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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000055-MR
AND
NO. 2016-CA-000062-MR

CAROL GREISSMAN — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 12-CI-00744

RAWLINGS AND ASSOCIATES, PLLC — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND MAZE, JUDGES.

LAMBERT, J., JUDGE: These appeals arise from an action in which Carol Greissman alleged she was wrongfully terminated by her employer, Rawlings and Associates, PLLC, (Rawlings) when she refused to sign a Confidentiality and No Solicitation Agreement (the Agreement) that she believed was prohibited by the

Kentucky Bar Association Ethics Rules, specifically Rules of the Supreme Court (SCR) 3.130 (5.6) (Rule 5.6). Greissman appeals from the Oldham Circuit Court's order denying her motion for partial summary judgment, granting Rawlings' motion for summary judgment, and dismissing her complaint, based on its holding that the Agreement did not violate Kentucky's Rules of Professional Conduct. Rawlings cross-appeals from an earlier order denying its motion to dismiss, in which the circuit court held that a Supreme Court Rule, when obligatory, supports a claim for wrongful termination in violation of public policy. We agree with Rawlings that the circuit court erred as a matter of law in denying the motion to dismiss, mooting Greissman's appeal from the final judgment. Because the circuit court ultimately dismissed Greissman's complaint in granting summary judgment, we affirm.

Greissman is a licensed attorney in the Commonwealth of Kentucky. Rawlings is a law firm that practices in the areas of health care subrogation. Greissman worked for Rawlings as a subrogation analyst from June 1997 through September 21, 2011, when she was terminated. Prior to her termination, Rawlings presented Greissman and its other employees with an Agreement that included a covenant not to solicit, contact, interfere with, or attempt to divert any of Rawlings' customers or potential customers after leaving Rawlings' employment. Failure to sign the Agreement would result in termination of employment. The Agreement provided in relevant part as follows:

> Non-Solicitation. Except to the extent necessary to comply with rules of professional responsibility applicable to attorneys, I agree that for as long as I am employed and for three (3) years following termination of my employment, for any reason, I will not, without the prior written consent of Rawlings: (i) solicit, contact, interfere with, or attempt to divert any customer served by Rawlings, or any potential customer (defined as a prospective customer who was solicited by Rawlings within 5 years); or (ii) solicit any person then or previously employed by Rawlings to join me, whether as a partner, agent, employee, or otherwise, in any enterprise engaged in a business that competes with business engaged in by Rawlings at the time my employment ceases.

Because Rule 5.6 prohibits an attorney from agreeing to restrict his or her rights to practice after leaving an employer, with limited exceptions, and after researching the issue, Greissman refused to sign the Agreement, and she was thereafter terminated.[1]

As a result, Greissman filed a complaint on September 19, 2012, and an amended complaint two days later seeking damages for wrongful termination. She alleged that Rule 5.6 is a statement of public policy and therefore created an exception to the terminable-at-will doctrine for purposes of wrongful termination actions. Greissman sought restoration of her former position with Rawlings; lost

[1] Rule 5.6 states as follows:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership or, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

wages; compensatory damages for embarrassment, mental anguish, and humiliation; and punitive damages.

In lieu of filing an answer, Rawlings filed a motion to dismiss Greissman's complaint pursuant to Kentucky Rules of Civil Procedure (CR) 12.02. Rawlings argued that the public policy exception to Kentucky's terminable-at-will doctrine addressed in *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985), did not extend to the violation of a public policy found in the Supreme Court Rules and enforced by the Supreme Court of Kentucky. Because the *Grzyb* Court limited the public policy exception to those set forth in the Constitution or a statute, a violation of a public policy set forth in a Supreme Court Rule would not provide grounds for a wrongful termination claim. Rawlings also relied upon a decision of the federal district court for the Western District of Kentucky reaching the same conclusion in a wrongful termination case. Therefore, Rawlings argued that Greissman failed to state a claim upon which relief could be granted.

Greissman objected to the motion to dismiss, arguing that her claims qualified under *Grzyb* and relying upon an opinion from the Eastern District of Kentucky in a contract dispute case and an order of the Jefferson Circuit Court in a wrongful termination case. She stated that authority from other jurisdictions held that Rules of Professional Conduct can establish public policy.

By order entered April 8, 2013, the circuit court denied Rawlings' motion to dismiss. The court stated, in part:

> The Rules of Professional Conduct, as set forth by the Kentucky Supreme Court, contain obligatory and hortatory sections. Certainly it would be counterintuitive to require lawyers to conform their conduct to the obligatory sections of the Rules then to turn around and dismiss a claim that they were discharged for refusal to violate an obligatory rule. While not strictly statutory or constitutional, the Kentucky Supreme Court has recognized that the Judicial Branch is vested with its own power to make rules. Where those rules are obligatory, the Court finds as a matter of law, they supply a source of authority that can ground a claim [for] wrongful termination in violation of public policy.

The court went on to find that Rule 5.6 "places a requirement on a lawyer to not participate in making an agreement that restricts the lawyer's right to practice law after termination of the relationship." Therefore, the court held that a lawyer who refuses to violate an obligatory rule and alleges he or she was terminated as a result is able to state a claim for wrongful termination in violation of a public policy as a matter of law.

Thereafter, Rawlings filed an answer to Greissman's amended complaint, and discovery began. Greissman filed a motion for partial summary judgment on liability, arguing that the inclusion of the savings clause at the beginning of the section at issue did not cure the wrong. In addition, Greissman argued that she only needed to establish a good faith, reasonable belief of the violation to state a cause of action, not an actual violation. Rawlings, in turn, filed a motion for summary judgment seeking dismissal of Greissman's complaint, arguing that the Agreement did not restrict an attorney's ability to practice law, but only restricted the disclosure of confidential information and the solicitation of non-legal business

from customers of The Rawlings Company, LLC, the subrogation business for which Rawlings provided legal services. Therefore, the Agreement did not violate Rule 5.6 and there was no public policy violation upon which her complaint could be based. Both parties responded to the opposing motions.

On January 4, 2016, the circuit court entered an order ruling on the cross-motions for summary judgment. The court determined that the Agreement did not violate the Rules of Professional Conduct and that the savings clause would have shielded Greissman from any violation of the Rules had she signed it. The court went on to hold that Greissman's belief that the Agreement violated the Rules of Professional Conduct was not enough to save her wrongful termination claim. Therefore, the circuit court denied Greissman's motion, granted Rawlings' motion, and dismissed the complaint. These appeals now follow.

On appeal, Greissman argues that the trial court erred in holding that the Agreement did not violate Rule 5.6, in holding that her good faith and reasonable belief that it violated the Rule did not save her claim, and in granting summary judgment in favor of Rawlings. On cross-appeal, Rawlings argues that the circuit court erred in concluding that Rule 5.6 provided the public policy to support Greissman's wrongful termination claim.

Because we must first determine whether Greissman stated a claim upon which relief may be granted, we shall consider Rawlings' cross-appeal first. Our standard of review of a motion to dismiss for failure to state a claim upon which

relief may be granted pursuant to CR 12.02 is set forth in *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005):

> A motion to dismiss should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari–Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When ruling on the motion, the allegations in "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 868 (Ky. App. 1987). In making this decision, the trial court is not required to make any factual findings. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Therefore, "the question is purely a matter of law." *Id*. Accordingly, the trial court's decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

With this standard in mind, we shall review whether the circuit court properly denied Rawlings' motion to dismiss. We hold that the circuit court erred as a matter of law in failing to dismiss Greissman's complaint.

Our review necessarily requires a discussion of Kentucky's wrongful discharge law. The Supreme Court of Kentucky has recognized that, "ordinarily an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). See *Grzyb v. Evans*, *supra*, for the Supreme Court's discussion of the terminable-at-will doctrine. By applying this doctrine, the Supreme Court has recognized that "[e]mployers as a group have a legitimate interest to protect by having the cause of action for wrongful discharge clearly defined and suitably controlled." *Firestone*, 666 S.W.2d at 733.

In *Firestone*, the Supreme Court adopted judicial exceptions to the terminable-at-will doctrine as set forth in *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834 (1983), by the Wisconsin Supreme Court. The *Grzyb* Court later summarized these exceptions as follows:

> 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
>
> 2) That policy must be evidenced by a constitutional or statutory provision.
> 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Grzyb, 700 S.W.2d at 401. The *Grzyb* Court also adopted the position of the Michigan Supreme Court in *Suchodolski v. Mich. Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982), as a caveat to its decision in *Firestone*, wherein it noted two situations "where 'grounds for discharging an employee are so contrary to public policy as to be actionable' absent 'explicit legislative statements prohibiting the discharge.'" *Grzyb*, 700 S.W.2d at 402 (quoting *Suchodolski*, 316 N.W.2d at 711). Those two situations are:

> First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment."

Grzyb, 700 S.W.2d at 402 (quoting *Suchodolski*, 316 N.W.2d at 711-12). The *Grzyb* Court expressly stated that "the concept of an employment-related nexus is

critical to the creation of a 'clearly defined' and 'suitably controlled' cause of action for wrongful discharge." *Grzyb*, 700 S.W.2d at 402.

In the present case, the circuit court held that the Rules of Professional Conduct could supply the public policy basis for a wrongful termination claim. Rawlings argues that public policy found in a Supreme Court Rule cannot form the basis for a wrongful termination claim; the public policy must be set forth in a constitutional or statutory provision pursuant to *Grzyb*, *supra*. Therefore, Greissman failed to identify a valid constitutional or statutory provision to support a public policy exception to the at-will employment doctrine.

In further support of its position, Rawlings cites to *Gadlage v. Winters & Yonker, Attorneys at Law, P.S.C.*, 3:11-CV-354-H, 2011 WL 6888538 at *2 (W.D. Ky. Dec. 29, 2011), an unreported decision by federal district court Judge Heyburn:

> Gadlage claims his firing violated the public policy against conflicts of interest in lawyer-client relationships expressed in Kentucky Supreme Court Rules, which are not themselves "constitutional or statutory provision[s]." [*Grzyb*, 700 S.W.2d at 401]. Plaintiff notes Section 116 of the Kentucky Constitution vests with the Supreme Court the power to establish the Supreme Court Rules. However, the source of the Kentucky Supreme Court's authority to establish rules does not transform those rules into the equivalent of a constitutional or statutory provision. Although it would be reasonable to find public policy in a wider scope of legal material—and other jurisdictions do exactly that—Kentucky has fairly drawn the line at constitutional and statutory provisions. *Compare Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140, 1144 (N.H. 1981) (holding wrongful discharge may be based on non-statutory

> expression of public policy) with *Grzyb*, 700 S.W.2d at 401. In Kentucky, a public policy from a court rule is insufficient to support a wrongful discharge claim. [Footnote omitted.]

We note that the Sixth Circuit Court of Appeals affirmed this order in an unreported opinion, but did not reach the question of whether a Supreme Court Rule could provide the public policy exception to the at-will employment doctrine. Gadlage failed to identify a particular Rule that had been violated, but rather made "vague and generalized statements" about conflicts of interest and client obligations. *Gadlage v. Winters & Yonker, Attorneys at Law, P.S.C.*, 547 Fed. Appx. 666, 668 (6th Cir. 2013).

Rawlings also cites to *Shrout v. The TFE Group*, 161 S.W.3d 351, 354 (Ky. App. 2005), in which this Court addressed the issue in terms of a violation of a federal regulation:

> Underpinning any cause of action for wrongful discharge is KRS 446.070, pursuant to which
>
> > a person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation. But this is limited to where the statute is penal in nature, or where by its terms the statute does not prescribe the remedy for its violation.... Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute.
>
> Thus, important to a finding of wrongful discharge is the requirement that the public policy must be defined by statute and directed at providing statutory protection

> to the worker in his employment situation. [Footnotes omitted.]

We concluded that "KRS 446.070, the underpinning of a wrongful discharge, extends a right of action only for the violation of a Kentucky statute or a constitutional provision. The protection does not extend to the violation of a federal regulation. Since Shrout's wrongful discharge claim hinges on the violation of a federal regulation, he cannot benefit from KRS 446.070." *Id*. at 355 (footnote omitted.) *See also Barlow v. Martin-Brower Co.*, 202 F.3d 267 at *2 (6th Cir. 2000) ("[Plaintiff's discharge] may have contravened the policy evidenced by the regulations, but such a policy is insufficient to support plaintiff's state public policy claim under the theory recognized in *Grzyb*[.]").

In response, Greissman argues that the Supreme Court's Rules of Professional Conduct are the only source of public policy in that area and therefore should provide a basis for a wrongful termination claim. She relies on *Martello v. Santana*, 874 F.Supp.2d 658, 670 (E.D. Ky. 2012), an opinion and order from the Eastern District of Kentucky addressing contract law and stating that "[t]his Court agrees with Santana that the Kentucky Supreme Court, through its rule-making powers and oversight of the Kentucky Bar Association, sets the public policy in dealings between lawyers and non-lawyers." The court went on to state:

> Given that Kentucky's Constitution vests the judicial power of the Commonwealth exclusively with the Court of Justice, and specifically grants the power to regulate attorney discipline solely with the Supreme Court of Kentucky, the public policy determinations reflected by the Rules should not be any less highly regarded because

> they are carried out by Rules promulgated by the Supreme Court rather than statutes enacted by the Legislature.

Id. In its opinion affirming, the Sixth Circuit Court of Appeals stated, "Kentucky courts have held that, in the absence of legislative guidance, courts may determine public policy." *Martello v. Santana*, 713 F.3d 309, 313 (6th Cir. 2013). In addition, Greissman, as did the circuit court below, continues to rely upon a 2010 order of the Jefferson Circuit Court in *Isaacs & Isaacs, PSC v. Rigor*, No. 05-CI-07688, for statements of the law that "[t]he promulgation and enforcement of the Supreme Court rules is a product of the Court's power to regulate judicial function" and that "[t]he termination of a lawyer by his or her employer for a refusal to violate obligatory Supreme Court Rules is grounds for sustaining a wrongful discharge claim." We note that the appeal of this order was dismissed as settled and that an order of a circuit court is not binding on this Court.

While we agree with Greissman that the Supreme Court Rules may indeed create public policy as she argues, we disagree that public policy enunciated in the Supreme Court Rules, specifically Rule 5.6, can form the basis for a wrongful termination suit. As Rawlings argues, the Supreme Court narrowly and specifically limited the public policy exception to the at-will employment doctrine to public policy created in constitutional or statutory provisions. *See Grzyb*, *supra*. It did not include public policy as created by either state or federal regulations or the Supreme Court Rules, as it could have done. We shall not do so in this opinion.

Accordingly, we must hold that the circuit court erred as a matter of law in denying Rawlings' motion to dismiss for failure to state a claim. Based upon this holding, Greissman's appeal from the summary judgment in Rawlings' favor is moot. Because the circuit court properly dismissed Greissman's complaint, albeit for a different reason, we shall affirm the final judgment.

For the foregoing reasons, the final judgment of the Oldham Circuit Court dismissing Greissman's complaint is affirmed.

CLAYTON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN RESULT ONLY.

MAZE, JUDGE, CONCURRING IN RESULT: Respectfully, I concur in the result, but I strongly disagree with the majority's reasoning. There is no dispute in this case that SCR 3.130, Rule 5.6 expressly prohibits an attorney from agreeing to restrict his or her rights to practice after leaving an employer. As an attorney licensed by the Kentucky Bar Association, Greissman would be subject to professional sanctions if she had signed such an agreement. Likewise, Rawlings & Associates, PLLC, as a law firm, would also be subject to discipline for requiring its employees who are attorneys to sign such an agreement. *See Kentucky Bar Association v. Truman*, 457 S.W.3d 325 (Ky. 2015). Nevertheless, the majority concludes that a violation of a Supreme Court rule can never form the basis for a wrongful-termination claim. Rather, the majority holds that the public-policy exception to the terminable-at-will doctrine may only be based on public policy set forth in a constitutional or statutory provision.

I am gravely concerned that the majority's decision places attorneys such as Greissman in an untenable position. If presented with a clearly improper contract, the attorney must either sign the agreement and face potential discipline, or refuse to sign the agreement and face termination with no legal remedy. There is conflicting persuasive authority on this issue, and no authority which is directly controlling. *See Gadlage v. Winters & Yonker, Attorneys at Law*, P.S.C., No. 3:11-CV-354-H, 2011 WL 6888538 (W.D. Ky. 2011). *But see Martello v. Santana*, 874 F. Supp.2d 658, 669-70 (E.D. Ky. 2012), affirmed on appeal in *Martello v. Santana*, 713 F.3d 309 (6th Cir. 2013). In light of this conflict, I would urge our Supreme Court to consider this issue directly.

In the interim, I would hold that the Kentucky Rules of Professional Conduct create an enforceable public policy in this area. The Kentucky Supreme Court is vested with the exclusive power to make rules regarding discipline of members of the bar. *Ky. Const*. § 116. Consequently, the legislature has no authority to set public policy in this field. Accordingly, I would hold that the public policy determinations reflected by the Rules of Professional Conduct have equal public policy weight to any public policy set forth expressly in our Constitution or in statutes enacted by the General Assembly. *Martello v. Santana*, 874 F.Supp at 669-70.

In the current case, the trial court eventually granted summary judgment for Rawlings. The court noted that the Agreement, as originally drafted, was unclear regarding the scope of the Non-Solicitation clause, and particularly the nature of

the services provided to Rawlings's customer. However, the court concluded that the subsequently-inserted savings clause specifically excludes any interpretation of the Agreement that would conflict with the Rules of Professional Conduct. Rather, the Non-Solicitation clause only applied to Rawlings's non-legal business clients. I agree with this interpretation. Likewise, I agree with the trial court that Greissman's good-faith reliance on the advice of counsel does not serve to keep her within the public-policy exception to the terminable-at-will doctrine. For these reasons, I would affirm the summary judgment dismissing Greissman's claims.

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