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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000081-MR
&
NO. 2008-CA-000279-MR

DONNA POWERS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 04-CI-03346

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
AS TO APPEAL AND CROSS-APPEAL

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: After a jury verdict in favor of her former employer Lexington-Fayette Urban County Government (LFUCG), Donna Powers appeals the trial court's denial of her motions for directed verdict, for judgment notwithstanding the

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

verdict, and for a new trial, on her claim brought pursuant to Kentucky's Whistleblower Act, KRS 61.101 *et seq.* (the Act). LFUCG cross-appeals, arguing that Powers failed to present evidence of a *prima facie* case and, therefore, the trial court erred by not directing a verdict in its favor. Finding neither appeal meritorious, we affirm as to both.

In early 2000, Powers began working for LFUCG in the HANDS Program, Division of Family Services, Department of Social Work. Powers' supervisor was Karen Hacker; Hacker's supervisor was Jean Sabharwal; Sabharwal's supervisor was Alayne White. Powers was terminated on May 19, 2004. The reason for her termination was the focus of the trial.

Powers told the jury that she had reported to Sabharwal, Sabharwal's assistant, and White that Hacker had committed numerous administrative violations and breaches of client confidentiality, had falsified employee attendance records, had shown employee favoritism, and had used intimidation with employees. Powers had also expressed similar allegations to her co-workers and LFUCG Human Resources personnel. She argued to the jury that this conduct constituted "whistleblowing" and that LFUCG retaliated by terminating her in violation of the Act. At the close of Powers' case, LFUCG moved for directed verdict, arguing that Powers had not made out a *prima facie* because she never reported these alleged violations to any proper authority as required by the Act. The motion was denied and LFUCG went forward with its defense.

LFUCG denied Powers' claim and presented evidence that her termination was based on facts entirely independent of those facts upon which she based her claim for retaliation. At the close of LFUCG's case, both parties moved for directed verdict and both motions were denied.

The jury was instructed by means of four interrogatories based on the Act. Two of those interrogatories have bearing on this appeal. On Interrogatory No. 1, the jury determined that Powers had reported a violation to an "appropriate body or authority." On Interrogatory No. 4, the jury found "by clear and convincing evidence that the report . . . was not a material factor in" her termination.

Each party argues that a directed verdict was appropriate because the evidence was not legally sufficient to support one of these instructions. LFUCG says a directed verdict should have been granted because the people to whom Powers reported a violation were not an appropriate body or authority as contemplated by the Act. Powers says a directed verdict, or a new trial, should have been granted because the evidence was not clear and convincing that her report was a material factor in her termination.

A directed verdict is called for where "there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ." *Gibbs v. Wickersham*, 133 S.W.3d 494, 495 (Ky.App. 2004), *citing Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). "A motion for directed verdict admits the truth of all evidence which is favorable to

the party against whom the motion is made." *National Collegiate Athletic Association v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988). "[A] motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict." *Gibbs* at 496. "[T]he court will direct a verdict where there is no evidence of probative value to support an opposite result. The jury may not be permitted to reach a verdict upon speculation or conjecture." *Wiser Oil Co. v. Conley*, 380 S.W.2d 217, 219 (Ky. 1964). With this standard in mind, we undertake our review.

The Whistleblower Act requires, and Interrogatory No. 1 asked, that the jury determine whether Powers "brought to the attention of an *appropriate authority*" (emphasis supplied here) an actual or suspected violation of law or policy by Hacker. LFUCG argued in its directed verdict motion, and now, that this interrogatory must be answered in the negative as a matter of law. We disagree.

Our Supreme Court, in a similar case involving the Workforce Development Cabinet as the employer, addressed this very issue.

> KRS 61.102(1) specifically lists a number of bodies and agencies to whom employees may make a protected disclosure, but also protects disclosures to "any other appropriate body or authority." The Cabinet argues that all entities listed in the statute are "third party entities with investigatory authority for wrongdoing by public agencies." Therefore, the Cabinet argues, "any other appropriate body or authority" should be limited to entities of this type. However, the . . . list of entities in KRS 61.102(1) is not limited to those with investigatory authority. Instead, the list encompasses those who may have authority to remedy or report perceived misconduct in a particular situation.

> We believe that "any other appropriate body or authority" should be read to include any public body or authority with the power to remedy or report the perceived misconduct. This interpretation serves the goals of liberally construing the Whistleblower Act in favor of its remedial purpose, and of giving words their plain meaning. Generally, the most obvious public body with the power to remedy perceived misconduct is the employee's own agency (or the larger department or cabinet).

Workforce Development Cabinet v. Gaines, 276 S.W.3d 789, 793 (Ky. 2008), (footnote omitted).

LFUCG urges the same argument the Cabinet presented in *Gaines*. Like employee Gaines, employee Powers reported a co-worker's alleged violation to her own agency. Therefore, applying *Gaines*, LFUCG's cross-appeal must fail.

We next turn to Powers' appeal.

Powers argues that the evidence was insufficient to support the verdict under Interrogatory No. 4 that her whistleblowing activity was not a material factor in LFUCG's decision to terminate her employment. Specifically, she contends that LFUCG's own evidence regarding the reason for her termination was inconsistent and contradictory. Without reference to legal authority, Powers argues that this inconsistency and contradiction made it "impossible for Defendant [LFUCG] to meet its burden of proof by clear and convincing evidence." (Powers' brief, p.20). We do not agree.

Two pieces of documentary evidence bear heavily on Powers' argument. The first is a memo dated on Powers' termination date, May 19, 2004,

from Sabharwal (Hacker's supervisor) to Lexington Mayor Teresa Ann Isaac. The memo was written in accordance with a LFUCG Code of Ordinances and states, in pertinent part,

> . . . this is to inform you of my recommendation that Donna Powers . . . be released from her employment . . . . She is an "Unclassified Civil Service", an at-will employee, and her services are no longer needed. If you accept this recommendation, Donna Powers' last day of employment will be May 19, 2004.

Mayor Isaac accepted this recommendation on May 20, 2004. As an at-will employee, no reason needed to be given.[2] *Grzyb v. Evans*, 700 S.W.2d 399, 400 (Ky. 1985) (at-will employment permits employer to fire employees "for good cause, for no cause, or for a cause that some might view as morally indefensible[.]"). Powers questioned whether her services were no longer needed. Consequently, on May 21, 2004, Sabharwal's supervisor, Alayne White, reaffirmed the basis for the termination.

> It has come to my attention that you believe you were released from employment with the Lexington-Fayette Urban County Government because an investigation determined that you created a hostile, or unpleasant, work environment. I want to advise you that this is not correct.
>
> As the Mayor's correspondence, dated May 19, 2004, states, you were released from employment because "your services were no longer needed."

[2] We note that these memos made the prospect that Powers would obtain unemployment compensation benefits more likely than if she had been terminated for misconduct. *See* KRS 341.370(1)(b), (6).

Powers argues that this latter memo effectively precluded the jury from considering any evidence that she was terminated because of her negative effect on her workplace and co-workers. Ironically, the memo itself supports an inference that even Powers herself harbored the belief that she was terminated for creating an unpleasant work environment. Furthermore, if the memo were taken as the sole determiner of the ultimate fact question – why was she terminated? – we would be compelled to find that she was fired because her services were no longer needed, not because she was a whistleblower. Notwithstanding these points, Powers asks that we treat the record before us as though it were utterly bereft of evidence that she created a hostile work environment, for that is the only way she would have been entitled to a directed verdict. *Gibbs*, *supra*, 133 S.W.3d at 495. Since the record did contain such evidence, the trial court committed no error in denying Powers' motions for directed verdict and judgment notwithstanding the verdict.

We also disagree with Powers' argument that she was entitled to a new trial. Where the jury's verdict of no liability is supported by substantial evidence, the plaintiff is not entitled to a new trial. *Bayless v. Boyer*, 180 S.W.3d 439, 451 (Ky. 2005). Here, Powers claims she is entitled to a new trial because of the "undisputed inconsistencies in the Defendant's stated reasons for termination[.]" (Powers' brief, p.21). On this point, the Supreme Court's opinion in *Bayless* is illustrative.

> In the end, Appellant[’s] list of “uncontroverted” evidence, though it musters perhaps the strongest factual arguments from which a jury might infer that [LFUCG] was liable, is incomplete in that it avoids any mention of evidence in the record that might lead a jury to the opposite conclusion. We, however, cannot ignore the existence of that evidence. Stated simply, Appellant[] ignored [her] obligation to show that the jury’s verdict was not based on substantial evidence and instead endeavored to prove to this Court that [she] had the “better” case.

Bayless at 452.

A trial court’s denial of a motion for a new trial can be reversed only where such denial is clearly erroneous. *Miller v. Swift*, 42 S.W.3d 599, 600-01 (Ky. 2001). Where, as here, the jury’s verdict was supported by substantial evidence, denial of a motion for a new trial was not clearly erroneous.

For the reasons stated herein, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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