

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 3, 2017

KATHY CARROLL v. MORGAN COUNTY BOARD OF EDUCATION

Appeal from the Circuit Court for Morgan County
No. 2014-CV-11 Michael S. Pemberton, Judge

No. E2017-00038-COA-R3-CV

The plaintiff Kathy Carroll, an employee of the defendant Morgan County Board of Education, was transferred to a position that she alleges she was physically unable to perform. She notes that her transfer occurred after she sent an email to a school board member complaining about school policy and practice regarding cancellation for bad weather. She brought this action stating claims for (1) age and gender discrimination under the Tennessee Human Rights Act; (2) breach of contract; (3) violation of the constitutional right to free speech; and (4) invasion of privacy. The trial court granted summary judgment on the invasion of privacy claims, stating that “all other issues are reserved for trial.” During the bench trial that followed, plaintiff’s counsel stated that plaintiff was not asserting a claim pursuant to a private right of action for violation of her right to free speech. The attorney also stated that the plaintiff was not seeking damages for such a claim. The trial court found in defendant’s favor on all claims. On appeal, plaintiff raises the sole issue of whether the trial court erred in dismissing her claim for violation of her right to free speech. We hold that plaintiff waived and abandoned this issue at trial. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which W. NEAL MCBRAYER and ARNOLD B. GOLDIN, JJ., joined.

David H. Dunaway, LaFollette, Tennessee, for the appellant, Kathy Carroll.

Kenneth S. Williams, Cookeville, Tennessee, for the appellee, Morgan County Board of Education.

OPINION

I.

Plaintiff filed a complaint alleging, among other things, that

when the Plaintiff expressed her concern for safety of her welfare, as well as the welfare of other employees, and made recommendations to the Defendant, Morgan County Board of Education, to reduce the risks of Central Office personnel placing their life in danger by being required to work on hazardous weather days, that the Defendant, Morgan County Board of Education, through . . . the Director of Schools, Edward L. Diden, retaliated against the Plaintiff for the Plaintiff having addressed her concerns.

As previously noted, plaintiff alleged four causes of action: age and gender discrimination, brought pursuant to the Tennessee Human Rights Act (THRA), Tenn. Code Ann. § 4-21-101 *et seq.*; breach of an express or implied contract of employment; violation of the constitutional right to freedom of speech; and common law claims for damage to reputation and false light invasion of privacy.

The defendant moved for summary judgment. The trial court granted the motion in part in an order stating as follows:

The parties having come before the court . . . on defendant's Motion for Summary Judgment, and the court having reviewed the court file, having read the party filings and having heard the arguments of counsel for plaintiff and defendant; and finding that plaintiff's common law actions and claims for damage to reputation and false light are variations of invasion of right of privacy claims, for which immunity has not been lifted under the Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-201 *et seq.*, and so should be dismissed; and the court further finding, viewing the evidence in the light most favorable to plaintiff as non-moving party, that a factual dispute exists on the question of pretext; and for good cause shown, it is hereby

ORDERED, ADJUDGED and DECREED that no material dispute of fact exists as to plaintiff's common law claims, as a

matter of law such claims are precluded under the [GTLA], and so summary judgment is granted in favor of defendant as to such common law claims; it is further

ORDERED, ADJUDGED and DECREED that a material dispute of fact exists as the existence of pretext, and so as to plaintiff's claims asserted under the [THRA], summary judgment is denied.

All other issues are reserved for trial.

(Capitalization in original.)

The case proceeded to a bench trial. At that point, no legal argument had been presented to the trial court regarding plaintiff's free speech claim; the only reference to such a claim in the record is the following paragraph in the complaint:

. . . the Defendant, through its agents, servants, and employees, and more specifically its Director, Edward L. Diden, has violated Article I, Section 19 of the Tennessee Constitution, which guaranteed the Plaintiff the right to freedom of speech inasmuch as the free communication of thoughts and opinions is one of the invaluable rights guaranteed to every citizen of the State of Tennessee such that every citizen may speak freely, write, and print on any subject, being responsible for the abuse of that liberty.

After close of proof, during closing arguments, the following exchange took place between the trial court and plaintiff's attorney:

THE COURT: All right. Let me ask you this. Well, one other question I want to ask before that. In Paragraph 12 of your Complaint you've alleged, or may have alleged, violation of Article 1, Section 9 [*sic*: 19] of the Tennessee Constitution in respect to freedom of speech. *I haven't heard much about that today, but are you taking the position that the law permits a private right of action from violation of –*

MR. DUNAWAY: *No, I'm not.*

THE COURT: Okay.

MR. DUNAWAY: That is asserted to show a standard of care that under the policy which is guaranteed to her, they – that’s one of the reasons why they adopted this transfer and reassignment policy.

THE COURT: I understand.

MR. DUNAWAY: And Mr. Wilson –

THE COURT: *So you’re not seeking any damages for that.*

MR. DUNAWAY: *No, no.*

(Emphasis added).

On the remaining claims of discrimination and breach of contract, the trial court ultimately ruled in favor of defendant. Its final judgment states as follows in pertinent part:

By Order dated May 25, 2016, this court dismissed the common law claims inasmuch as they are variations of invasion of right of privacy claims for which immunity has not been lifted under the [GTLA].

Additionally, the court also dismissed the plaintiff’s claims for violation of her right to freedom of speech in that no private right of action exists in Tennessee for such claims. *See Bowden Bldg. Corp. v. Tennessee Real Estate Com’m*, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999) (Tennessee has not recognized an implied cause of action for damages based upon violations of the Tennessee Constitution); *Lee v. Ladd*, 834 S.W.2d 323, 324 (Tenn. Ct. App. 1992).

As a result, the only two (2) causes of action remaining for trial, and the only two (2) that were tried, were those of age and gender discrimination brought pursuant to Tenn. Code Ann. § 4-21-101, et seq., and breach of an express or implied contract of employment.

Plaintiff timely filed a notice of appeal.

II.

Plaintiff raises these issues, as quoted verbatim from her brief:

1. Did the Trial Court err in dismissing the Plaintiff's claims for violation of her right to freedom of speech otherwise guaranteed by Article I, Section 19 of the Tennessee Constitution after the Plaintiff/Appellant had expressed through an email her concern for her safety and the safety of other personnel during inclement weather?

2. If the Trial Court did err in dismissing the Plaintiff's claims for violation of her right to freedom of speech, and given the fact that the Trial Court found that the Plaintiff's re-assignment from the position of Elementary Education Supervisor, where she had served at least nine (9) years, to the position of a first grade teacher was retaliatory, is the Plaintiff entitled to damages stemming from her retaliatory transfer and/or constructive discharge by the Director of Schools?

III.

On appeal, plaintiff argues that "the time has come for the Court of Appeals and the Supreme Court to recognize that there is a private right of action for constitutional violations and that there is a cause of action for constitutional torts except for those torts that are otherwise excluded by the [GTLA]." As stated above, plaintiff did not make this argument to the trial court. She attempts to explain the colloquy quoted above where her attorney expressly disavowed any claim for violation of free speech rights by stating the following in her reply brief:

in the Transcript of Proceedings, when the Court asked Plaintiff's counsel whether [she] was seeking any damages for a violation of the Tennessee Constitution in reference to freedom of speech, Plaintiff's counsel said, "no, I'm not," it was because the Court had previously dealt with that issue or had intended to deal with that issue in its Motion for Summary Judgment and all parties recognized that in Defendant's Motion for Summary Judgment that was

previously briefed and argued, the Court intended to dismiss that claim at the summary judgment hearing, but apparently did not do so formally. . . . It was not because of the fact that [plaintiff] did not intend to pursue that claim, but only that the Court had previously foreclosed that issue in its Memorandum Opinion and Order on the Defendant’s Motion for Summary Judgment.

This argument is unpersuasive for several reasons. First, there is nothing in the trial court’s summary judgment order, already quoted above, that states or even implies that the trial court granted summary judgment on plaintiff’s free speech claim. Directly to the contrary, the order expressly states that “[a]ll other issues are reserved for trial.” As plaintiff aptly points out, “[i]t is well-settled that a trial court speaks through its written orders.” *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015); *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977) (“No principle is better known than that which states that a Court speaks through its orders and decrees entered upon the minutes of the Court”).

Second, the trial court’s final judgment does not expressly state *when* “the court also dismissed the plaintiff’s claims for violation of her right to freedom of speech.” An inference might be drawn that the trial court was referring back to its summary judgment order, although such an inference is not supported by the language of the earlier order. Another inference may reasonably be drawn that the trial court considered the free speech claim to have been dismissed, as a practical matter, at the time when plaintiff’s counsel told the court that she was not pursuing it.

Third, if the trial court had dismissed the free speech claim on summary judgment, then the court’s question during trial – “are you taking the position that the law permits a private right of action from violation of [the right to free speech?]” – makes no sense. Fourth, if it had been the understanding of everyone involved that the free speech claim had been dismissed earlier, we believe plaintiff’s counsel would have said so at that point, rather than simply denying plaintiff was presenting such a claim.

Defendant argues that the issues raised by plaintiff are not properly before this Court because they were expressly waived. We agree. Waiver “has long been defined in the Tennessee cases as the voluntary relinquishment of a known right.” *Dallas Glass of Hendersonville, Inc. v. Bituminous Fire & Marine Ins. Co.*, 544 S.W.2d 351, 354 (Tenn. 1976). The Supreme Court has stated that waiver

may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim

the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive.

Baird v. Fidelity-Phenix Fire Ins. Co., 162 S.W.2d 384, 389 (Tenn. 1942). In this case, the statements of plaintiff's counsel could hardly have been clearer and more unequivocal. Because plaintiff waived and abandoned her free speech claim in the trial court, she cannot raise it now on appeal.

IV.

The judgment of the trial court is affirmed. Costs on appeal are assessed to the appellant, Kathy Carroll. The case is remanded to the trial court for collection of costs assessed below.

CHARLES D. SUSANO, JR., JUDGE