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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000837-MR

LEE WHITE APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 09-CI-01581

SANITATION DISTRICT NO. 1;
AND JEFFERY A. EGER APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Lee White brings this appeal from a January 7, 2013, Trial Order and Judgment of the Kenton Circuit Court dismissing White's claims against Sanitation District No. 1 and Jeffery A. Eger (collectively referred to as appellees). We affirm in part, reverse in part, and remand.

White was hired by Sanitation District No. 1 (SD1) as a controller in 2004 and was tasked with managing the accounting department. In February 2008, White attended a meeting concerning the upcoming fiscal year budget (July 1, 2008 – June 30, 2009). At this meeting, White asserts that he became aware of a plan to improperly capitalize certain operating and maintenance expenses in official accounting records. White voiced opposition to the capitalization plan at the meeting and thereafter began his own investigation. According to White, he later discovered that SD1 had improperly reported certain operating and maintenance expenses as capital improvements in prior years. White informed his immediate supervisor, Ron Schmitt, that the capitalization of operating and maintenance expenses was a violation of general accounting practices, sundry state and federal laws, and the terms of certain capital improvement bonds. It appears that White was particularly concerned about SD1 using the funds from capital improvement bonds to finance certain operating and maintenance expenses.

As a result of White's repeated opposition to the capitalization of certain operating and maintenance expenses, White maintained that he was subjected to intimidation and ridicule by other employees of SD1 from February 2008 until March 2009. According to White, Jeffery Eger, Executive Director of SD1, was particularly upset with White for opposing the capitalization plan and repeatedly scorned and ridiculed him. White stated that Eger sent the message that White should "comply, get on with the show, or shut up." White's Brief at 3. Eger

also excluded White from future budget meetings, and White recounted a specific episode between himself and Eger:

> In April 2008, Mr. White encountered Mr. Eger in the SD1 bathroom. Mr. White asked Mr. Eger if they could have a professional relationship. Eger's reaction was shocking. Eger "whirled on [White] and got right in [his] face and told [White], 'I don't think you get it. Accounting standards were not laws just standards and if [Eger] believed in standards, then [Eger] wouldn't be discharging in Brush in Creek.'" Eger was "highly upset," so White "took a step back [witness with his hands in the air']." Eger told White "not to worry, he wasn't going to fire him yet."

White's Brief at 4 (citations omitted.) Eventually, White took a medical leave of absence from SD1 on February 11, 2009, due to depression and anxiety allegedly caused by SD1's retaliation and ultimately resigned from his position on March 27, 2009. White alleges that he did not voluntarily resign but was constructively discharged.

On May 22, 2009, White filed an action in the Kenton Circuit Court against SD1 and Eger. In his complaint and amended complaint, White alleged that SD1 constructively discharged him in retaliation for reporting SD1's improper capitalization policy. White also asserted that SD1 subjected him to humiliation, ridicule, and reprisals for reporting SD1's improper capitalization policy. White specifically claimed violation of the Kentucky Whistleblower Act,[1] constructive discharge, and the tort of intentional infliction of emotional distress.

[1] The Kentucky Whistleblower Act is codified at Kentucky Revised Statutes 61.101 *et seq*.

Upon motion for summary judgment, the circuit court dismissed the whistleblower claim against Eger and the claim of intentional infliction of emotional distress against SD1. A jury trial ensued on the remaining claims, and the circuit court granted a directed verdict dismissing the claim of intentional infliction of emotional distress against Eger.

At the close of the evidence, the circuit court instructed the jury upon the remaining claim of violation of the Whistleblower Act against SD1. White objected to the instruction. The jury ultimately found in favor of SD1 upon the whistleblower claim, and the circuit court dismissed the action by judgment entered January 7, 2013. This appeal follows.

White contends that the circuit court erroneously instructed the jury upon the claim of violation of the Whistleblower Act.[2] In particular, White argues that the circuit court mistakenly instructed the jury to find that White suffered "an adverse employment action" by SD1 in order to prevail upon the whistleblower claim. White believes that the circuit court committed an error of law by requiring the jury to so find. For the following reasons, we conclude that the circuit court erroneously instructed the jury and that such erroneous instructions constituted prejudicial error. *See Barrett v. Stephany*, 510 S.W.2d 524 (Ky. 1974).

The relevant jury instructions at issue are as follows:

<u>Instruction No. 2</u>

[2] Lee White properly preserved this issue for appeal by tendering jury instructions and by objecting to the circuit court's jury instructions. Kentucky Rules of Civil Procedure 51.

Adverse Employment Action – an adverse employment action is an action taken by an employer which is materially adverse to the employee, and can include, by way of example only, demotion, discipline, reduction in pay or job responsibilities, or termination.

Instruction No. 4

If you are satisfied from the evidence that:

A) Defendant, Sanitation District No. 1, subjected reprisal or directly or indirectly used, or threatened to use, official authority of influence against Plaintiff, Lee White;

AND,

B) Defendant, Sanitation District No. 1, took an adverse employment action against Plaintiff, Lee White,

AND,

C) Plaintiff's disclosure was a contributing factor in Defendant's decision to take an adverse employment action;

then you will find for Plaintiff, Lee White. Otherwise, you will find for the Defendant, Sanitation District No. 1

Question A

Do you believe from the evidence that Plaintiff suffered an adverse employment action because of his disclosure as explained in Instruction No. 4?

YES _____ NO ____

When submitting instructions to the jury, the circuit court must instruct upon all claims supported by the evidence introduced at trial, and the

instructions must accurately set forth the law. *Hainline v. Hukill*, 383 S.W.2d 353 (Ky. 1964). To constitute reversible error:

> An error in a court's instructions must appear to have been prejudicial to the appellant's substantial rights or to have affected the merits of the case or to have misled the jury or to have brought about an unjust verdict . . . .

Miller v. Miller, 296 S.W.2d 684, 687 (Ky. 1956) (quoting *Maupin v. Baker*, 302 Ky. 411, 194 S.W.2d 991, 993 (1956)). If a jury instruction improperly sets forth the law, our review proceeds *de novo*. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272 (Ky. App. 2006).

The Whistleblower Act's underlying purpose "is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Davidson v. Com., Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004) (citation omitted). To prevail upon a claim under the Whistleblower Act, the plaintiff must prove that his employer is a employer as defined by the Act (KRS 61.101(2)), the plaintiff is an employee as defined by the Act (KRS 61.101(1)), plaintiff made a good faith disclosure of violation of law or suspected mismanagement or waste, and the employer threatened or took a personnel action against plaintiff to discourage or punish plaintiff for making the disclosure. *Thornton v. Office of Fayette County Attorney*, 292 S.W.3d 329 (Ky. App. 2009). In addition, the plaintiff must demonstrate that "the disclosure was a contributing factor in the personnel action." *Davidson*, 152 S.W.3d at 251 (citation omitted). If the plaintiff

meets this burden, the burden then shifts to the employer "to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." *Id.*

In this appeal, the relevant portions of the Whistleblower Act are as follows:

Kentucky Revised Statutes (KRS) 61.102 reads:

> (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 Executive Branch Ethics Commission, 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.
>
> (2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth

in subsection (1) of this section.

(3) This section shall not be construed as:

(a) Prohibiting an employer from requiring that an employee inform him or her of an official request made to an agency for information, or the substance of testimony made, or to be made, by the employee to legislators on behalf of an agency;

(b) Permitting the employee to leave his or her assigned work area during normal work hours without following applicable law, administrative regulations, rules, or policies pertaining to leave, unless the employee is requested by the Kentucky Legislative Ethics Commission or the Executive Branch Ethics Commission to appear before the commission, or by a legislator or a legislative committee to appear before a legislative committee;

(c) Authorizing an employee to represent his or her personal opinions as the opinions of his or her employer; or

(d) Prohibiting disciplinary or punitive action if an employee discloses information which he or she knows:

1. To be false or which he or she discloses with reckless disregard for its truth or falsity;

2. To be exempt from required disclosure under the provisions of KRS 61.870 to 61.884; or

3. Is confidential under any other provision of law.

And, KRS 61.103 reads:

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.

(b) "Contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision. It shall be presumed there existed a "contributing factor" if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action.

(2) 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 action may be filed in the Circuit Court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(3) Employees filing court actions under the provisions of subsection (2) of this section shall show by a preponderance of evidence that the disclosure was a contributing factor in the ***personnel action***. Once a prima facie case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the ***personnel action***. (Emphases added.)

KRS 61.103 plainly utilizes the term "personnel action." We think the legislature intentionally utilized the broad term personnel action in KRS 61.103 to mirror the corresponding expansive list of prohibited acts of employer retaliation

banned in KRS 61.102(1). Our Supreme Court commented that KRS 61.102(1) prohibits "the overt retaliatory act of reprisal as well as the subtle exercise of official authority of influence . . . ." *Commonwealth Dept. of Agriculture v. Vinson*, 30 S.W.3d 162, 164 (Ky. 2000). By requiring an adverse employment action as defined in Jury Instruction No. 2, the circuit court limited the prohibited acts of employer retaliation banned by KRS 61.102(1) much narrower than set out in the statutes and thus improperly construed KRS 61.102(1) and KRS 61.103 to White's detriment.

Hence, we conclude the circuit court committed a legal error in its jury instructions (No. 2 and No. 4) by requiring White to demonstrate an adverse employment action to prevail upon his whistleblower claim. Simply put, the circuit court misstated the law in Instructions No. 2 and No. 4. These erroneous instructions undoubtedly misled the jury and were prejudicial to White given the evidence introduced at trial. *See Miller*, 296 S.W.2d 684. We, therefore, reverse the judgment based upon the erroneous Instructions No. 2 and No. 4. Upon remand and retrial of the Whistleblower claim, the circuit court shall not instruct the jury to find an adverse employment action as it did in Instruction No. 4; rather, the circuit court shall substitute the term "personnel action" as set forth in KRS 61.103(3).

White next asserts that the circuit court committed error by excluding from evidence an August 17, 2011, audit of SD1 conducted by the Kentucky Auditor of

Public Accounts, Crit Luallen (Kentucky State Audit).[3] As this evidentiary issue is likely to reappear on retrial, we will address it.

The circuit court excluded the Kentucky State Audit both as irrelevant and as constituting inadmissible hearsay. In their argument that the Kentucky State Audit was properly excluded, appellees also claim that the Kentucky State Audit is irrelevant:

> From the outset of the litigation, SD1 conceded that White had made a good faith report of suspected wrongdoing. Consequently, whether White's report was right or wrong was not at issue in the litigation. With that concession as context, the parties argued the relevancy of SD1's accounting practices early in this litigation. On January 24, 2011, in response to a discovery dispute, the court ruled that evidence regarding SD1's accounting practices was relevant only to the extent it provided context as to the nature of the dispute and whether SD1 took any actions to retaliate against White. Of course, evidence of what happened *after White resigned* would certainly not be relevant because it has no bearing on whether or not White was subject to retaliation *during his employment*.
>
> Finding 6 of the APA [Auditor of Public Accounts] Audit deals with projects and costs charged to SD1's Construction in Progress Accounts as of April 30, 2011. It also discusses several costs and charges made in Fiscal Years 2010 and 2011. Because all of this action occurred *more than a year after White resigned from SD1*, it did nothing to make it more or less probably that SD1 retaliated against White.
>
> Furthermore, in Finding 6 the State Auditor did not pronounce SD1's accounting practices to be fraudulent or illegal, as White steadfastly contended at trial. To the contrary, the Auditor acknowledged in her report that

[3] White entered the Kentucky State Audit into the record by avowal pursuant to Kentucky Rules of Evidence (KRE) 103(a)(2).

> there were no strict guidelines or capitalization and that many issues “undoubtedly fall into a ‘gray’ area that is subjective and subject to professional judgment.” As such, the Auditor merely stated that certain charges were ‘questionable’ and never opined that they were illegal or fraudulent. Consequently, the 2011 APA report was not relevant to this matter and the trial court properly excluded it.

SD1’s Brief at 18-19 (citations and footnotes omitted).

Kentucky Rules of Evidence (KRE) 401 defines “relevant evidence” as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

And, we review the circuit court’s evidentiary rulings for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000)

The Kentucky State Audit specifically provides that it included “an examination of SD1 records and information for the period July 1, 2008[,] through December 31, 2010.” Under the subheading Capitalization Versus Operations and Maintenance Expense, the Kentucky State Audit particularly provides:

> As part of the Examination of certain financial transactions, policies, and procedures of the SD1, the APA [Auditor of Accounts] reviewed whether appropriate financial statement adjustments were made to properly account for financial activity in SD1’s CIP [Construction-in-Process] and Operations and Maintenance (O & M) accounts. This review focused primarily on the 2008 financial statements given that current and former employees of SD1, as well as the CPA firm hired to conduct the 2008 audit, revealed a difference of opinion among the parties as to what types of expenses should have been included in CIP to be capitalized versus what should have been charged to

> current year expense. Improperly capitalizing expenditures rather than charging them to expense in the current year understates current expenses and increases net income for the year. An overinflated net income inaccurately portrays an entity's financial stability on which bond rating agencies and other users rely to determine bond ratings, which ultimately affects rate increases.

Kentucky State Audit at 26. And, more specifically under Finding 6, the Kentucky State Audit concludes that "[t]he decision of capital versus expense should be guided solely by available accounting authority and as such should ultimately be determined by knowledgeable finance or accounting staff. Allowing engineers to significantly influence capitalization decisions resulted in erroneous and non-compliant accounting entries affecting the integrity and accuracy of the financial statements." Kentucky State Audit at 51.

The Kentucky State Audit did find that some operation and maintenance expenses were improperly reported as capital improvements during 2008, 2009, and before these years. In this respect, the Kentucky State Audit would buttress White's version of events and supply a motive for SD1's alleged retaliatory conduct. Thus, we view the Kentucky State Audit as relevant. Upon retrial, the Kentucky State Audit may be admissible at trial if it meets the public records hearsay exception of KRE 803(8).

White additionally maintains that the circuit court erred by excluding from evidence an email sent on November 24, 2010, by an employee of SD1 to over 200

public officials of Northern Kentucky.[4] The email basically set forth SD1's trial position and refuted White's allegations that SD1 improperly capitalized certain operating and maintenance expenses. White claims that the email was evidence of SD1's further retaliation and of his damages.

The evidence reveals that the email was sent after White filed this lawsuit against appellees and, more importantly, after White left his employment with SD1 in March 2009. As the email was sent in 2010, it is simply irrelevant to White's claims of retaliation by SD1 under the Whistleblower Act. We, thus, concluded that the circuit court did not abuse its discretion by excluding the email from evidence.

White also argues that the circuit court erred by directing a verdict in favor Eger upon the tort of intentional infliction of emotional distress. We disagree.

A directed verdict is proper if viewing the evidence most favorable to the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. Kentucky Rules of Civil Procedure (CR) 50.01; *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963).

The tort of intentional infliction of emotional distress was recognized in *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984). Therein, the Supreme Court adopted Section 46 of the *Restatement (Second) of Torts* (1965):

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such

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[4] White entered the November 24, 2010, email into the record by avowal pursuant to KRE 103(a)(2).

emotional distress, and if bodily harm to the other results from it, for such bodily harm.

For a plaintiff to recover upon the tort of intentional infliction of emotional distress, he must demonstrate that:

> [D]efendant's conduct was intentional or reckless, that the conduct was so outrageous and intolerable so as to offend generally accepted standards of morality and decency, that a causal connection exists between the conduct complained of and the distress suffered, and that the resulting emotional stress was severe.

Brewer v. Hillard, 15 S.W.3d 1, 6 (Ky. App. 1999). Comment d to the *Restatement (Second) of Torts* § 46 (1965) further explains:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

According to White's testimony, Eger committed the following acts of outrageous conduct:

> [M]ocking and ridiculing White in front of a room full of SD1 managers; projecting anger at Mr. White on multiple occasions, such as clenching teeth, gripping his chair, and staring Mr. White down with angry looks so severe that it looked like he wanted "to punch White and knock his head off"; announcing in front of SD1 managers that Eger wants the former controller back; sending around emails to SD1 personnel making fun of White; ostracizing White at SD1; berating Mr. White in several close-door meetings; refusing to allow White to document concerns about illegal activity in wring; telling White that he "doesn't get it" and the Eger is "tired of his

> ethics BS"; telling Mr. White that Eger is not going to fire him yet because he gives second chances; sitting White in the corner during his "review" and telling White that he needs to come back and give him a reason why Eger should not fire him.

White's Brief at 22. Viewing the evidence in a light most favorable to White, we do not believe Eger's conduct rose to the required level of outrageousness. While Eger's conduct was certainly inappropriate and may have constituted retaliation under the Whistleblower Act, it did not amount to audacious or utterly intolerable conduct in a civilized society. Consequently, we are of the opinion that the circuit court properly rendered a directed verdict dismissing White's claim of intentional infliction of emotional distress against Eger.

White lastly maintains that the circuit court improperly instructed the jury upon punitive damages. Given that the jury did not reach the issue of punitive damages as it found in favor of appellees on the Kentucky Whistleblower Act claim, the issue is moot. We cannot speculate on the likelihood of the punitive damage issue being presented to the jury on remand, and thus decline to address this argument in this appeal.

In sum, we affirm the circuit court's directed verdict upon the claim of intentional infliction of emotional distress against Eger. We reverse upon White's claim of violation of the Whistleblower Act due to erroneous jury instructions and remand for a new trial upon this claim. Upon retrial, the circuit court shall submit jury instructions consistent with this Opinion.

For the foregoing reasons, the Trial Order and Judgment of the Kenton Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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