

SUPREME COURT OF OKLAHOMA

King v. Berryhill Fire Protection District

2013 OK 76, 311 P.3d 836 · Decided September 24, 2013

OPINION

REIF, J.

REIF, V.C.J. T1 This case concerns a claim that the Berryhill Fire Protection District wrongfully terminated the employment of Steven King for his efforts to stop a "training exercise" that involved the burning of structures owned by the fire chief.

The trial court believed that the circumstances surrounding the fire chiefs decision to burn the structures in question created a factual issue over whether this "training exercise" would vio*837late the statutory prohibition against arson.

The jury found that King acted to prevent arson and was wrongfully terminated for performing an act consistent with this clear and compelling policy.. 12 The Court of Civil Appeals disagreed, ruling that burning the structures for training could not constitute arson as a matter of law.

The Court of Civil Appeals noted that arson requires a "malicious burning" or one without just cause or exeuse. The Court of Civil Appeals reasoned that the burning of the structures for a fire district training exercise could not be a "malicious burning," because it involved a burning with a just cause or excuse. Upon review, we disagree with this analysis.

13 The chief problem with this analysis is that it invades the province of the jury. The jury heard the accounts of both King and the fire chief concerning the plan to burn the structures, and more importantly, viewed their demeanor as they testified.

The jury was free to consider and weigh the self-interest on the part of the fire chief, as well as the numerous factors that indicated burning of the structures would not be appropriate for training. The jury was likewise free not to believe the fire chief's explanation that he intended the burn to be a training exercise.

In doing so, the jury could reasonably conclude the "training exercise" was a pretext and the attempt of the fire chief to do indirectly what he could not do directly, 4e., commit arson by burning the structures himself. 14 It is well settled that "(aln employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious breach of contractual obligations."

Burk v. K-Mart Corp., 1989 OK 22, ¶ 17, 770 P.2d 24, 28 (footnote omitted). Early on, this Court generally recognized that "the employer has committed a wrong against the employee and society

at large when the employee is discharged for doing that which is right [in the public interest] or refusing to do that which is wrong." *Marshall v. OK Rental & Leasing, Inc.*, 1997 OK 34, ¶ 8, 939 P.2d 1116, 1119 (overruled in other respects by *Kruchowski v. The Weyerhaeuser Company*, 2008 OK 105, ¶ 35, 202 P.3d 144, 154).

More recently, this Court has specifically recognized that "Employees who report and complain of an employer's unlawful or unsafe practices and whose actions seek to further public good by unmasking these breaches should be protected from an employer's retaliation." *Vasek v. Board of County Commissioners of Noble County*, 2008 OK 35, ¶ 22, 186 P.3d 928, 933 (citation omitted).

T5 In the case at hand, the jury believed Mr. King's account that he was fired in retaliation for exposing and opposing the unlawful and unsafe burning of structures owned by the fire chief under the guise of a "training exercise." Furthermore, the jury either (1) did not believe the non-retaliatory reasons proffered by the fire chief and fire district for his termination, or (2) concluded that Mr. King's exposure of and opposition to the unlawful and unsafe burning constituted a significant factor in the decision to terminate him, notwithstanding any non-retaliatory reasons.

Id. at ¶¶ 30-31, 186 P.3d at 934. The trial court's judgment on the jury verdict must be affirmed because review of the record reveals competent evidence to support the jury's verdict and no fundamental error¹ *838in the trial of this case. 20 0.8.2011, § 3001.1. 12 0.8.2011, § 78; CERTIORARI PREVIOUSLY GRANTED, COURT OF CIVIL APPEALS OPINION VACATED, TRIAL COURTS JUDGMENT ON THE JURY VERDICT AFFIRMED.

16 COLBERT, C.J., REIF, V.C.J., WATT, EDMONDSON, COMBS and GURICH, JJ., concur. T7 KAUGER, J., concurs in result. T8 WINCHESTER and TAYLOR, JJ., dissent.. The Court of Civil Appeals limited its opinion to deciding the issue of whether the trial court erred in submitting King's wrongful termination claim to the jury.

In addition to this issue, Berryhill's brief-in-chief also contended that the trial court abused its discretion in failing to grant a new trial. Berryhill argued that certain rulings by the trial court (1) resulted in the jury returning excessive damages, and (2) caused irregularity in the proceedings that denied Berryhill a fair trial.

On the issue of excessive damages, the brief-in-chief made three specific complaints. The first complaint concerns the court's exclusion of King's income tax returns. The second complaint concerns the court's instruction that allowed the jury to award King the salary he would have earned in the time between termination and trial.

The third complaint is the court's refusal to instruct on King's failure to mitigate his damages in view of his failure to seek employment elsewhere as a paid firefighter. On the issue of irregularity/denial of fair trial, the brief-in-chief presented six specific complaints.

The first complaint is the court excluded of a former fire district board member as Berryhill's representative at trial. The second complaint is the court allowed a fireman-witness King designated for one limited purpose to testify about the "training exercise."

The third complaint is that the court permitted King to use the deposition given by the fire chief in a federal case in which King sued the fire chief personally. The fourth complaint concerns the court allowing King to use a fireman-witness designated for a particular purpose as an expert on the dangers of the proposed "training exercise."

The fifth complaint is that the court let a witness testify about the fire chief discouraging "unionizing" the fire district employees contrary to a granted motion in limine. The sixth and final complaint concerns the court admitting a photograph that King's attorney represented to depict King in running shorts at the fire station, when the person in the picture was actually a county commissioner.

(One of the disputed issues was whether Berryhill had allowed running shorts at the fire station before it sought to make this a basis for King's termination.) The gist of Berryhill's plea for a new trial is that these alleged errors misled the jury, caused surprise to Berryhill in the trial of this case, and allowed the jury to consider irrelevant matters that prejudiced Berryhill.

When viewed in the context of the record as a whole, we do not agree that these matters individually or collectively warrant a new trial. We find that the damages were not excessive because King established that "but for" the wrongful termination, he would have earned the amount of the lost wages through the date of trial (i.e., until the court could consider reinstatement as a potential remedy).

Even assuming error in the other matters, such error would be harmless, because the pivotal issue in this case was the credibility of King and the fire chief which the jury resolved in favor of King.