

RENDERED: MARCH 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000676-MR

TERRY CARL

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 07-CI-02023

JEFFREY DIXON, JR.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

VANMETER, JUDGE: Terry Carl appeals from the order of the Kenton Circuit Court denying his motion for summary judgment. Having heard oral argument, and considering the issues raised on appeal, we reverse and remand.

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On July 12, 2006, Leon Stamper, III was arrested and taken to Kenton County Detention Center (“KCDC”). Upon arriving at KCDC, Stamper was interviewed by a booking deputy and then placed in a general population holding cell. Stamper admitted to being under the influence at the time of his arrest. Shortly thereafter, Dixon was arrested on a warrant for failure to pay child support and placed in the general population holding cell with Stamper. At some point in the night, Stamper assaulted Dixon in the holding cell.

Dixon filed a complaint against Carl, the elected Kenton County jailer, as well as two other employees of KCDC, in their individual capacities, alleging they negligently performed their duties by placing Stamper in the general population holding cell with Dixon. Carl moved for summary judgment claiming that he was entitled to qualified official immunity, the injury was not foreseeable, and he was not directly responsible for Stamper’s placement in the general population holding cell. The trial court denied Carl’s motion, holding, in part, that he was not entitled to qualified official immunity. Specifically, the trial court held Carl was responsible for developing and enforcing a prisoner classification system, and his duties in that regard were ministerial. Carl then filed this interlocutory appeal challenging the trial court’s order concerning his entitlement to immunity from Dixon’s action.

Carl argues that the trial court erred by denying him qualified official immunity from Dixon’s claim that Carl failed to enforce a prisoner classification system. We agree.

Generally, an order denying a motion for summary judgment is not a final order, and therefore is not appealable. *See Battoe v. Beyer*, 285 S.W.2d 172 (Ky. 1955) (citations omitted). For an interlocutory order to be appealable, it “must ‘conclusively determine the disputed question,’ and that question must involve a ‘claim of right separable from, and collateral to, rights asserted in the action.’” *Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985) (internal citations omitted). A trial court’s “denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable ‘final decision’ . . . notwithstanding the absence of a final judgment.” *Id.* at 530, 105 S.Ct. at 2817 (adopted by *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886-87 (Ky. 2009)). Thus, in this instance, if Carl’s argument that the trial court erred by denying him qualified official immunity turns on a question of law, rather than fact, this court has jurisdiction to review his appeal.

In *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), Kentucky’s highest court held:

“Official immunity” is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. . . . [W]hen sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions . . . ; (2) in good faith; and (3) within the scope of the employee’s authority.

Id. at 521-22 (internal citations omitted).

Dixon alleges Carl failed to comply with 501 KAR² 3:110. Notably, since he does not allege that Carl acted outside the scope of his employment or in bad faith, Carl's entitlement to qualified official immunity depends on whether his duties under 501 KAR 3:110 were discretionary or ministerial. The rule is well-established that "the construction and application of statutes is a question of law[.]" *Osborne v. Commonwealth*, 185 S.W.3d 645, 648 (Ky. 2006) (citation omitted). Therefore, our determination as to the nature of Carl's duties is a question of law, and we have jurisdiction to review Carl's interlocutory appeal. We review questions of law *de novo*. *Baker v. Coombs*, 219 S.W.3d 204, 206 (Ky.App. 2007) (citation omitted).

Discretionary acts involve "the exercise of discretion and judgment, or personal deliberation, decision, and judgment[.]" *Rowan County v. Sloas*, 201 S.W.3d 469, 477 (Ky. 2006) (citing *Yanero*, 65 S.W.3d at 522). Discretionary duties "require the exercise of reason in the adaptation of a means to an end, and discretion in determining how or whether the act shall be done or course pursued." *Sloas*, 201 S.W.3d at 477 (citation omitted). Conversely, "[a] ministerial act . . . is 'one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.'" *Id.* at 478 (citation omitted).

² Kentucky Administrative Regulations.

Despite these often-quoted guidelines, courts have observed that a statute will often task a government official with both ministerial and discretionary functions. *See Stratton v. Commonwealth*, 182 S.W.3d 516, 521 (Ky. 2006) (holding that the investigation of allegations of abuse involves ministerial functions prescribed by statute such as who must be interviewed, but also involves discretionary acts of whether and how to pursue such allegations). The Kentucky Supreme Court noted,

determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act.

Haney v. Monsky, 311 S.W.3d 235, 240 (Ky. 2010).

In this case, Carl was alleged to have violated 501 KAR 3:110 which provides, in part,

- (1) Each jail shall develop a prisoner classification system, which shall be included in the facility's written policy and procedure manual.
- (2) The prisoner classification system shall provide for separation of the following categories of prisoners:
 - (a) Male and female prisoners, except in diversion/holding;
 - (b) Mental inquest detainee and other prisoners;
 - (c) Mentally ill or mentally retarded prisoners and other prisoners;
 - (d) Chemically incapacitated prisoner and other prisoners;

(e) A prisoner with a tendency to harm others, be harmed by others, or requiring administrative segregation and other prisoners;

(f) A prisoner with a communicable disease and other prisoners.

Specifically, Dixon alleges Stamper should have been separated from other prisoners because he was chemically incapacitated and had a tendency to harm others. The trial court, relying on *Upchurch v. Clinton County*, 330 S.W.2d 428 (Ky. 1959), held the use of the word “shall” in 501 KAR 3:110(2) imposed a ministerial, rather than discretionary duty, because Carl was without discretion to develop a prisoner classification system, and “his duty is considered the *enforcement* of 501 KAR 3:110.”

The record reveals that Carl created a prisoner classification system in accordance with 501 KAR 3:110. (Appellants’ *Memorandum in Support of Motion for Summary Judgment*, exhibit 8). Indeed, Policy Number 4.2.2., provides that “[u]nruly, disruptive or intoxicated persons” as well as “[p]risoners with a tendency to harm others” are to be separated from other prisoners upon admission into KCDC. The prisoner classification system was in place during Dixon’s arrest and incarceration at KCDC. Carl’s duty to create a prisoner classification system was ministerial, because he was without discretion not to do so; however, the evidence clearly establishes that Carl complied with this duty. Thus, the substance of Dixon’s claim concerns Carl’s duty to enforce the prisoner classification system within KCDC.

While Carl's duties under 501 KAR 3:110 are mandatory, his decisions on how to enforce the system involve the use of judgment and discretion in a legally uncertain environment. To enforce such a system requires a jailer and other employees to determine which prisoners are chemically incapacitated or potentially harmful to others. Moreover, enforcing a prisoner classification system requires Carl to employ, train, and supervise a staff capable of making the necessary classifications. Since Carl retains significant discretion in the manner in which to enforce the system, a claim based on his failure to enforce the prisoner classification system implicates discretionary functions. *See Haney*, 311 S.W.3d at 243 (holding that the enforcement of a general and continuing supervisory duty which depended on constantly changing circumstances was subjective and discretionary). Accordingly, the trial court erred by holding Carl was not entitled to qualified immunity with respect to his duty to enforce the prisoner classification system.

The order of the Kenton Circuit Court is reversed and this case is remanded with directions for the trial court to enter an order granting Carl qualified immunity.

ALL CONCUR.

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