2019 IL App (4th) 180060-U

NO. 4-18-0060

FILED
January 10, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MARGARET SNOW,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
THE DEPARTMENT OF HUMAN SERVICES, DAN MELLIERE, and CAROL KRAUS,	)	No. 11CH522
Defendants-Appellees.	)	Honorable
	)	John W. Belz,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the circuit court's decision was not against the manifest weight of the evidence where plaintiff failed to establish that defendants violated a law, rule, or regulation and defendant took no action in retaliation against plaintiff in violation of the State Officials and Employees Ethics Act (5 ILCS 430/15-5 to 15-20 (West 2010)).

¶ 2 Plaintiff, Margaret Snow, appeals the judgment of the circuit court finding defendants, the Department of Human Services (Department), Dan Melliere, and Carol Kraus, did not retaliate against plaintiff in violation of the State Officials and Employees Ethics Act (Ethics Act) (5 ILCS 430/15-5 to 15-20 (West 2010)). On appeal, plaintiff argues (1) she reasonably believed that Kraus—by changing the internal parking policy—violated a Department rule; (2) she disclosed the purported violation to a supervisor or public body by posting fliers; and (3) her posting fliers about the purported violation contributed to the Department's retaliatory

action of changing the terms and conditions of her employment. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Procedural History

¶ 5 In October 2011, Snow filed a first amended complaint alleging defendants retaliated against her for engaging in protected activities—posting fliers alleging a purported violation of the Department's internal parking policy—in violation of the Ethics Act (5 ILCS 430/15-5 to 15-20 (West 2010)). Specifically, plaintiff asserted defendants "impermissibly modified [plaintiff]'s work conditions, her job duties[,] and gave her a very poor job performance evaluation in retaliation for her disclosing what she reasonably believed to be a violation of a rule."

¶ 6 In November 2011, defendants filed a motion to dismiss plaintiff's first amended complaint. The circuit court denied the motion. The matter proceeded to a one-day bench trial in September 2017. Below, we summarize the evidence presented at trial.

¶ 7 B. Plaintiff's Bench Trial

¶ 8 From 1998 to 2010, plaintiff worked as an office coordinator for the Office of Fiscal Services in the Bureau of Collections, a subdivision of the Department. Plaintiff reported to Dennis Erickson until he left the Department in 2008. Erickson and plaintiff considered each other friends and socialized outside of work.

¶ 9 In September 2009, Alex Jordan—plaintiff's supervisor at the time—approached her about bidding on an open office administrator III position. Jordan told plaintiff that the position would combine her office coordinator duties with the office administrator III duties.

Jordan also explained the office administrator III position would be responsible for filing. Subsequently, plaintiff did bid on and receive the position.

¶ 10 On January 15, 2010, Plaintiff started in the office administrator III position. On plaintiff's first day, Jordan e-mailed her and Erickson—who had since returned to the Department as assistant bureau chief—and explained plaintiff's current duties would include payroll and filing for a few weeks until the Department trained another employee to complete the payroll processing.

¶ 11 In May 2010, the Bureau of Collections moved its offices from East Monroe Street in Springfield, Illinois, to the Harris building on South Grand Avenue. At the time of the move, Kraus served as the chief financial officer for the Department. Kraus made decisions relating to the move, including how to allocate parking among the staff at the Harris building. According to Kraus, the parking at the Harris building was limited and it caused a problem when the Bureau of Collections moved there.

¶ 12 Kraus testified that the Department's parking policy for the Harris building changed at least twice in the years prior to the Bureau of Collections moving to the Harris building. Initially, the Department based the allocation of parking spaces on seniority calculated by the number of years of State of Illinois employment, not just Department employment. In 2009, the Department revised the parking policy to consider only Department seniority. According to Kraus, the rumor was that the former fiscal director changed the policy in 2009 to enable his secretary to have a parking spot. In May 2010, Kraus changed the policy back to the initial "State of Illinois seniority" policy after consulting with the chief operating officer, among other parties.

¶ 13 Plaintiff testified that in advance of the move to the Harris building, she sent an e-mail with parking space assignments pursuant to the "parking policy at the Harris building." After plaintiff sent the e-mail, Erickson informed her that the Department modified the parking policy. According to plaintiff, Erickson "had received an e-mail stating that the parking would not be divvied out as it had previously been stated and that he would be the only one with a parking space." Plaintiff testified that she believed this determination "clearly violated the policy."

¶ 14 Plaintiff further testified that she and others were "upset" about the decision to change the parking policy so in July 2010 "to vent her frustration" she "placed two fliers in [her] car windows and in the basement of the Harris building, bathroom, lady's restroom" to "let the world know that [she] thought it was not right." The first flier stated:

> **"Unethical Practices Right Here in DHS**
>
> When Carol Kraus chose not to follow the policy that was currently in place for the Office of Fiscal Services when the Bureau of Collections was moved to the Harris Building; it was because a relative complained that she would lose her parking to one of our staff. This is unethical!
>
> The parking policy states that it is done by seniority within DHS. The Bureau Chiefs redistributed the parking by seniority with us included; as this was the practice followed in the past. Several staff that currently had parking would have lost their parking to our staff that had more seniority. And the next day Carol told her

Bureau Chiefs that they were not allowed to redistribute the parking to include us."

¶ 15 The second flier stated:

"**Unfair Treatment of the Bureau of Collections Staff**

If it can't be proven that Carol['s] done this for an unethical reason; the next paragraph clearly shows how the Bureau of Collections is being treated unfair!

One of our staff took a job, within another Bureau in Fiscal Services that moved her to the Harris Building one month before we moved in; and she was allowed to be included in their parking by her seniority."

¶ 16 Plaintiff never spoke with Kraus about the parking policy. Plaintiff testified she did not report Kraus to any authority "because [she] was not 100 percent positive" that the alleged action constituted a violation; instead, it was "just [her] belief." Kraus testified she saw one of the fliers and someone told her about the other flier.

¶ 17 Erickson testified that in July 2010 after a staff meeting, Kraus approached him stating, "I know that your secretary, Margaret Snow, is the one who put that letter in the bathroom regarding me" and that plaintiff "should get her facts straight" because what she wrote "wasn't true." Erickson then told Kraus he could not "stop people from, you know, posting notices like that" and asked Kraus "if there was anything she wanted [him] to do to [plaintiff]." Kraus responded, "No. I'll take care of it."

¶ 18 Kraus had no recollection of talking with Erickson about plaintiff's fliers. Kraus testified she "was very concerned about some of the statements in [the fliers] because to the best

of her knowledge, no relative of [hers] worked at [the Department]." However, Kraus never formally disciplined plaintiff for posting the fliers. According to Kraus, if she felt disciplinary action was necessary she "would have taken it through the chain of command." She testified that she "figured people were upset and [plaintiff] was blowing off steam." Kraus further stated that the issue with plaintiff was not "something high on [her] list to take over."

¶ 19 In August 2010, Kraus announced Melliere as the new bureau chief for the Bureau of Collections. Prior to the announcement, the Department was reviewing employees' official job descriptions with the goal of reducing head count in the existing structure and hiring additional positions where necessary. Employee's official job descriptions are outlined in a document called a "[Central Management Services (CMS)-]104," which "delineates who a person works for, what their tasks are[,] as well as who reports to them, and what their tasks are going to be." As part of this review, Melliere reviewed CMS-104s, including the office administrator III's CMS-104 to "ensure that people are doing what the [CMS-]104s said and make sure they are current, and if they weren't current, then go through the process of updating those."

¶ 20 According to Melliere's testimony and the office administrator III's CMS-104, plaintiff, as office administrator III, was responsible for supervising and maintaining the file system, as well as developing and implementing a system to locate and retrieve the files at several different facilities. The CMS-104 did not include payroll responsibilities. Plaintiff presented a draft document written by Erickson and Jordan that purported to outline her job duties. Although that document never became an official CMS-104, plaintiff testified to her reliance on it. Plaintiff also relied on the description of her job duties found in the fall 2009 posting for the officer administrator III position stating, "Performs highly responsible

administrative and supervisory duties in managing, planning, assigning, supervising, and reviewing clerical staff, performs difficult and complex clerical work relating to excess assistance and non IV-D support activities."

¶ 21 On the same day Kraus announced Melliere as the new bureau chief for the Bureau of Collections, Melliere met with plaintiff, Erickson, and others to inform plaintiff the Department would rely solely on her CMS-104 to determine her job duties. Accordingly, plaintiff's job responsibilities now included filing at a warehouse and she would no longer perform payroll duties, as it was within the official job duties of other employees in the Bureau of Collections. Subsequently, plaintiff received a parking space at the Harris building because her duties required travel from the Harris building to the warehouse.

¶ 22 Melliere also told plaintiff she would report to Mike Thornton instead of Erickson. In fact, plaintiff should have been reporting to Thornton all along where plaintiff's CMS-104 and an e-mail sent in January 2010—by Jordan—listed Thornton as plaintiff's supervisor.

¶ 23 Plaintiff further testified she "expressed very much a dissatisfaction" at the meeting itself. According to plaintiff, she did not understand the reasoning behind having her focus on filing, as it required training multiple staff members to perform her other duties. Erickson also testified to his surprise at hearing plaintiff would no longer perform payroll and maintain the access database.

¶ 24 Melliere did not change his mind following the meeting; therefore, plaintiff became responsible for filing at the warehouse and the Harris building. Plaintiff testified the warehouse was "very unpleasant" and she "did not feel safe there." Plaintiff further explained that "[t]here were pigeon carcasses and pigeon feces all over the place as well as other dead

rodents [and] spiders in most of the boxes and file cabinets." Plaintiff complained to her supervisor about the conditions at the warehouse and then filed a complaint with the Illinois Department of Labor. In March 2011, plaintiff took a voluntary reduction in her job title and transferred to the Department's Division of Mental Health.

¶ 25 C. Circuit Court's Decision

¶ 26 On January 9, 2018, the circuit court ruled in favor of defendants, finding plaintiff failed to meet her burden of proof under the Ethics Act. The court found that plaintiff failed to prove that she (1) "had an objectively reasonable belief that an activity or practice of a state actor violated a law, rule, or regulations;" (2) "disclosed or threatened to disclose a violation of a law, rule[,] or regulation to a supervisor or public body;" and (3) "suffered any retaliatory action or that any protected conduct was a contributing factor to such actions." The court concluded "[t]he evidence presented at trial showed [p]laintiff's job duties were not changed but were enforced to reflect her duties as outlined in [her] official CMS[-]104." The court found no evidence of disciplinary action resulting from plaintiff posting the fliers.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 On appeal, plaintiff argues defendants retaliated against her for complaining about a change in the Department's internal parking policy in violation of the Ethics Act (5 ILCS 430/15-5 to 15-20 (West 2010)).

¶ 30 A. Standard of Review

¶ 31 "The standard of review in a bench trial is whether the judgment is against the manifest weight of the evidence." *Chicago's Pizza, Inc., v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859, 893 N.E.2d 981, 991 (2008). " 'A judgment is against the manifest

weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Buckner v. Causey*, 311 Ill. App. 3d 139, 143, 724 N.E.2d 95, 99 (1999) (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 215, 647 N.E.2d 273, 277 (1995)).

¶ 32 "As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." *Chicago's Pizza*, 384 Ill. App. 3d at 859. A reviewing court will not disturb the lower court's findings unless a contrary finding is clearly apparent. *Id.*

¶ 33 B. Ethics Act

¶ 34 Under section 15-10(1) of the Ethics Act, a state employee or state agency shall not take any retaliatory action against a state employee where the state employee "[d]iscloses or threatens to disclose to a supervisor or to a public body an activity, policy, or practice of any officer, member, State agency, or other State employee that the State employee reasonably believes is in violation of a law, rule, or regulation." 5 ILCS 430/15-10(1) (West 2010). "A violation of this Article may be established only upon a finding that (i) the State employee engaged in conduct described in Section 15-10 and (ii) that conduct was a contributing factor in the retaliatory action alleged by the State employee." 5 ILCS 430/15-20 (West 2010). A defendant may refute the alleged retaliatory action by demonstrating "clear and convincing evidence that the officer, member, other State employee, or State agency would have taken the same unfavorable personnel action in the absence of that conduct." 5 ILCS 430/15-20 (West 2010).

¶ 35 Plaintiff asserts that (1) she reasonably believed that Kraus—by changing the internal parking policy—violated a Department rule; (2) she disclosed the purported violation to

a supervisor or public body by posting fliers; and (3) posting fliers about the purported violation was a contributing factor to the Department's retaliatory action of changing the terms and conditions of her employment. We turn first to plaintiff's allegedly reasonable belief that Kraus violated a Department rule.

¶ 36 1. *Violation of a Department Rule*

¶ 37 Plaintiff first argues that she reasonably believed that Kraus—by changing the internal parking policy—violated a Department rule. Defendants argue that the internal parking policy is not a "law, rule, or regulation" and, in any event, plaintiff failed to objectively believe that a violation occurred. We agree with defendants.

¶ 38 Plaintiff failed to demonstrate that the change in the internal parking policy qualified as a rule within the meaning of the Illinois Administrative Procedure Act (APA). The APA defines a rule as an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." 5 ILCS 100/1-70 (West 2016). However, a rule does not include an agency determination concerning its internal management that does not affect private rights and procedures available to persons or entities outside the agency. *Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency*, 215 Ill. 2d 219, 247, 830 N.E.2d 444, 459 (2004).

¶ 39 The internal parking policy related to parking at the Harris building for Department employees and was not a matter of public concern or general applicability. See *Donnelly v. Edgar*, 117 Ill. 2d 59, 65, 509 N.E.2d 1015, 1018 (1987) (finding that a document is not a rule because it merely prescribed an internal method for maintaining consistency in the agency's decisions); *Walk v. Department of Children and Family Services*, 399 Ill. App. 3d 1174, 1185-86, 926 N.E.2d 773, 783 (2010) (finding that a policy guide was not a rule for purposes of

the APA because it merely guided agency employees in how to asses cases and did not expand an agency's authority).

¶ 40 Furthermore, formal rulemaking requires a rule to conform to the public notice and comment requirements of the APA and be filed with the Secretary of State. 5 ILCS 100/5-10(c) (West 2016). The internal parking policy did not require enactment through formal rulemaking procedures or codification in the Illinois Administrative Code. See *Applegate v. Department of Transportation*, 335 Ill. App. 3d 1056, 1064, 783 N.E.2d 96, 104 (2002) ("[T]he Department's personnel policies manual concerned only internal management and was not a binding rule or regulation adopted in compliance with the [APA] and codified in the Illinois Administrative Code.").

¶ 41 The official title of the internal parking policy stated, "Office of Fiscal Services Parking *Policy* – Harris Building." (Emphasis added.) The plain language of section 15-10(1) of the Ethics Act draws a distinction between policies and rules. 5 ILCS 430/15-10(1) (West 2010). Specifically, a policy does not trigger the protections of the Ethics Act unless that policy, or a modification to the policy, violates a "law, rule, or regulation." 5 ILCS 430/15-10(1) (West 2010).

¶ 42 Plaintiff argues that under the Illinois Unemployment Insurance Act the legislature concluded that the terms "rule" and "policy" are analogous. 820 ILCS 405/602A (West 2016). However, the Unemployment Insurance Act draws no such pronouncement and instead provides only that "the term 'misconduct' means the deliberate and willful violation of a reasonable rule or policy of the employing unit ***[.]" 820 ILCS 405/602A (West 2016). Thus, we find that the Department's internal parking policy did not qualify as a rule under the Ethics Act.

¶ 43 Even if the internal parking policy qualified as a rule under the Ethics Act, plaintiff failed to prove that she had an objectively reasonable belief that Kraus violated it. Plaintiff testified that she decided to post the fliers "to vent her frustration" because she was "upset" about Kraus's decision. Plaintiff did not, however, speak with Kraus about the parking policy or report Kraus to any authority because she "was not 100 percent positive" that a violation occurred; rather it was "just [her] belief." In fact, one of the fliers captured plaintiff's doubts about the purported violation, stating: "If it can't be proven that Carol['s] done this for an unethical reason; the next paragraph clearly shows how the Bureau of Collections is being treated unfair!"

¶ 44 Kraus also testified at length about her decision to alter the internal parking policy. As she explained, prior to 2009, parking was allocated based on the number of years an employee worked for the State. In 2009, the policy changed to consider only an employee's seniority in the Department, without taking into consideration other State employment. When Kraus reviewed the parking policy in conjunction with the move to the Harris building, she decided to return to the original policy after consulting with the chief operating officer and other parties impacted by the decision.

¶ 45 Section 15-10(1) of the Ethics Act required plaintiff to have a reasonable belief that Kraus violated the internal parking policy. 5 ILCS 430/15-10(1) (West 2010). Based on the evidence, even if plaintiff believed that Kraus, by altering the parking policy, violated a Departmental rule, her belief was not a reasonable belief; rather, it was based on mere speculation. Therefore, we conclude the circuit court's finding that plaintiff did not have an objectively reasonable belief that Kraus violated a rule was not against the manifest weight of the evidence.

¶ 46 2. *Disclosure Requirement*

¶ 47 Plaintiff next argues that she disclosed the purported violation to a supervisor or public body by posting fliers in a public place where Kraus would see them. Specifically, plaintiff argues under the Ethics Act she was not required to disclose the purported violation directly to a supervisor. Defendants argue plaintiff's actions did not constitute disclosure because plaintiff did not make known previously unknown information. We agree with defendants.

¶ 48 Plaintiff took no action constituting disclosure of Kraus's conduct to a supervisor or a public body. As plaintiff testified at trial, the subject of the fliers—the change in the parking policy—was well known around the Harris building when plaintiff posted the fliers, and obviously, Kraus knew of the change she made to the policy. Accordingly, plaintiff's actions did not amount to disclosure. See *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 19, 79 N.E.3d 184 ("The Merriam-Webster dictionary defines the verb 'disclose' as 'to expose to view' or 'to make known or public.' "); *Willms v. OSF Healthcare System*, 2013 IL App (3d) 120450, ¶ 13, 984 N.E.2d 1194 (quoting Black's Law Dictionary 531 (9th ed. 2009) (defining " 'disclosure' as '[t]he act or process of making known something that was previously unknown; a revelation of facts.' ")).

¶ 49 Plaintiff testified that she posted fliers to vent her frustration about a modification to the parking policy. Plaintiff's situation differs from circumstances where an employee brings previously unknown information of illegal or unethical activities to a supervisor or a public body. See *Crowley v. Watson*, 2016 IL App (1st) 142847, ¶¶ 31-32, 51 N.E.3d 69 (retaliation based on "contacting the Attorney General's office and disclosing information" about a supervisor's violation of the Freedom of Information Act).

¶ 50 Plaintiff argues that although she "never actually complained directly to Kraus or wrote to Kraus with her complaints," she complied with the disclosure requirement under section 15-10(1) of the Ethics Act by "posting those complaints in a public place [where] Kraus admitted that she saw [them]." However, "[i]nforming the violator his or her actions are improper does not expose to view or make known the alleged improper activity." *Sweeney*, 2017 IL App (4th) 160492, ¶ 19.

¶ 51 Plaintiff posted the fliers on her own floor in the Harris building rather than in the vicinity of Kraus's office. As a result, Kraus only saw one of the fliers herself and another employee brought the second flier to her attention. Thus, it does not appear, based on the evidence, that plaintiff intended to disclose the purported violation to Kraus but rather to complain about Kraus to other Department employees.

¶ 52 We find that because plaintiff did not engage in conduct protected by section 15-10(1) of the Ethics Act, the circuit court's finding was not against the manifest weight of the evidence.

¶ 53 3. *Retaliatory Action*

¶ 54 Lastly, plaintiff argues that the Department's retaliatory action of changing the terms and conditions of her employment was a direct result of her posting fliers about the purported violation. Defendants argue the circuit court correctly concluded that the terms and conditions of plaintiff's employment were not changed based on her posting fliers but enforced to reflect her duties as outlined in her CMS-104. We agree with defendants.

¶ 55 Under the Ethics Act, retaliatory action is defined as "reprimand, discharge, suspension, demotion, denial of promotion or transfer, or change in the terms or conditions of employment of any State employee, that is taken in retaliation for a State employee's

involvement in protected activity, as set forth in section 15-10." 5 ILCS 430/15-5 (West 2010). In *Wynn v. Illinois Department of Human Services*, 2017 IL App (1st) 160344, ¶ 58, 81 N.E.3d 28, the causation requirement—that the change be a "contributing factor"—has been defined as any factor, alone or in combination with other factors, that tends to affect the outcome of the decision.

¶ 56 Plaintiff argues she satisfied this standard because the evidence presented at trial demonstrated that defendants changed the terms and conditions of her employment after her posting of fliers about the purported violation. Specifically, plaintiff asserts three arguments support her position that her flier postings were a contributing factor to her changed job duties: (1) the "ominous conversation" between Kraus and Erickson, (2) that the decision to refocus her duties to filing "belies common sense," and (3) the timing of the events. We find the trial court appropriately rejected these arguments.

¶ 57 First, the testimony regarding the conversation between Kraus and Erickson failed to prove retaliation based on Kraus stating she would "take care of it." Whether the conversation between Kraus and Erickson took place was disputed, as Kraus denied any recollection of speaking with Erickson about plaintiff posting the fliers. Also, Kraus's statement was open to interpretation. Kraus telling Erickson that she would "take care of it" does not necessarily indicate that Kraus intended to retaliate against plaintiff. We defer to the circuit court's credibility judgments where it was in a better position to make such determinations. See *Chicago's Pizza*, 384 Ill. App. 3d at 859.

¶ 58 Second, plaintiff's belief that the Department was better served with her performing payroll and database tasks did not establish clear causation evidence. As Melliere's testimony showed, the Department decided that it would be most efficient to require plaintiff to

complete the filing duties listed in her CMS-104 and to reassign some of her other duties to other individuals. Before plaintiff took the office administrator III position, she was aware that filing was part of her job duties. Also, on her first day as office administrator III, Jordan sent an e-mail to plaintiff informing her that she would initially conduct payroll but eventually the Department planned to train other employees to take over payroll, and then plaintiff's focus would be on filing. Plaintiff's dissatisfaction with the Department's decision about her job duties did not render the determination retaliatory.

¶ 59 Lastly, plaintiff's argument regarding the timing of events does not establish causation. "[C]lose timing is usually not enough to establish a causal connection standing alone." *Flick v. Southern Illinois Healthcare, NFP,* 2014 IL App (5th) 130319, ¶ 25, 21 N.E.3d 82. Plaintiff argues the modification of her job duties came shortly after Kraus became aware of the fliers in July 2010. While Melliere informed plaintiff in August 2010 that she would be focusing on filing, the information was not new to plaintiff. In September 2009, Jordan informed plaintiff that as office administrator III, she would engage in filing as part of her job duties. Also, in August 2010, the Department reevaluated CMS-104s for all employees department wide; the Department did not single out plaintiff for this review.

¶ 60 The circuit court found that plaintiff's "job duties were not changed but were enforced to reflect her duties as outlined in [her] official CMS[-]104." The evidence demonstrated that defendants would have taken the same unfavorable personnel action in the absence of plaintiff posting the fliers. We therefore find that the circuit court's decision was not against the manifest weight of the evidence because defendants did not violate a law, rule, or regulation or retaliate against plaintiff in violation of the Ethics Act.

¶ 61 III. CONCLUSION

¶ 62 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 63 Affirmed.