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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000620-MR

VERNON STARR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 09-CI-003047

LOUISVILLE GRAPHITE, INC. — APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Vernon Starr appeals from a summary judgment in favor of Louisville Graphite, Inc. on his age discrimination claim under the Kentucky Civil Rights Act (KCRA), an order denying him liquidated damages under Kentucky's Wages and Hours Act, and an award of attorney fees in an amount substantially less than requested. We affirm the summary judgment on the KCRA claim. We affirm the denial of liquidated damages but reverse and remand for reconsideration of the attorney fees awarded.

Starr initially filed this action against Louisville Graphite alleging retaliatory discharge for Starr's pursuit of a workers' compensation claim and age discrimination under the KCRA. He later amended his complaint to add claims for violations of Kentucky's Wages and Hours Act.

Starr was employed by Louisville Graphite for twenty-two years. In February 2009, he filed a workers' compensation claim for injuries received in the course of his employment. He was discharged in March 2009. At that time, Starr was forty-eight years of age.

Louisville Graphite filed a motion for summary judgment on Starr's retaliation and age discrimination claims. Following discovery on the issues presented, the trial court ruled there was a material issue of fact regarding the retaliation claim and denied the motion.

Regarding Starr's KCRA claim, the trial court ruled Louisville Graphite did not have the requisite number of employees to qualify as an employer under the Act and granted Louisville Graphite summary judgment. Starr contends the trial court erred because there is a material issue of fact whether Louisville Graphite and a separate company, Louisville Exchanger and Vessel, Inc., should be treated as a single employer for purposes of the KCRA and their employees aggregated to meet the Act's numerosity requirement.

Under Kentucky Rules of Civil Procedure (CR) 56.03, "[s]ummary judgment is properly entered if the pleadings and all relevant discovery indicate that there is no genuine issue as to any material fact and the moving party is

entitled to judgment as a matter of law." *Toyota Motor Mfg., U.S.A., Inc. v. Epperson*, 945 S.W.2d 413, 414 (Ky. 1996). "The record must be viewed in a light most favorable to the party opposing the motion and all doubts are be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Kentucky Revised Statutes (KRS) 344.030(2) defines "employer" for purposes of the KCRA as a person with "eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year[.]" To meet the statute's numerosity requirement, Starr argues Louisville Graphite and Louisville Exchanger should be treated as a single employer for purposes of the KCRA.

In determining whether to treat two employers as a single employer for numerosity purposes of civil rights laws, the prevailing test in the federal courts requires four considerations: "(1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership." *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983), *abrogated on other grounds by Arbaugh v. Y&H Corp*., 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). The Court noted that "[a]ll four criteria need not be present in all cases[.]" *Id*. at 1338. "Nevertheless, control over labor relations is a central concern." *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 994 (6th Cir. 1997).

Our Supreme Court expressly adopted the four-part single-employer test in *Palmer v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 882 S.W.2d 117, 119 (Ky. 1994). In doing so, it noted that "the determination of what constitutes an employer is on a case-by-case basis[.]" *Id*. Under the facts, the Court determined that district lodges and local union lodges were distinct from the International Association of Machinists and Aerospace Workers. The Court found the following facts persuasive: "Each unit separately conducts its daily operations and finances. There is a separate treasury for each local union and each unit is required to file separate employee and tax forms with the appropriate federal revenue department. . . .The management of each unit is fundamentally different." *Id.* Summarizing the factors into one succinct statement, the Court held "[t]he single employer principle applies only where separate entities are organized or operate in such a way that they are not actually separate." *Id*.

There is no dispute that Louisville Graphite and Louisville Exchanger are owned by different individuals: Keith Cummins owns Louisville Graphite and Gary Boldin owns Louisville Exchanger. Each company has its own employees and keeps it own financial records. Despite the separate ownership and operation of the companies, Starr argues there is an issue of material fact whether the two are a single employer for purposes of the KCRA.

The companies are involved in similar businesses. Louisville Graphite works on graphite heat exchangers and Louisville Exchanger deals with metal heat exchangers and tanks. They have common customers, are located in the same

building, and maintain a joint website. Although the companies' financial records are separate, the same bookkeeper services both companies. On occasion, a single employee performed work for both companies but that employee was paid by the company for which the work was performed. Despite the separation of ownership of the companies, Boldin has check-signing authority for Louisville Graphite and Cummins and Boldin co-own the property on which both companies are located.

Notably missing is any evidence that Louisville Graphite or Louisville Exchanger has any role in the day-to-day operations, finances, or personnel matters of the other company, which is the "central concern" of the single-employer doctrine. *Swallows*, 128 F.3d at 994. Louisville Exchanger has no ownership interest in Louisville Graphite or authority to control its operations and neither company is a sham corporation. *Id*. at 995. Summary judgment was properly granted on Starr's KCRA claim.

Starr's retaliatory discharge claim survived summary judgment but was unsuccessful at trial. He did not appeal that portion of the judgment entered following the jury's verdict. He did succeed on his claim that Louisville Graphite violated Kentucky's Wages and Hours Act. Only a brief recitation of the facts presented to the jury are necessary for our purposes.

Starr's Wages and Hours Act claims were premised on Louisville Graphite's failure to pay him overtime as required by KRS 337.285 and KRS 337.060, which makes it unlawful for any employer to "withhold from an employee any part of the wage agreed upon" without written authorization.

Much of the testimony at trial focused on company loans and side jobs given to Starr by Cummins and Starr's additional one-hour morning task of turning on the equipment. There was testimony that the loans and extra work were to help Starr with financial difficulties.

Louisville Graphite did not keep adequate records of the loans, made deductions from Starr's pay as loan repayments, and improperly paid overtime. The payments for Starr's side jobs were from its general business account rather than from its designated payroll account and not included as overtime worked.

The jury found Louisville Graphite failed to pay Starr the full amount of overtime pay to which he was entitled and awarded him $16,000 as the amount owed. The jury also found that Louisville Graphite failed to pay Starr the wages to which he was entitled through unauthorized withholdings as loan repayments and awarded him an additional $4,000.

Following the trial, Starr moved for liquidated damages equal to the unpaid wages. The trial court denied the liquidated damages claim in its entirety.

Liquidated damages are available under the Wages and Hours Act. KRS 337.385 (1) provides in part:

> Except as provided in subsection (3) of this section, any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages[.]

However, the statute also provides an exception to the award of such damages. KRS 337.385(2) provides:

> If, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he or she had reasonable grounds for believing that his or her act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section.

KRS 337.385 contains nearly identical language to 29 United States Code Annotated (U.S.C.A.) § 260 of the Federal Labor Standards Act (FLSA). When a Kentucky Act is similar to a Federal Act, it will normally be interpreted consistent with federal law. *Ammerman v. Bd. of Educ., of Nicholas Cty.*, 30 S.W.3d 793, 797-98 (Ky. 2000).

The standard of appellate review involves mixed questions of law and fact. A determination whether an employer acted in good faith and on reasonable grounds is reviewed for clear error: A trial court's legal conclusions are reviewed de novo. *Dybach v. State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 (11th Cir. 1991). If an employer establishes good faith and reasonable grounds, the decision to deny or limit liquidated damages is reviewed for an abuse of discretion. *Id.* Kentucky law teaches that "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

The FLSA and state Wages and Hours Acts were "enacted for the purpose of protecting workers from substandard wages and oppressive working hours." *Lynn's Food Stores, Inc. v. U.S. By and Through U.S. Dep't of Labor, Employment Standards Admin., Wage & Hour Div.*, 679 F.2d 1350, 1352 (11th Cir. 1982). When enacted in 1938, the FLSA did not contain an exception to the rule that upon a finding that the Act had been violated, liquidated damages (double damages) were mandatory. Such damages were viewed as compensatory in nature and awarded as "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945).

The section of the FLSA mandating the imposition of liquidated damages without regard to the intent of the employer to violate the FLSA or reasonableness of the employer's actions was unfair and did not promote the deterrent purpose of the Act. Recognizing the need for reform, "[i]n 1947, Congress amended this section by enacting section 260, which gives the court some discretion in awarding liquidated damages." *Hultgren v. Cty. of Lancaster, Neb.*, 913 F.2d 498, 509 (8th Cir. 1990). This provision reduces the harshness which resulted from imposition of liquidated damages under the FLSA on employers acting in good faith.

The terms "good faith" and "reasonable belief" implicate the opposite terms "bad faith" and "unreasonable" which, in the law, are associated with conduct so

offensive that it must be punished. As stated in *Jackson v. Tullar*, 285 S.W.3d 290, 297-98 (Ky.App. 2007) (internal quotations and citations omitted), compensatory and punitive damages serve distinct purposes:

> A plaintiff is compensated for injuries through actual or compensatory damages. As the name implies, actual or compensatory damages seek to make the plaintiff whole by awarding an amount of money designed to equal the wrong done by the defendant. Punitive damages, in contrast, do not compensate for injuries, but rather serve to punish or deter a person, and others, from committing such acts in the future. Accordingly, punitive damages have no relation to compensating a plaintiff for injury, but instead exist as a punishment for the wrongdoer.

In Kentucky, punitive damages are reserved for only the most egregious conduct and must be awarded in conformity with the punitive damage statute, KRS 411.184.[1] The "statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute." KRS 411.184(5). The statute further provides: "A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." KRS 411.184(2).

At least one state court has held liquidated damages under the FLSA are punitive. *Skrove v. Heiraas*, 303 N.W.2d 526 (N.D. 1981). The Court noted that "by the later enactment of Section 260 authorizing a court to refuse to award

[1] In *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), KRS 411.184(1)(c) was declared unconstitutional.

liquidated damages where the defendant acted in good faith the United States Congress has, by implication, established liquidated damages as partially punitive in nature in those instances in which they are awarded by the court." *Id*. at 532. The Court held that the "standard for awarding liquidated damages under the Federal Act is now the same as that for awarding exemplary damages under State law, i. e., a lack of good faith[.]" *Id*. In *Elwell v. Univ. Hosps*. 276 F.3d 832, 840 (6th Cir. 2002), the Court suggested the same when it recognized that the liquidated damage provision of the FLSA is, in part, punitive in nature noting that such damages are not awarded if it would be "unfair to impose upon [the employer] more than the compensatory verdict."

Kentucky's punitive damage statute sets a high evidentiary bar for an award of punitive damages and places the burden upon the plaintiff. However, KRS 337.385 and the FLSA place the burden on the employer to demonstrate good faith and reasonableness and that burden has been said to be "substantial." *Id*. If the liquidated damages are punitive in nature, an argument can be made that any such award must comply with the punitive damage statute. We leave unanswered whether that argument would have merit. Even if Louisville Graphite had a substantial burden to prove its defense to such damages, it met that burden.

The trial court found that Louisville Graphite acted in good faith. The trial court found that Louisville Graphite's intent in loaning Starr money and providing extra work was to help Starr, not underpay or disadvantage him. By giving

financial assistance to its long-term employee, Louisville Graphite did not act willfully or intend to thwart the pubic policy underlying those laws.

Louisville Graphite is a small company owned by a single individual with less than eight employees. As often happens in small companies, during Starr's twenty-two-year employment, he and Cummins developed a friendship. Aware that Starr was in financial need, Cummins, through Louisville Graphite, assisted him by loaning money and giving him extra work. The side jobs and morning task of turning on the equipments were assigned to Starr to financially advantage Starr, not to pay him substandard wages or oppress him. The trial court did not commit clear error in finding that Louisville Graphite acted in good faith.

The reasonableness of Louisville Graphite's conduct necessarily requires that its conduct be viewed in the context of the circumstances. As a small company, Louisville Graphite operates without sophisticated bookkeeping and, as the trial court found, its bookkeeping was "appalling." However, Starr was a long-time employee of a small company who was in need of financial assistance that was given by Louisville Graphite basically on nothing more than a "hand-shake" agreement. While there were violations of the Wages and Hours Act, there was ample evidence that under the circumstances, Louisville Graphite reasonably believed it had complied with its requirements.

The plain and clear language of KRS 337.385(2) states that the trial court has the "sound discretion" to deny liquidated damages. As the finder of fact, the trial court found Louisville Graphite acted in good faith and on reasonable grounds

and, in its sound discretion, denied liquidated damages. We will not disturb its conclusion that it would be "unfair" to award Starr more than the compensatory amount. *Elwell*, 276 F.3d at 840.

After receiving a favorable jury verdict on his wage-and-hours claim, Starr requested that the trial court award him $131,444.50 in attorney fees. The trial court awarded Starr $45,229.

It is the general rule that "in the absence of a statute or contract expressly providing therefore, attorney fees are not allowable as costs, nor recoverable as an item of damages." *Cummings v. Covey*, 229 S.W.3d 59, 61 (Ky. App. 2007). In cases where a violation of the Wages and Hours Act has been found, the legislature has authorized a trial court to award "reasonable" attorney fees. In pertinent part KRS 337.385(1) states the employer "shall be liable to such employee … for costs and such reasonable attorney's fees as may be allowed by the court."

"Where an attorney fee is authorized by statute, the reasonableness of the claimed fee is for the trial court to determine, subject only to an abuse of discretion." *Young v. Vista Homes, Inc*., 243 S.W.3d 352, 367 (Ky.App. 2007). However, when a trial court is considering whether to award statutory attorney fees and costs or how much to award, the trial court's decision should be guided by the purpose and the intent of providing an award of attorney fees and costs under the particular statute. *Alexander v. S & M Motors, Inc.,* 28 S.W.3d 303, 305 (Ky. 2000).

In *Meyers v. Chapman Printing Co., Inc.,* 840 S.W.2d 814 (Ky. 1992), our Supreme Court adopted the United States Supreme Court's analysis in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), for determining reasonable attorney fees in civil rights actions. Under that method, the attorney fees awarded should consist of the product of counsel's reasonable hours spent on the successful claim, multiplied by a reasonable hourly rate, which provides a lodestar figure. That figure may then be adjusted to account for various special factors in the litigation. *Id.* at 826. As in civil rights cases, the purpose of attorney fees for violation of the Wages and Hours Act is to provide access to the courts for meritorious cases. Therefore, the same method is appropriate to calculate reasonable attorney fees to be awarded on the wage-and-hour claims.

Under the FLSA, "the court [has] no discretion to deny fees to a prevailing plaintiff; its discretion extend[s] only to the amount allowed." *Hagelthorn v. Kennecott Corp.,* 710 F.2d 76, 86 (2d Cir. 1983). The same mandatory provision is found in KRS 337.385.

In determining the amount, "the court should give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation and ability of counsel." *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998). As the Court stated in *Singer v. City of Waco, Tex.*, 324 F.3d 813, 829 (5th Cir. 2003), "the most critical factor in determining an attorney's fee award is the degree of success obtained." (Quoting *Romaguera v. Gegenheimer*, 162 F.3d 893, 896 (5th Cir. 1998). As cautioned in

James v. Wash Depot Holdings, Inc., 489 F. Supp.2d 1341, 1347 (S.D. Fla. 2007), "[f]ee awards, however, should not simply be proportionate to the results obtained by the Plaintiff."

Kentucky has also emphasized the same factors when considering the amount of attorney fees to be awarded. In *Axton v. Vance*, 207 Ky. 580, 269 S.W. 534, 536-37 (1925), the Court set forth the factors as follows:

> (a) Amount and character of services rendered.
>
> (b) Labor, time, and trouble involved.
>
> (c) Nature and importance of the litigation or business in which the services were rendered.
>
> (d) Responsibility imposed.
>
> (e) The amount of money or the value of property affected by the controversy, or involved in the employment.
>
> (f) Skill and experience called for in the performance of the services.
>
> (g) The professional character and standing of the attorneys.
>
> (h) The results secured.

Starr's counsel attached a detailed log of attorney and staff time given to preparing and litigating Starr's claims and apportioned the time spent on preparing and litigating the wages-and-hour claims so work on Starr's other claims could be excluded from the attorney fees calculation. As counsel recognizes, attorney fees are recoverable only for the successful pursuit of the wage-and-hour claims and all

other hours must be excluded from the calculation. The Court in *Hensley,* 461 U.S. at 434-35, 103 S.Ct. at 1940, explained:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants —often an institution and its officers, as in this case— counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved. The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Although the the trial court purported to apply the method set forth in *Hensley* and adopted in *Meyers*, it did not determine a lodestar figure by first finding the reasonable number of hours spent on the wage-and-hour claims and the reasonable hourly rate. It was then required to multiply the reasonable hours spent by the reasonable hourly rate. Without calculating a lodestar figure, it reduced the fee based on two factors: (1) the lack of oppressive or exploitative behavior by Louisville Graphite, and (2) Starr's limited success.

There are two apparent flaws in the trial court's findings to support its reduction in the fees requested. First, the trial court erred by not first reaching a lodestar figure before reducing the fees requested. Moreover, the fact that Louisville Graphite's violation of the Wages and Hours Act was in good faith and reasonable is not a proper reason to reduce the attorney fees requested. Attorney

fees are awarded under the Wages and Hours Act to provide access to the courts for meritorious cases, not to punish the employer.

We are compelled to reverse and remand for reconsideration of the attorney fees awarded. However, we do not necessarily disagree with the reduction in attorney fees. On remand, we leave the amount of attorney fees to the discretion of the trial court after reaching a lodestar figure.

The summary judgment of the Jefferson Circuit Court on Starr's KCRA claim is affirmed. The order denying Starr liquidated damages on his wages-and-hours claims is also affirmed. The order awarding attorney fees in the amount of $45,229 is reversed and the case remanded for further proceedings.

ALL CONCUR.

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