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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000261-MR

WESTERN KENTUCKY UNIVERSITY APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-01959

ELIZABETH ESTERS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

LAMBERT, JUDGE: Western Kentucky University (WKU) has appealed from a series of orders in which the Franklin Circuit Court concluded that Elizabeth Esters had been constructively discharged from her employment at WKU while she was working under a lawfully authorized written contract and awarded her damages. We have thoroughly reviewed the record and the parties' respective arguments. Finding no error, we affirm.

In October 2009, Esters filed a complaint in Warren Circuit Court seeking damages for breach of her employment contract with WKU. Esters had worked for WKU since 1972 and had received excellent performance evaluations during her thirty-six-year tenure. During the time period at issue in this case, the 2008-2009 academic year, Esters was working in a dual position as Staff Assistant to the President and Secretary to the Board of Regents, a position for which she was elected for July 1, 2008, through June 30, 2009, pursuant to Kentucky Revised Statutes (KRS) 164.330. She alleged that she was working pursuant to an employment contract, under which she could only be terminated for cause, when she was forced by WKU President Gary Ransdell to retire against her will on December 31, 2008. Esters claimed that President Ransdell constructively discharged her by telling her that she needed to "go on and retire" and that she would be leaving midyear. In other words, she would be fired if she did not retire. Esters claimed that she suffered contractual damages in the amount of $44,617.80, which equaled her salary and benefits through the end of the contract period.

WKU moved to dismiss Esters' complaint, arguing that Esters did not have a written contract, that WKU was immune from suit, and that the Warren Circuit Court lacked subject matter jurisdiction pursuant to KRS 45A.245, as the complaint should have been filed in Franklin Circuit Court. Esters moved for leave to file an amended complaint[1] and to transfer the action to Franklin Circuit Court, which the Warren Circuit Court granted by agreed order on November 10,

[1] The amended complaint removed her demand for a trial by jury.

2009. WKU answered the amended complaint, pleading sovereign and governmental immunity as affirmative defenses. Based upon an agreement of the parties, the circuit court set a briefing schedule for summary judgment arguments.

In its motion for summary judgment, WKU argued that it was protected by the doctrine of sovereign immunity, that the General Assembly had not specifically and expressly waived immunity for this case, that Esters was an at-will employee based upon WKU's Human Resources policy and bylaws, and that she was not working under an enforceable, written employment contract. In her motion for partial summary judgment on the issue of whether she had a lawfully authorized written contract with WKU, Esters argued that she was working under a written employment contract pursuant to the minutes of the Board of Regents and that by application of KRS 45A.245, immunity was waived.

Following oral arguments, the circuit court entered an opinion and order on August 25, 2011, granting Esters' motion for partial summary judgment and denying WKU's motion for summary judgment. Relying upon *Mills v. McGaffee*, 254 S.W.2d 716 (Ky. 1953), the circuit court found that Esters was working under a lawfully authorized, written contract:

> In the present case, the July board minutes is a Board-approved writing that names Plaintiff to the office of secretary. The appointment of a secretary is in fact required of the Board each year in accordance with KRS 164.330. Through this yearly appointment, the parties express an intention to undergo certain undertakings: Plaintiff to perform the duties required of the secretarial office and the Board to compensate her for those services

> in accordance with KRS 164.450.[2] While the exact consideration is not set out by this document, it is undisputed that Plaintiff worked in a dual role as both staff assistant and secretary for the Board since 1982 and made a combined salary of $89,235.59 per year for her work in these roles. When the Board appointed her as secretary for the 2008-09 year it renewed the compensation amount set in previous years, and the appointment set out in the board minutes memorialized the understanding of the parties that Plaintiff's employment would continue under the same terms. Further, because the Board is statutorily required to set a salary for its appointed secretary, the compensation was added to the salary she was already receiving as staff assistant.
>
> The parties agree that the Board is authorized to employ and compensate its own and all employees of WKU; therefore, this Court finds that the board minutes constitute a lawfully authorized written contract. The actions taken by the Board to employ and compensate Plaintiff were lawfully authorized (as the Board has sole authority to perform both actions), the board minutes are in writing, and contain all the necessary elements of any contract. These minutes name the parties to the contract, renew the formerly set consideration for the undertaking, and establish a one year term of employment for the 2008-09 Board year.

Based upon this conclusion, the circuit court determined that the legislature had waived sovereign immunity in this case by application of KRS 45A.245(1), which provides:

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[2] "The secretary of each board of regents shall keep and prepare all records, books and papers belonging to the board. He shall keep a journal of the proceedings of the board in which, if requested by any member of the board, the 'yeas' and 'nays' on all questions shall be entered. He shall prepare, under the direction of the board, all reports and estimates, and shall execute all matters belonging to his office. *His compensation shall be fixed by the board."*

KRS 164.450 (emphasis added) (footnote 1 in original).

> Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

On October 24, 2011, WKU filed a renewed motion for summary judgment, arguing that Esters' contract, or appointment, was at-will and could be terminated at any time with or without cause pursuant to the Board's bylaws. Following additional arguments, the circuit court entered an order on December 14, 2011, denying WKU's renewed motion for summary judgment, explaining that while the Board's bylaws provide that a member of the Board may be terminated for any or no reason by a majority vote of all of the Board members, such was not the case here:

> Plaintiff was not terminated by a majority vote of the full Board. Instead, Plaintiff submitted a resignation which she asserts was forced upon her by WKU's President, Gary Ransdell. The by-laws permit the Board to replace an officer who vacated her position, but it is whether this decision to vacate her post was voluntary that is the crux of the remaining issues in this matter.

Rather than holding a bench trial, the parties agreed to submit simultaneous briefs and have the court take the matter under submission. The parties also filed joint stipulations and included an appendix of their respective motions and responses. The stipulations of fact were as follows:

> (a) All facts contained in the "Statement of Facts" section of this Court's Opinion and Order entered August 25, 2011 (see Exhibit A);
>
> (b) President Ransdell told Plaintiff Esters that her position was being eliminated as part of University-wide budget cuts and that if she did not retire effective December 31, 2008, she would be terminated.
>
> (c) Plaintiff Esters' resignation letter is attached hereto (see Exhibit B). Plaintiff would not have written this letter, nor resigned, but for President Ransdell's statement that she would be terminated if she did not retire.
>
> (d) Following Esters' resignation as Secretary to the Board of Regents, her successor was appointed at the Board's next meeting.
>
> (e) The value of Plaintiff Esters' lost wages and benefits from January 1, 2009 through June 30, 2009 (the remaining portion of the 2008-2009 academic year) is $44,617.80, or 50% of "actual total compensation" for 2008-2009 academic year, $89,235.59 (see Exhibit C).

In her brief, Esters argued that she was constructively discharged because President Ransdell told her that she would be terminated if she did not retire and that her damages for the breach of her contract equaled the value of her remaining contract, or $44,617.80. In its brief, WKU argued that Esters had not asserted a claim for constructive discharge, noting that her claim was premised on an alleged breach of contract, that her resignation did not constitute a constructive discharge, and that she would have had to assert a common law tort claim before the Board of Claims. In reply, Esters argued that she both alleged and proved that she was

constructively discharged and that she did not assert a common law tort claim or a statutory violation of employment discrimination law, as WKU suggested.

On January 22, 2013, the circuit court entered an opinion and order finding in favor of Esters. The court found that Esters' resignation was not voluntary and that she was constructively discharged based upon her reasonable conduct in resigning following President Ransdell's ultimatum that she would be fired if she did not resign. The court also concluded that President Ransdell intended to induce Esters to resign, and her resignation was reasonably foreseeable to him. Based upon these conclusions, the circuit court found that Esters was entitled to the full amount due to her under her employment contract, $44,617.80, as well as pre- and post-judgment interest. This appeal now follows.

On appeal, WKU contends that the circuit court erred in concluding that Esters was not an at-will employee, that she had a one-year written employment contract at the time of her resignation, and that she was constructively discharged. Esters contends that WKU's arguments are not properly before this Court, and that in any event the circuit court did not commit any error.

Regarding WKU's first two arguments – that the circuit court improperly concluded that Esters was not an at-will employee and that she was working under a written employment contract, Esters contends that WKU is precluded from raising these issues in the present appeal because it did not seek review of the August 25, 2011, order in which the circuit court ruled that Esters was employed under a lawfully authorized written contract pursuant to the Board minutes. She

argues that in this order, the circuit court denied WKU's sovereign immunity argument and that therefore WKU should have immediately appealed the ruling pursuant to *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009). In its reply brief, WKU contends that Esters' immunity from contract claims was never the central issue in the case once the matter was transferred to Franklin Circuit Court. Rather, the litigation concerned whether Esters had an enforceable written contract of employment with WKU and whether WKU had the right to terminate this contract.

In *Prater*, the Supreme Court of Kentucky held that the denial of a substantial claim of absolute immunity entitles a claimant to an immediate appeal, even if a final judgment has not yet been entered. *Id*. at 886-87. The Court considered exceptions to the application of Kentucky Rules of Civil Procedure (CR) 54.01, which it described as "authorizing interlocutory appeals to address substantial claims of right which would be rendered moot by litigation and thus are not subject to meaningful review in the ordinary course following a final judgment." *Id*. at 886. These examples are found in CR 54.02, addressing non-final judgments involving multiple claims and multiple parties; CR 65.07, addressing appeals from orders granting, denying, modifying, or dissolving a temporary injunction; KRS 22A.020(4), addressing the Commonwealth's right to take an interlocutory appeal; and KRS 417.200, addressing orders denying motions to compel arbitration. The Supreme Court stated: "As we observed recently in *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006), immunity entitles its

possessor to be free 'from the burdens of defending the action, not merely ... from liability.'" *Prater*, 292 S.W.3d at 886, quoting *Sloas*, 201 S.W.3d at 474. Furthermore, "such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action." *Id*. The Court concluded:

> In sum, unlike other defenses, immunity is meant to shield its possessor not simply from liability but from the costs and burdens of litigation as well. An order denying a substantial claim of immunity is not meaningfully reviewable, therefore, at the close of litigation, and that fact leads us to conclude, as has the Supreme Court of the United States, that an interlocutory appeal is necessary in such cases notwithstanding the general rule limiting appellate jurisdiction to "final" judgments.

Id. at 888.

Considering WKU's argument in its reply brief that these two arguments did not address immunity, we must disagree with this description. On the contrary, had WKU been successful in convincing the circuit court that Esters was not working under a lawfully authorized written contract, Esters' claim would have been barred by governmental immunity by application of KRS 45A.245(1). WKU discussed this in its memoranda below, and the circuit court discussed this in its opinion and order. However, we also disagree with Esters' reading of *Prater*, which she contends mandates an interlocutory appeal in this particular case. Here, the question before the circuit court was not whether WKU was immune from suit. Rather, it was whether Esters was working under a lawfully authorized written

contract. If the court had determined she was not, the immunity waiver in KRS 45A.245(1) would not apply, and Esters' claim would have been dismissed. Because the issues before the *Prater* Court and the circuit court in the present case were entirely different, *Prater* does not apply, and WKU was not required to immediately appeal the August 25, 2011, order. Therefore, we disagree with Esters that these two issues are not properly before this Court for review, and we shall therefore address both arguments.

Our standard of review is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for 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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999).

Because there are no disputed issues of material fact, we shall review the circuit court's legal conclusions *de novo*.[3]

WKU's first argument addresses whether Esters was an at-will employee pursuant to HR Policy #20-100 and the Board's bylaws, which was addressed in the circuit court's December 14, 2011, order ruling on WKU's renewed motion for summary judgment. HR Policy #20-100 provides:

> The Western Kentucky University Board of Regents has the sole power and authority to employ the President and all other employees. No official or representative of Western Kentucky University, other than the Board of Regents, has authority to enter into any agreement for employment. The University President is authorized to extend good faith offers of employment to prospective employees contingent upon subsequent approval by the Board. Employment recommendations shall be made to the Board following prescribed procedures.
>
> Except where specific rules are provided to the contrary, as in the case of employees holding academic rank, employment with Western Kentucky University is for no definite period of time. Employment with Western Kentucky University may be terminated with or without cause, and without notice, at any time, at the option of either the University or employees.

Article III, Section 4 of the Board's bylaws provides that "[a]ny officer may be removed either with or without cause by a vote of the majority of the entire Board of Regents."

[3] In her brief, Esters contends that our review is not *de novo*, but rather is governed by the clearly erroneous standard based upon the parties' agreement to permit the court to act as the finder of fact. While generally it is true that the existence of a contract is an issue of fact, *see Audiovox Corp. v. Moody*, 737 S.W.2d 468, 471 (Ky. App. 1987), in this case, the circuit court decided the contract issue in summary judgment proceedings where no disputed issues of material fact existed. Therefore, the question in this case of whether Esters was working under a lawfully authorized written contract represented a question of law.

Based upon these two documents, WKU contends that Esters is an at-will employee. On the other hand, Esters argues that her position as the Board secretary was a statutorily mandated position, that the Board elected her to a one-year term for the academic year, and that the Board approved her dual role as Secretary and as Staff Assistant to the President and her salary with benefits. We agree with the circuit court that whether Esters was terminated is not the issue in this case because the Board did not vote to terminate her employment. The issue is whether Esters' decision to resign was voluntary. Furthermore, we agree with Esters' argument that an employee's at-will status may be altered by agreement with the employer. *See Buchholtz v. Dugan*, 977 S.W.2d 24, 27 (Ky. App. 1998). Accordingly, we find no error in the circuit court's denial of WKU's renewed motion for summary judgment.

Next, WKU contends that the circuit court erroneously concluded that Esters had a one-year written employment contract at the time of her resignation. It argues that the letter from the President outlining her compensation for the fiscal year did not constitute an employment contract and did not mention that Esters would enjoy an exception to WKU's at-will employment. It further argues that Esters could not point to any written contract approved by the Board for her position as Staff Assistant to the President. WKU argues that Esters' reliance upon *Mills v. McGaffee*, *supra*, which permitted the minutes of the board of education to create a written contract, is misplaced because of the Board's bylaws that permitted her position to be removed without cause. WKU also relies on the unpublished

case of *Weickgenannt v. Board of Regents of Northern Kentucky University*, 2012 WL 6651887 (Ky. App. 2012)(2011-CA-001975-MR), in which it claimed this Court affirmed a summary judgment in favor of the university because the employee failed to present a written contract of employment. We agree with Esters that *Weickgenannt* is distinguishable from the present case because the issue in that case was whether a combination of one-year contracts created an implied guarantee of tenure. That is not the issue before this Court in the present appeal.

In addition, WKU relies upon *Commonwealth v. Whitworth*, 74 S.W.3d 695 (Ky. 2002), to argue that Esters was on constructive notice of her at-will status based upon the Supreme Court's holding that Department of Parks employees were on notice that project managers were not authorized to guarantee work for any specified period. We again agree with Esters that *Whitworth* is distinguishable from the present case; the holding did not turn on whether internal documents met the written contract requirement of KRS 45A.245(1), but rather on the Court's conclusion that the Department of Parks did not have the authority to enter into the contracts.

In *Mills v. McGaffee*, relied upon by the circuit court below, the former Court of Appeals addressed the applicable limitations period in an action for the balance due on an alleged employment contract, which turned on whether the alleged contract was oral or in writing. The Court first described a written contract:

> A written contract is one which is all in writing, so that all its terms and provisions can be ascertained from the instrument itself. 45 Words & Phrases, p. 605; 53 C.J.S., Limitations of Actions, § 60, p. 1017. The cases generally hold that a written instrument which sets forth the undertaking of the persons executing it or discloses terms from which such an undertaking can be imported, and which shows the consideration for the undertaking, and which identifies the parties thereto, will be considered a contract in writing. See Annotation to 3 A.L.R.2d, Sec. 2, p. 812, et seq., wherein many cases are cited upholding the above principles.

Mills, 254 S.W.2d at 717. The Court then concluded:

> There can be little doubt that the entry in the minute book stated every essential item necessary to create the entire contract between the board and Mills. The board, according to the writing, employed Mills as its secretary at a stated salary for a period of two years, beginning and ending at a definite date, and both the board through its chairman and Mills as secretary signed the minute book. Mills entered upon his employment and worked as secretary for 15 months. No material provision is omitted from the agreement, and there is no need to resort to parol evidence to complete the contract. And there was every intention that the written instrument should be the final contract between the parties.

Id. In addition, the circuit court considered the statutory definitions of "contract" and "writing" or "written" as set forth in KRS 45A.030(7) and (29), respectively:

> (7) "Contract" means all types of state agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and insurance contracts except as provided in KRS 45A.022. It includes supplemental agreements with respect to any of the foregoing;

. . . .

> (29) "Writing" or "written" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

We must agree with Esters that the circuit court properly held that the minutes in which the Board appointed her as Secretary for a term of one year constituted a lawfully authorized written contract. As Esters points out, the Board was authorized to elect her and set her compensation pursuant to KRS 164.330 ("Each board of regents shall hold its first meeting within thirty (30) days after each appointment of new members. At this meeting there shall be elected a vice chairperson and a secretary for the board.") and KRS 164.450 ("[The secretary's] compensation shall be fixed by the board."). Accordingly, we hold that the circuit court did not commit any error in concluding that Esters was working under a lawfully authorized written contract pursuant to the Board's July 18, 2008, minutes electing her to the position of Secretary in combination with the letter outlining her compensation for the 2008-2009 fiscal year, or in concluding that WKU was not entitled to immunity by operation of KRS 45A.245(1).

For its last argument, WKU argues that the circuit court erroneously concluded that Esters was constructively discharged. We agree with Esters that this issue is not preserved for appellate review because WKU did not list this argument as an issue in its prehearing statement. CR 76.03(4)(h) provides that a

prehearing statement must include "[a] brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[,]" and CR 76.03(8) provides that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." *See Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004) ("Since that issue was not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for "good cause shown," CR 76.03(8), this matter is not properly before this court for review."). *See also Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012) ("Because that issue was not identified in the prehearing statement, pursuant to CR 76.03(8), the Court of Appeals could not properly reverse on that issue absent a finding of palpable error, CR 61.02, which it so found.").

The issues WKU listed in its prehearing statement are as follows:

- Whether Esters was an at-will employee of WKU; and
- Whether Esters had a written contract of employment with WKU for a one-year term at the time of her resignation from WKU.

Neither issue includes whether Esters was constructively discharged, and WKU did not request permission to supplement its prehearing statement or request this Court to review the issue for palpable error. Therefore, this argument is not properly preserved for our review, and we shall decline to address it further.

For the foregoing reasons, the orders of the Franklin Circuit Court are affirmed.

ALL CONCUR.

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