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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001881-MR

ADMINISTRATIVE OFFICE OF THE COURTS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 12-CI-00607

MARTIN VIDAUD — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: CLAYTON, JONES, AND KRAMER, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Franklin Circuit Court reversing and remanding the Appellee's termination due to violations of his due process rights. Based upon the following, we affirm in part and reverse in part.

BACKGROUND INFORMATION

Appellee, Martin Vidaud, was an interpreter employed by Appellant, the Administrative Office of the Courts ("AOC"). On September 29, 2011, his employment was terminated due to allegations that he had sexually harassed another employee. The Court of Justice Harassment Complaint Panel (the Panel) received a complaint about Vidaud and, after investigating, determined that his behavior was "inappropriate, irresponsible and unacceptable." The Panel also determined that Vidaud could pose a risk to other employees.

The Panel based its decision to dismiss Vidaud on Court of Justice ("COJ") Personnel Policy Section 3.02. Section 3.2(2)(a) defines harassment in the workplace as, "unwelcome or unsolicited speech or conduct based upon race, color, religion, gender, national origin, age, disability, sexual orientation, or political affiliation that creates a hostile work environment." "Hostile work environment" is defined as "one wherein a reasonable person would consider the environment to be hostile or abusive; and, the person who is the object of the harassment perceives the environment to be hostile or abuse." Under COJ Personnel Policy 3.2(2)(b), the following factors are considered in making a determination as to whether the environment is hostile:

> (1) The frequency of the discriminatory conduct;
> (2) Its severity;
> (3) Whether it is physically threatening or humiliating, or a mere offensive utterance; and
> (4) Whether it unreasonably interferes with an employee's work performance.

On September 29, 2011, AOC sent a termination letter to Vidaud and he was immediately terminated without a hearing or other administrative process. Vidaud then filed a grievance as provided by personnel policy. He also met with AOC Director, Laurie Dudgeon. After the meeting, Dudgeon sent Vidaud a letter reaffirming the prior termination decision. In her letter, Dudgeon again stated that Vidaud had violated COJ Personnel Policy, but she also asserted that Vidaud had violated AOC Personnel Policy as well, specifically, COJ Personnel Policy sections 8.08(1), 8.08(2)(g), 2.01, 2.03(2)(a), and 2.02(2)(b). The letter set forth that he had violated provisions requiring general good conduct and professional behavior.

Vidaud appealed his termination to the Dismissal Appeal Board, which conducted a hearing regarding his termination. The Board affirmed Vidaud's termination, finding sufficient evidence to support it. The Board also found that AOC had failed to prove a basis for Vidaud's termination under Section 3.02(2). The Board held that the evidence supported the allegation made by the complainant against Vidaud but that "the environment created solely from this one incident did not rise to the definition of hostile work environment as defined by the Court of Justice Personnel Policies, Section 3.02(2)." The Board recommended that the termination be upheld as it was based on provisions of the COJ Personnel Policy Section 2, or the "general code of conduct" section. Dudgeon voluntarily recused herself from the matter. Therefore, the final decision was made by the Director's designee, Hon. James Keller. He issued a decision on April 5, 2012,

which upheld the termination on opposite grounds to those determined by the Board. Hon. Keller found that AOC did prove the termination under § 3.02 but not under § 2.03(2)(a) and (b).

The Franklin Circuit Court found that the ruling and recommended order of the Board was never served on Vidaud and that he was not given any opportunity to file exceptions, thus the post-termination process was flawed. Furthermore, he was not given a pre-termination hearing as constitutionally required and that the final decision erred as a matter of law in applying COJ Personnel Policies 3.02, in a manner inconsistent with the EEOC's policy guidance on sexual harassment. As a result of this finding, the circuit court reversed the Board's decision and remanded the case. AOC then brought this appeal.

STANDARD OF REVIEW

In reviewing a final personnel order of the AOC, the appellate court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." KRS 13B.150(2). "The findings of fact of an administrative agency which are supported by substantial evidence of probative value must be accepted as binding by the reviewing court." *Kosmos Cement Co., Inc. v. Haney*, 698 S.W.2d 819, 820 (Ky. 1985). "Substantial evidence" is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). Questions of law are reviewed *de novo*. With these standards in mind, we review the decision of the Franklin Circuit Court.

DISCUSSION

AOC first asserts that we should reverse the judgment of the circuit court since, under the limited jurisdiction of KRS 13B.150, a circuit court may not make a *sua sponte* merits holding that an agency's termination appeals process is *per se* unconstitutional. In other words, AOC contends the circuit court acted outside its jurisdiction by ruling on a constitutional challenge that was not raised.

Vidaud, however, asserts that the circuit court was not ruling *sua sponte*. He argues that his appeal specifically set forth that his procedural due process rights were violated by the termination process the AOC instituted. He also contends that the circuit court was entitled to make determinations of law even if the specific argument was not raised in the brief.

KRS § 13B.150(2) provides that the circuit court "may reverse [a] final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is: (a) [i]n violation of constitutional… provisions; …or (g) [d]eficient as otherwise provided by law." AOC argues that this provides that the reviewing court has no jurisdiction to conduct an independent review of the agency's personnel policies beyond the final order at issue. We agree that the circuit court could not rule on the issue of the constitutionality of the personnel policy, in general, but we also find that the issue of Vidaud's due process was properly before the circuit court.

In *Priestley v. Priestley*, 949 S.W.2d 594, 596 (Ky. 1997), the Kentucky Supreme Court held that a reviewing court must confine "itself to the record…

[when] deciding an issue not presented by the parties." In *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 424 (Ky. 2005), however, the Kentucky Supreme Court cites 16 C.J.S. Constitutional Law § 92 (2004) in a footnote which provides that "[t]his is not an inflexible rule, however, and in some instances constitutional questions inherently involved in the determination of the cause may be considered even though they may not have been raised as required orderly procedure." *Id.* at n. 73. On this matter, the *Priestley* court stated that "[w]hile it is widely recognized that appellate courts should be reluctant to engage in such a practice, their discretion is broad enough to prevent a conclusion that it has been abused." *Priestley* at 596.

In this case, Vidaud raised the issue of his due process rights when he brought his appeal to the Franklin Circuit Court. Also, the circuit court had to determine whether Vidaud had been given an opportunity to file exceptions to the Board's Order. Finally, the review of the pre-termination proceedings was within the purview and jurisdiction of the circuit court in determining whether Vidaud was afforded due process. These are the inherent constitutional questions provided for in *Elk Horn*.

AOC also argues that the Franklin Circuit Court did not have the authority to determine that a policy enacted by the Kentucky Supreme Court is facially unconstitutional. It contends that, since AOC is the head of the judicial branch and its administrative division, only the Kentucky Supreme Court has the authority to determine the *per se* constitutionality of its Personnel Policies once enacted.

In *Ex Parte Farley*, 570 S.W.2d 617, 622 (Ky. 1978), our Supreme Court held that:

> [E]xcept for matters in which the United States Supreme Court has the right of review over the judgments of this court, the jurisdiction to hear and determine any cause that has as its ultimate objective a judgment declaring what this court must do or not do is vested exclusively in this court, for the very simple reason that our Constitution makes it the highest court of the state and gives it the authority to "exercise control of the Court of Justice." It could not be said to possess such authority if it or its members in their official capacities were held subject to the authority of the Circuit Court or any other court of the state.

As set forth above, the Franklin Circuit Court did have jurisdiction to review the final agency decision. In *Jones v. Commonwealth*, 171 S.W.3d 53, 56 (Ky. 2005), the Kentucky Supreme Court held that "the application of KRS 13B.140 to determine the 'proper court' for appeal of an AOC personnel action is necessary. This Court simply does not possess the resources to open its gates to direct appeals of each personnel action taken by the AOC. Sound management of judicial resources dictates that the circuit courts hear the initial appeals from such administrative actions."

In this case, the Franklin Circuit Court did so. The Court continued:

> Moreover, there is no counterbalancing reason to deny comity as existed in Auditor of Public Accounts. KRS 13B.140 provides for judicial review of agency action and will not subject the AOC to an intrusion by one of the political branches of our government. Circuit court review will not threaten the Supreme Court's "authority to 'exercise control of the Court of Justice,'" Farley, 570 S.W. 2d at 622 (quoting Ky. Const. § 110(2)(a)), as the

> review shall be limited, in accordance with the provisions of KRS 13B.150. Additionally, this Court will retain the ultimate authority over AOC personnel actions, as well as the determination of the circuit courts reviewing such actions, by way of the normal appellate process.

Id. KRS 13B.150(2) specifically provides that "[t]he court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is: (a) [i]n violation of constitutional or statutory provisions…".

In this case, the Franklin Circuit Court found that "[t]he AOC violated Vidaud's due process right to a pre-termination hearing, and his right to notice and the opportunity to be heard regarding the report and recommendation of the Dismissal Appeals Board." The circuit court made this determination based on a lack of hearing for Vidaud and also the fact that there was no defined pre-termination process set forth in the COJ Personnel Policies, in violation of KRS 18A.095 and the Kentucky Constitution. We agree.

The Franklin Circuit Court is empowered with the jurisdiction of hearing appeals from personnel administrative proceedings under both the Kentucky Revised Statutes and case law in this Commonwealth set forth above. Thus, the case was properly before the circuit court. Once the case was before the circuit court, it had the right to determine whether Vidaud had been allowed due process since Vidaud argued on appeal that he had not. Due process requires a pre-termination hearing as provided by *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and KRS 18A.095. Since Vidaud was

not afforded the pre-termination hearing, the case must be reversed and remanded to AOC as the Franklin Circuit Court held. The issue of whether the Franklin Circuit Court had the jurisdiction to determine the COJ Personnel Policy was facially unconstitutional, however, was not properly before the circuit court and it was outside its jurisdiction in ruling on the issue.

We agree that the issue of Vidaud's due process was properly before the circuit court. We do not, however, agree that the issue of the constitutionality of the COJ Personnel Policy was properly before the circuit court. Thus, we affirm the decision of the Franklin Circuit Court in part and reverse in part.

JONES, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KRAMER, JUDGE: I concur with the well-written majority opinion but write separately to point out-- at least in my view--the separate troubling outcome of this matter. *Cleveland Board of Education v. Loudermill*, 470 U.S. 531, 105 S.Ct. 1487, 84 L.ED.2d 494 (1985) is the seminal case that courts look to when addressing a public employee's property interest in his protected employment and the process required prior to termination. As the majority opinion correctly states, *Loudermill* requires a certain amount of pre-termination due process. The rub in this case, according to the AOC, is that the process governed by *Loudermill* is actually a very low threshold met by the AOC and that Vidaud received all the process to which he was constitutionally entitled. While I agree that *Loudermill's* standards are not high, do not require a regimented or sophisticated process, and

that the term "hearing" is likely often taken out of context in these cases, it nonetheless requires more than Vidaud received.[1] Simplistically, *Loudermill* only requires notification of the charges, an explanation of the charges, and an opportunity for the employee to present his side of the story, *pre-termination*.[2] *Id.* at 546, 105 S.Ct. 1487. It can be quite flexible to fit the particular facts surrounding the circumstances. *See e.g., Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). State law or an agency may require more or even formalistic procedures; however, this is not required to satisfy constitutional scrutiny.

Vidaud did not receive, even the very limited, pre-termination due process to which he was entitled. And that is unfortunate. Certainly, the merits of Vidaud's conduct are not before this Court, given this case's procedure posture. Nonetheless, the fact finders who have reviewed the factual allegations believe that he engaged in the highly offensive conduct for which he was terminated. And, the issue of whether or not termination was the appropriate response to his alleged noxious behavior in the workplace environment is also not before this Court. But had the AOC given Vidaud the very basic, unadorned full process required by *Loudermill* prior to his termination, it is very likely that his termination would not

[1] I pause to note one of the primary basis espoused, at least during oral argument before this Court, by counsel for the AOC that the requirements of *Loudermill* were somehow fulfilled through the process of an investigation into the allegations lacks absolutely all foundation and do not suffice to satisfy *Loudermill* under the facts of this case.

[2] But where pre-termination procedures meet only the very low threshold of *Loudermill*, more meaningful process may be required post-termination. *Zinermon v. Burch*, 494 U.S. 113, 128, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

be reversed and the AOC would not be in the regrettable position of being court ordered to reinstate him.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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