses, in the amount of $24,228 and $6,164.96 respectively. The trial court reduced the award by the amount of unemployment benefits Allen had received, $13,299, for a total judgment of $57,089.94.

CIMA's first argument on appeal is that the trial court should have dismissed Allen's whistleblower claims entirely for failure to file them within 90 days of termination. The provision at issue is KRS 61.103(2), which states in pertinent part:

> 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 trial court decided that the language of the statute only required that claims for punitive damages or injunctive relief be brought within 90 days, but that compensatory damage claims were not limited by the statute. CIMA argues that the 90 day limitation applies to all claims brought under the Whistleblower Act.

This court has a duty to give statutory language its literal meaning unless to do so would produce an absurd result.

Alliant Health System v. Kentucky Unemployment Ins. Com'n, 912 S.W.2d 452 (Ky. App. 1995). A statute should be construed, if possible, so that no part of it is meaningless and ineffectual. Hardin County Fiscal Court v. Hardin County Bd. of Health, 899 S.W.2d 859 (Ky. App. 1995). Each section of a legislative act should be read in light of the act as a whole, with a view to making it harmonize, if possible, with the entire act and with each section and provision thereof, as well as with the expressed legislative intent and policy. Frankfort Pub. Co., Inc. v. Kentucky State University Foundation, Inc., 834 S.W.2d 681, 682 (Ky. 1992).

We agree with the trial court's construction. The words of the statute creating the 90 day limitation only reference injunctive relief or punitive damages. The availability of other forms of relief is provided in KRS 61.990. The statutory enactment when read as a whole does not reveal any intent by the legislature to cut off other forms of relief to whistleblowers after 90 days. Instead, by enumerating the other forms of relief available in a different statute, 61.990(4), the legislature indicates that these forms of relief would be available notwithstanding the 90 day time limit.

We agree with Allen that it would have been very simple for the legislature to have precluded all relief on a whistleblower claim after the passage of 90 days if that was its

intent. It did not impose an absolute statute of limitation to all forms of relief. Therefore, the courts may not read such a limitation into the plain language which exists. See Bailey v. Reeves, 662 S.W.2d 832, 834 (Ky. 1984). Statutes are to be given a liberal construction in order to promote their objects and carry out the intent of the legislature. KRS 446.080. Moreover, a construction in favor of allowing the greater time period to prevail is favored when construing statutes of limitation because they are in derogation of a presumptively valid claim. Troxell v. Trammell, 730 S.W.2d 525 (Ky. 1987).

CIMA argues that the statute leads to an absurd result because it limits whistleblower claims according to the nature of the remedy rather than the type of claim brought. Yet, while this may not be the usual classification for a limitations statute, it certainly does not make the result absurd. The statute as written suggests that the General Assembly intended that persons claiming whistleblower violations act quickly if they seek injunctive or punitive relief. We do not find this to be an absurd objective. We affirm the trial court's ruling that the 90 day limitation did not apply to Allen's claim for back pay.

CIMA next contends that it should have been granted a directed verdict on the whistleblower claim because Allen did not engage in activity protected by the Whistleblower Act. CIMA

argues that Allen did not threaten to contact the *enforcement* division of Kentucky OSHA. CIMA argues that all Allen threatened to do before termination was to request a survey from KOSHA, which action leads to education and training rather than enforcement. CIMA argues that the evidence reflects that Allen did not contact the enforcement division until after he received notification of the lay off. Thus, CIMA argues Allen's activity prior to termination was not whistle blowing.

The standard of review of the denial of a motion for directed verdict is set forth in Lewis v. Bledsoe Surface Min. Co., 798 S.W.2d 459 (Ky. 1990). Upon review of the evidence supporting a judgment entered upon a jury verdict, the appellate court's role is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. Id. at 461. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight to be given the evidence, these being functions reserved to the trier of fact. Id. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Id. The appellate court must determine after reviewing the evidence whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" Id. at 461-62.

We affirm the denial of the directed verdict motion. We believe the activities of Allen prior to termination met the requirements of the statutes. KRS 61.102 required that Allen "report, disclose, divulge or otherwise bring to the attention . . ." of appropriate authorities "any facts or information relative to an actual or suspected violation of" any law or regulation or rule. The meaning of "disclose" is enlarged on in KRS 61.103:

> As used in this section, unless the context otherwise requires:
> (1) (a) "Disclosure" means a person acting on his own behalf, or on behalf of another, who reported or is about to report, either verbally or in writing, any matter set forth in KRS 61.102.

Construing the statutes together, it seems that disclosure occurs with the threat of reporting in addition to an actual report. Allen's letter threatened to make a report to Kentucky OSHA.

We conclude that CIMA is reading the statute too narrowly in positing that Allen had to report a violation and request enforcement specifically. Instead, the statute is clear that the passing of information relative to a violation is sufficient. The act of threatening to alert the Kentucky OSHA of the violations, as Allen did, met the element of disclosure. Moreover, Allen testified that he kept in contact with Joe Giles of the Labor Cabinet and informed him of his difficulties with

obtaining corrections to safety violations. We are persuaded that Allen disclosed information within the definition given that term by the whistleblower statutes. The verdict is not flagrantly against the evidence, and so we affirm the denial of the directed verdict on the whistleblower claim.

As to the cross-appeal, Allen argues that the trial court erred in reducing the jury award in the amount of $13,299.00 representing unemployment compensation received by Allen. We find no error in deducting the amount of unemployment benefits from the final award. See Simpson County Steeplechase Assoc., Inc. v. Roberts, 898 S.W.2d 523, 528 (Ky. App. 1995).

Finally, Allen also cross-appeals on his contention that CIMA should have been required to post a supersedeas bond despite the exemption contained in CR 81A. That Rule states that the requirement to post a bond shall not apply to municipal corporations. However, after the court below took judicial notice that CIMA will be dissolving, Allen sought to require the posting of a supersedes bond to ensure that his judgment would be adequately secured. He argues that because CIMA has dissolved it is no longer entitled to the protection of Rule 81A. We agree, however, that there is no legal authority for creating an exception to that Rule, and so the trial court proceeded correctly.

For the foregoing reasons, we affirm the judgment of the Logan Circuit Court.

All CONCUR.

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