STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Frank Vetter,
Plaintiff Below, Petitioner

vs) No. 11-1353 (Hardy County 10-C-81)

Town of Moorefield,
Defendant Below, Respondent

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner Frank Vetter, by counsel Harley O. Staggers, appeals the order of the Circuit Court of Hardy Court filed on September 12, 2011, granting summary judgment in favor of the respondent, the Town of Moorefield. The respondent filed its response by counsel, Kathryn K. Allen. The petitioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioner filed suit against the respondent alleging, inter alia, claims of age discrimination and retaliatory discharge following the termination of his employment as Chief of Police. The respondent argued that it terminated the petitioner for misconduct. The circuit court entered summary judgment in favor of the respondent.

The standard of review of a circuit court's entry of summary judgment is de novo. Syl.Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Further, this Court has recognized:

> "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Syl. Pt. 2, *Minshall v. Health Care & Retirement Corp. of America*, 208 W.Va. 4, 537 S.E.2d 320 (2000).

The Court has fully reviewed the issues raised by the petitioner. The Court concludes that the circuit court's entry of summary judgment, under the facts and circumstances of this case, was proper. The Court adopts and incorporates by reference the well-reasoned final order granting summary judgment that is attached hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

FILED
DATE 9/12/11
CLERK

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

DEPUTY

FRANK VETTER,

Plaintiff

vs. Civil Action No. 10-C-81

TOWN OF MOOREFIELD,

Defendant

ORDER

On this 31st day of August, 2011, this cause came on for consideration by the Court upon the appearance of the Plaintiff, Frank Vetter, in person, and by his attorney, Harley O. Staggers, Jr., the Mayor of the Town of Moorefield, Gary Stalnaker, in person, the Town of Moorefield, by its attorney, Kathryn K. Allen; upon Plaintiff's Motion for Summary Judgment; upon Defendant's Response to Plaintiff's Motion for Summary Judgment; upon Defendant's Motion for Summary Judgment; Memorandum of Law in Support of Defendant's Motion for Summary Judgment; Plaintiff's Response to Defendant's Motion for Summary Judgment; Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment; Plaintiff's Sur-Response to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment; Defendant's Supplemental Brief in Support of Defendant's Motion for Summary Judgment; and argument of counsel for the respective parties.

In consideration of which, the Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. The Plaintiff, Frank Vetter, as Chief of Police, was an at will employee of the Town of Moorefield, and, as such, he could be terminated for any reason or for no reason, so long as his dismissal did not violate the law. Skaggs v. Elk Run Coal Co., Inc., 479 S.E.2d 561, 198 W.Va. 51 (1996).
2. That on April 9, 2010, the Plaintiff received a termination letter from the Defendant stating as reasons: "1.) The altercation that you initiated on April 7, 2010, with Lt. Galen Reel of the Moorefield Police Department. 2.) The receipt of the letter dated April 6, 2010, authored by patrolperson, Stacy Ault, alleging two incidents of sexual harassment of her on your part. 3.) The dissention, animosity, and distrust that you have caused within the Moorefield Department. 4.) Your conduct and demeanor with the council, recorder and myself." (Gary B. Stalnaker.)
3. The Plaintiff filed a grievance with the Grievance Review Board of the Town of Moorefield, and the Grievance Review Board unanimously upheld Plaintiff's termination, and affirmed Defendant's reasons as being a legitimate, non-discriminatory basis for Plaintiff's termination.
4. That on September 9, 2010, the Plaintiff filed his complaint against the Defendant asserting that he was discharged because of his age, in violation of the Human Rights Act in that two other employees, similarly situated, received disparate treatment, and further that he was discharged in retaliation for filing a complaint of a hostile work environment while engaged in a protected activity.

5. That in an action to redress unlawful discrimination employment under the West Virginia Human Rights Act (5-11-1 et.seq.) the burden is upon the Plaintiff to prove by a preponderance of the evidence a prima facie case of discrimination. The burden then shifts to the Defendant to offer some legitimate and non-discriminatory reason for Plaintiff's rejection, and if the Defendant succeeds in rebutting the presumption of discrimination, the Plaintiff has the opportunity to prove by a preponderance of the evidence that reasons offered by the Defendant were merely pretext for unlawful discrimination. State of W.Va. Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77, 174 W.Va. 711, (1985).
6. That a Plaintiff in a disparate treatment discriminatory discharge case may meet the initial burden of proving a prima facie case by a preponderance of the evidence. 1.) That the Plaintiff is a member of a group protected by the Act. 2.) That the Plaintiff was discharged or forced to resign from employment. 3.) That a non-member of the protected group was not disciplined, or was disciplined less severely than the Plaintiff, while both engaged in similar conduct. Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 193 W.Va. 475 (1995); West Virginia American Water Company v. James A. Nagy W.Va. Supreme Ct. No. 101229, filed June 15, 2011; Young v Bellofram Corp., 705 S.E.2d 560, 277 W.Va 53 (2010).
7. That at the time of his termination, the Plaintiff was 55 years of age, and, as such, was a member of a protected class as defined by the Act.

8. That while the Court in O'Conner v. Consolidated Coin Caterers Corporation 512 U.S. 308 (1996), held that there is "no magic age gap", it is note-worthy that the Plaintiff was replaced by Steve Reckart, age 53, and a member of the protected class.
9. That Stacy Ault, age 30, was not a member of a protected class based on her age, under the Act.
10. That, as acknowledged by the Plaintiff, Stacy Ault, was an officer trainee, who had apparently lawfully taped a fellow police officer, but failed to comply with the directive of the Plaintiff to file a report of the incident.
11. That while the Plaintiff complained to the Defendant about the insubordination of Stacy Ault, at a Town Council meeting on March 25, 2010, he did not recommend that she be terminated, as was eventually the case with the Plaintiff himself.
12. That Galen Reel, age 40, was a member of the protected class, as defined by the Act, who was indicted for non-consensual sexual relations with a female in his police car while on duty. He initially entered a plea of guilty, was allowed to withdraw his plea by Judge Donald H. Cookman, and then after a jury trial, was acquitted.
13. That on August 5, 2008, Galen Reel was notified by the Defendant that they were seeking his termination as a result of having had a sexual relationship with a female in his police car while on duty.

14. That pursuant to the formal statement of charges against Galen R. Reel by the Defendant, the Police Board of the Town of Moorefield was convened on August 28, 2008, wherein the case was dismissed, predicated on the finding that the Defendant did not have the authority to bring the charges against Galen Reel as it was necessary for the charges to be brought by the police department or any officer thereof.

15. That it's not credible, as the Plaintiff alleges, that he was unaware of the statutory authority (8-14A-1 et seq) relied upon by the Police Board that led to the dismissal of the charges against Galen Reel, or that he had no knowledge of the basis for the dismissal of the charges against Galen Reel.

16. That subsequently, at a meeting of the Town Council on March 25, 2010, the Plaintiff acknowledged that Lieutenant Reels' sexual conduct with a female in his police car while on duty was now off the table and no longer an issue. At that meeting, the Plaintiff also complained that Galen Reel was not properly performing his duties, but the Town Council was not satisfied that the Plaintiff had presented any documentation to support his allegations.

17. On April 8, 2010, and notwithstanding the dismissal of the charges against Galen Reel, and contrary to the policeman's Bill of Rights and proper protocol, (8-14A-2) the Plaintiff engaged Officer Reel in a confrontation in the parking lot, which confrontation described as hysterical by an Administrative Law Judge, was taped by Officer Reel, who presented it to the Defendant.

18. That the Plaintiff applies a mixed motive to Defendant's violation of the Act, in that he further complains that he reported a hostile work environment to the Defendant to no avail.

19. That there was substantial dissention and discord within the Police Department five or six months before Plaintiff's termination, and the Plaintiff's responsibility for this contentious atmosphere is evidenced by his statement that he intended to stay on at the Department until he had "straightened out the mess."

20. That at no time did the Plaintiff complain to the Defendant, to his wife, or to anyone else for that matter that he was subject to discrimination due to his age.

21. That although the Plaintiff had gone to a retirement meeting with Phyllis Sherman, a fellow employee, his relationship with her was strained, such that the Plaintiff complained that she had called him a "smart-ass," but beyond this isolated incident, there were no other complaints by the Defendant as to any hostile work environment.

22. The Plaintiff has not demonstrated that the workplace was permeated with discriminatory intimidation, ridicule and insult sufficiently severe and persuasive to alter the conditions of the Plaintiff's employment and create an abusive working environment.

23. That the Plaintiff has produced no statistical evidence showing age based disparity within the Moorefield Police Department.

24. That the Plaintiff is not aware of the Defendant terminating the employment of any other person allegedly because of his or her age.

25. That in 2010, four of six employees hired in the police department were over the age of 50, all of which were hired after the Plaintiff was terminated.

26. That no reasonable person could infer that Plaintiff's age or his report of a hostile work environment was a motivating factor in the adverse employment decision.

27. That the Plaintiff did not provide evidence which would sufficiently link the termination decision to his status as a member of a protected class or that there is any nexus between his discharge and a complaint of a hostile work environment.

28. That Plaintiff's argument that he is similarly situated or engaged in similar conduct to Officer Reel and Officer Ault fails. Plaintiff was the Chief of Police. Officers Reel and Ault were subordinates, and not in charge of running the entire Police Department. Officer Ault was a newly hired officer, and did not comply with writing a report concerning an incident with another Officer. Plaintiff engaged in an abusive altercation and confrontation with a subordinate, and threatened the subordinate with termination and criminal charges in a parking lot, which is a level three violation, subject to termination, according to the Defendant's personnel policy.

29. That the Plaintiff has neither established a prima facie case, nor has he established a pretext for discrimination based on Defendant's action.

30. That the Plaintiff was not engaged in a protected activity known to the Defendant, and there can be no inference of any retaliatory motivation.

31. That there is an interesting time line in the tit-for-tat sequence wherein the Plaintiff, on March 25, 2010, makes a complaint about Stacey Ault's insubordination, Stacey Ault's allegation on April 6, 2010, about Plaintiff's sexual harassment of her, and Plaintiff's confrontation with Galen Reel on April 8, 2010 about Galen Reel's improper sexual conduct.

32. That from a totality of the evidence presented, and viewed in the light most favorable to the Plaintiff, the record could not lead a rational trier of fact to find for the Plaintiff.

33. That the Plaintiff implores the Court to infer that the Defendant engaged in conduct which violated the West Virginia Human Rights Act, which allegations are based merely on suspicion, speculation and arbitrary conclusions.

34. That viewed in a light most favorable to the Plaintiff, there is no genuine issue as to a material fact such that Defendant is entitled to a summary judgment as a matter of law.

It is, therefore, the ORDER of the Court that the Plaintiff's Motion for Summary Judgment is DENIED, and the Defendant's Motion for Summary Judgment is GRANTED. The Court notes the objection of counsel for the respective parties to any adverse ruling.

Nothing further remaining to be done, and that all costs having been assessed to the Plaintiff, it is the further ORDER of the Court that this matter be removed from the docket and placed among the matters ended.

The Clerk of this Court shall send a copy of this Order to Counsel of record.

ENTERED this 9th day of September, 2011.

A TRUE COPY
ATTEST:
Kimberly A. Evans
Clerk Of Said Circuit Court
By: Deborah J. Hines
Deputy Clerk

Charles E Parsons
CHARLES E. PARSONS, JUDGE