

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001081-MR

KENTUCKY STATE POLICE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 09-CI-01342

TERRY SCOTT AND
DAMON FLEMING

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

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

COMBS, JUDGE: This appeal is taken from a judgment of the Franklin Circuit Court in favor of Terry Scott and Damon Fleming, two arson investigators employed by the Kentucky State Police (KSP). Scott and Fleming sued KSP for alleged violations of their right to equal protection of the law after discovering that another individual had been hired to fill a vacant position for arson investigator position at a higher rate of pay. After our review, we affirm the circuit court.

I. BACKGROUND

In November 2004, KSP hired Mark Boaz for the position of Arson Investigator II. Boaz was stationed at KSP Post 16 in Henderson, Kentucky, and his beginning salary was \$3,173.58 per month. Although Boaz had not had previous experience as an arson investigator, the Kentucky Personnel Cabinet approved both his hire and his level of compensation.

During his employment, Boaz received training from Damon Fleming. Fleming had been a KSP arson investigator since November 2002, and he was Boaz's predecessor at KSP Post 16. Fleming created the vacancy at KSP Post 16 when he voluntarily transferred to KSP Post 2 in Madisonville, Kentucky. At the time that Boaz was hired, Fleming was earning a salary of \$2,292.68 per month.

Scott had been hired in April 2002 and was earning \$2,639.83 a month at the time Boaz was hired. Sometime after beginning his new job, Boaz reportedly told Terry Scott, an arson investigator at KSP Post 4 in Elizabethtown, Kentucky, that he had **negotiated** his higher salary. Scott later relayed Boaz's statements to Fleming.

In May 2006, Scott and Fleming filed internal grievances with KSP seeking an upward salary adjustment in light of Boaz's higher earnings. Because Scott and Fleming did not work in the same county as Boaz, KSP rejected their grievances pursuant to 101 KAR¹ 2:034 §1, which provides as follows:

- (1) An appointing authority shall appoint a new employee at a salary not to exceed the midpoint of the pay grade.

¹ Kentucky Administrative Regulations (KAR).

- (2) The appointing authority shall adjust to that salary an employee who is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee:
- (3)(a) Is in the same job classification;
- (b) Is in the same work county; and
- (c) Has a similar combination of education and experience relating to the relevant job class specification.

Scott and Fleming appealed the rejection to the Kentucky Personnel Board.

However, the Board dismissed their appeals as untimely because they were filed more than one year after the initial rejection by KSP.

In August 2009, Scott and Fleming filed suit against KSP in state court for violating their federal and state constitutional rights. They alleged that Boaz made more money because he had registered as a Republican voter within a week of applying for his new job. A Republican administration had been elected two years before Boaz was hired. Scott and Fleming, who were both registered Democrats, alleged that the salary discrepancy amounted to unconstitutional political discrimination. The action was removed to federal court, where the federal claims were dismissed and the state law claims were remanded. At the state level, the trial court dismissed all but one of the claims by way of summary judgment. Scott's and Fleming's lone surviving claim alleged violations of their right to equal protection under Kentucky's constitution. Constitution of Kentucky, Section 2; *see also Pritchett v. Marshall*, 375 S.W.2d 253, 258 (Ky. 1963).

A bench trial was conducted during which Lieutenant Colonel Dan Hayes, Major Jeff Hancock, Captain Greg Baird, and Sergeant Stacy Blackburn,

all of the KSP, testified that Post 16 had experienced a high rate of turnover with respect to the position of arson investigator. They explained that three investigators had left the position during the four-year period extending from October 2000 through October 2004. The officers also testified that Boaz had been an experienced fire fighter prior to his hire by KSP -- although they acknowledged Boaz's lack of investigative experience.

Scott and Fleming disputed KSP's position that there was a high rate of turnover at Post 16. Although three arson investigators had left that position over the same four-year period, Scott and Fleming explained that one former investigator had to resign because he could not pass the Peace Officer Standards (POPS) test. After further pointing out to the trial court that Boaz had signed his own POPS certification form, Fleming also explained that he left KSP Post 16 in order to work closer to his home. He also testified that he would have remained at that location if he had earned as much as Boaz.

In light of the evidence produced at trial, the trial court found that KSP did not have a rational basis for paying Boaz more than Scott and Fleming. The trial court ultimately concluded that KSP had violated the appellees' state constitutional rights and awarded them injunctive relief, back pay, benefits, attorneys' fees and costs. This appeal followed the denial of KSP's motion to alter, amend, or vacate the final order of the trial court.

On appeal, KSP first challenges the trial court's judgment on procedural grounds. KSP argues that the trial court's judgment was improper

because the appellees failed to exhaust their administrative remedies by filing a timely appeal to the Kentucky Personnel Board.

As a general rule, the failure of a party to exhaust administrative remedies before seeking judicial relief deprives Kentucky's courts of subject matter jurisdiction. *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 625 (Ky. 2001).

There are exceptions to this general requirement, which include instances when the legislature has authorized direct judicial relief by statute, when a party has shown that continuation of the administrative process would be futile, and when a party has mounted a facial attack on the constitutionality of a particular statute or regulation. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471-72 (Ky. 2004).

Scott and Fleming asserted claims under various theories, including KRS² 18A.140 along with their constitutional claims. KSP is correct in arguing that claims asserted under KRS 18A.140 must first be heard by the Personnel Board and that the jurisdiction of the Franklin Circuit Court is limited to appeals of final orders of that Board.

However, the Franklin Circuit Court recognized, acknowledged, and addressed this issue in its opinion and order of November 14, 2013. The court acknowledged that "Plaintiffs [Appellants] must do more than merely show that there were statutory violations" because they "failed to timely exhaust their administrative remedies by appealing to the Personnel Board." However, the court

² Kentucky Revised Statutes (KRS).

concluded that violations of the hiring procedures set forth at KRS Chapter 18A were **not** the issues presented to the court. Rather than asserting administrative issues, the appellants focused instead on the constitutional violations underlying their grievances:

Thus, these administrative violations are not before the Court. The Court finds that Plaintiffs carried their burden to show [a] *prima facie* case of both First Amendment and equal protection claims.... The Court finds that upon review of the evidence as a whole, the Plaintiffs satisfied their burden. Plaintiffs' constitutional right to equal protection was violated, and they are thus entitled to equitable relief. Opinion and Order of November 14, 2013, p.7.

The court clearly recognized and discussed the issue of exhaustion of administrative remedies and then correctly proceeded to adjudicate this case on the constitutional issue of violation of equal protection.

The appellees correctly argued in their brief that exhaustion of administrative remedies is **not** required when constitutional issues are the crux of a complaint, *citing DLX*, 42 S.W.3d at 626. In that case, the Supreme Court held: "Exhaustion of administrative remedies is not necessary when attacking the constitutionality of a statute or a regulation as void on its face . . . *because an administrative agency cannot decide constitutional issues.*" (Emphasis added.)

The Personnel Board lacked subject-matter jurisdiction over this equal protection claim, and this matter was properly before the Franklin Circuit Court. We find no error in the sound reasoning of the trial court in awarding appellants injunctive relief, back pay, benefits, and attorneys' fees and costs.

We affirm the judgment of the Franklin Circuit Court.

DIXON, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS BY SEPARATE OPINION.

D. LAMBERT, JUDGE, DISSENTING. Respectfully, I dissent. As the majority has correctly explained, a party must exhaust his administrative remedies before seeking judicial relief except in three situations: (1) where a statute expressly authorizes direct judicial relief, (2) where the party demonstrated the futility of continuing the administrative process, and (3) where the party has challenged the constitutionality of a particular statute or regulation **on its face**. See p. 5, *supra* (citing *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471-72 (Ky. 2004)). If none of these three exceptions applies, then the failure of the party to exhaust deprives the courts of subject matter jurisdiction.

Here, Scott and Fleming failed to exhaust their administrative remedies by not filing a timely appeal to the Kentucky Personnel Board. They also failed to show how one of the above-mentioned exceptions applies. They did not cite statutory authority for bypassing the administrative process. They did not demonstrate how an appeal to the Kentucky Personnel Board was a futile exercise. And most importantly, they did **not** “[attack] the constitutionality of a statute or a regulation as void on its face[.]” See p. 7 (citing *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001)), for the proposition that exhaustion is unnecessary when the constitutionality of a statute is in question because agencies cannot decide constitutional issues). Scott and Fleming did not argue 101 KAR 2:304 §1

was unconstitutional on its face and in fact, did not challenge the constitutionality of **any** statute or regulation either facially or as applied. Instead, Scott and Fleming filed a direct action in state court for “back pay,” to which they never showed they were ever entitled to receive, alleging violations of Section 2 of the Kentucky Constitution. Our Supreme Court rejected such a *Bivens*³ type action for money damages in *St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 537-38 (Ky. 2011), when an adequate alternative remedy (such as an administrative appeal) was available. Accordingly, *St. Luke* should apply in this case, and the appellees’ failure to timely appeal to the Kentucky Personnel Board should have deprived the trial court of subject-matter jurisdiction.

To the extent the jurisdictional deficiency did not resolve the case, the merits certainly did. Assuming Scott and Fleming properly challenged the constitutionality of a statute or regulation, *e.g.*, 101 KAR 2:304 §1, or in contravention of precedent were able to bring a *Bivens* type constitutional claim for violations of the state constitution, the Federal Court already dismissed their First Amendment claims based on political discrimination. That dismissal thus compelled the trial court to engage in rational-basis review to determine whether KSP could provide a reasonable justification for the pay disparity. KSP carried this burden by explaining that Boaz’s higher rate of pay was due to turnover (four

³ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

different employees in as many years) experienced in the arson investigator position at KSP Post 16.

As the Appellees' failed to exhaust their administrative remedies, the judgment of the Franklin Circuit Court should have been reversed.

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