REL: 11/25/2009

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2009-2010

2080520

Dr. Stephen Franks, as president of Central Alabama Community College

v.

Andrew Jordan

Appeal from Montgomery Circuit Court (CV-08-900147)

MOORE, Judge.

Dr. Stephen Franks, as president of Central Alabama Community College, appeals from a judgment of the Montgomery Circuit Court granting Andrew Jordan's petition for a common-

law writ of certiorari to the administrative law judge ("the ALJ") in a proceeding brought pursuant to the Fair Dismissal Act, § 36-26-100 et seq., Ala. Code 1975 ("the FDA"). We affirm in part and reverse in part.

Facts and Procedural History

In August 2002, Trenholm State Technical College hired Jordan as its "Interim Director of Accounting." Jordan voluntarily resigned from that position in August 2003, and, in September 2003, Jordan began working for Snead State Community College as the temporary director of financial services. Jordan worked at Snead State for one year until his temporary position expired. In August 2004, Central Alabama Community College offered Jordan a temporary position as its business manager until the position could be advertised. Central Alabama subsequently extended Jordan's appointment three times, until notifying Jordan on June 27, 2007, that his temporary employment would terminate on August 15, 2007. At that time, Jordan had spent over four years in the postsecondary school system. Jordan appealed the decision to terminate his employment to the Chief Administrative Law Judge of the Office of Administrative Hearings in the Division of

Administrative Law Judges of the Office of the Attorney General. See § 36-26-115, Ala. Code 1975.

The ALJ assigned to hear Jordan's appeal ordered the parties to file briefs regarding whether the due-process requirements of the FDA had been complied with and stated that she would determine that issue without holding a hearing. On January 9, 2008, the ALJ dismissed Jordan's appeal, stating that Jordan had not reached nonprobationary status at the time his employment was terminated and, thus, that he was not entitled to the due-process protections of the FDA. On January 29, 2008, Jordan filed a "motion to reconsider"; the ALJ denied that motion on the basis of lack of jurisdiction on January 30, 2008. On February 8, 2008, Jordan filed a petition for a common-law writ of certiorari in the Montgomery Circuit Court.

On January 29, 2009, the circuit court issued a writ of certiorari to the ALJ, stating that the ALJ had erred in holding that Jordan was not a nonprobationary employee. Specifically, the circuit court concluded that the FDA does not require that an employee's three-year probationary period must be fulfilled by working for a single two-year

institution. The circuit court ordered that the termination of Jordan's employment be rescinded and that Jordan be awarded backpay "without regard to any mitigation on [Jordan's] part." On March 3, 2009, Franks filed a notice of appeal to this court.

Standard of Review

> "In South Alabama Skills Training Consortium v. Ford, 997 So. 2d 309, 324 (Ala. Civ. App. 2008), this court held that a party aggrieved by an ALJ's determination as to whether someone is an employee covered by the FDA may seek review of that determination by way of a petition for a common-law writ of certiorari filed in the circuit court.
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>> "'The circuit court's standard of review of a petition for a common-law writ of certiorari is well settled. On common-law certiorari review, the circuit court's "scope of review was limited to determining if the [ALJ's] decision ... was supported by legal evidence and if the law had been correctly applied to the facts." Evans v. City of Huntsville, 580 So. 2d 1323, 1325 (Ala. 1991). "In addition, the court was responsible for reviewing the record to ensure that the fundamental rights of the parties, including the right to due process, had not been violated." Id. "Questions of fact or weight or sufficiency of the evidence will not be reviewed on certiorari." Personnel Bd. of Jefferson County v. Bailey, 475 So. 2d 863, 868 (Ala. Civ. App. 1985).
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>>> "'"'"[A] common-law writ of certiorari extends only to

> > questions touching the jurisdiction of the subordinate tribunal and the legality of its proceedings. The appropriate office of the writ is to correct errors of law apparent on the face of the record. Conclusions of fact cannot be reviewed, unless specially authorized by statute. The trial is not de novo but on the record; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review."'"
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> "'G.W. v. Dale County Dep't of Human Res., 939 So. 2d 931, 934 n.4 (Ala. Civ. App. 2006) (quoting City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919), quoting in turn Postal Tel. Co. v. Minderhout, 195 Ala. 420, 71 So. 91 (1916)). "This court's scope of appellate review is the same as that of the circuit court." Colbert County Bd. of Educ. v. Johnson, 652 So. 2d 274, 276 (Ala. Civ. App. 1994).'"

"Ford, 997 So. 2d at 324.

Holland v. Pearson, [Ms. 2070996, Dec. 19, 2008] ___ So. 3d ___, ___ (Ala. Civ. App. 2008).

Discussion

Franks first argues on appeal that the circuit court erred in issuing the writ of certiorari because, Franks says, Jordan had not reached nonprobationary status at the time his

employment was terminated because he had not worked at a single two-year educational institution for the requisite three-year period. Jordan, on the other hand, argues that the FDA does not require that an employee work three years at the same two-year educational institution in order to reach nonprobationary status. We agree with Jordan.

> "The 'overall purpose of the [FDA] [is] to provide non-teacher employees [of the public school system] a fair and swift resolution of proposed employment terminations.' Bolton v. Board of School Commissioners of Mobile County, 514 So. 2d 820, 824 (Ala. 1987). In order to achieve this purpose, the [FDA] provides statutory guidelines for the termination of those employees protected by [the FDA], such as requiring notification, along with reasons of the proposed termination, and allowing a hearing."

Ex parte Clayton, 552 So. 2d 152, 154 (Ala. 1989). Section 36-26-100, Ala. Code 1975, a part of the FDA, defines "employees" as:

> "all persons employed by county and city boards of education, two-year educational institutions under the control and auspices of the State Board of Education, the Alabama Institute for Deaf and Blind, including production workers at the Alabama Industries for the Blind, and educational and correctional institutions under the control and auspices of the Alabama Department of Youth Services, who are so employed by any of these employers as bus drivers, lunchroom or cafeteria workers, maids and janitors, custodians, maintenance personnel, secretaries and clerical assistants,

> full-time instructors as defined by the State Board of Education, supervisors, and all other persons not otherwise certified by the State Board of Education."

(Emphasis added.) Pursuant to Ala. Code 1975, § 36-26-101(a), employees, as defined above, are "deemed employed on a probationary status for a period not to exceed three years from the date of his or her initial employment."

In Ex parte Clayton, supra, our supreme court considered whether it should read into § 36-26-101(a) a requirement that an employee be employed for three consecutive years in order to attain nonprobationary status. The court noted that although the Teacher Tenure Act, § 16-24-1 et seq., Ala. Code 1975, specifically requires that the three years of employment necessary to attain continuing-service status under the act be consecutive, the FDA does not contain a similar requirement for obtaining nonprobationary status under it. The court reasoned:

> "'Where it appears from the context that certain words have been inadvertently omitted from a statute, the court may supply such words as are necessary to complete the sense, and to express the legislative intent, but it cannot supply words purposely omitted, and should supply an omission only when the omission is palpable and the omitted word plainly

> > indicated by the context; and words will not be added except when necessary to make the statute conform to the obvious intent of the legislature or prevent the act from being absurd; and where the legislative intent can be accurately determined because of the omission, the court cannot add words so as to express what might or might not be intended.'
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> "State v. Calumet & Hecla Consol. Copper Co., 259 Ala. 225, 232, 66 So. 2d 726 (1953). We do not find that the [FDA] will be rendered absurd, or its purpose defeated, or the legislative intent obstructed by enforcing a literal interpretation of it. If the legislature had intended that the requisite term of probationary employment be consecutive or continuous, it would have so stated. There is no language within the text of the [FDA] to support the construction requiring three consecutive years of probationary service from the date of the employee's initial employment."

Clayton, 552 So. 2d at 154-55.

Similarly, with regard to the issue in this case, the FDA does not specify that an employee must work at the same two-year educational institution for three years in order to attain nonprobationary status. In contrast, the Teacher Tenure Act specifically requires a teacher to be employed "in the same county or city school system" for three consecutive years in order to achieve continuing-service status. § 16-24-2(a). Just like the court in Clayton, "[w]e do not find that the [FDA] will be rendered absurd, or its purpose defeated, or

the legislative intent obstructed by enforcing a literal interpretation of it." 552 So. 2d at 154. Accordingly, we conclude that the circuit court correctly determined that the fact that Jordan had not worked for a single two-year educational institution for three years did not prohibit him from attaining nonprobationary status.

Franks argues that the ALJ, quoting Hulcher v. Taunton, 388 So. 2d 1203, 1206 (Ala. 1980), correctly concluded that the Alabama Supreme Court "has maintained that[,] based upon the statutory structure of the Alabama postsecondary institutions, those institutions do 'not operate as one system for the purpose of tenure'" and that the Hulcher "interpretation" has not been changed since that case was decided. In Hulcher, the issue whether the state's trade and technical schools acted independently or as one employing entity was crucial to the determination of whether the plaintiff had attained tenure status under a resolution passed by the State Board of Education adopting provisions of the Teacher Tenure Act, which, as noted earlier, requires that an employee be employed for three years in the "same county or city school system" in order to obtain continuing-service

status under that act. However, also as noted earlier, the FDA does not contain the same language as the Teacher Tenure Act; rather, the FDA refers to "all persons employed by ... two-year educational institutions under the control and auspices of the State Board of Education." Ala. Code 1975, § 36-26-100. No provision in the FDA indicates any legislative intent to limit the applicability of the FDA to only employees who have worked at the same two-year college for three years. Hence, Hulcher is inapplicable in this case.

Franks also argues that this court's decision in Holland v. Pearson, supra, lends support to his argument. In Holland, however, this court did not reach the issue whether an aggregate three years' employment in multiple two-year colleges qualifies an employee for nonprobationary status because the employee at issue in Holland had not spent three years employed by various two-year colleges. ___ So. 3d at ___. Instead, a portion of the employee's pertinent three-year employment history had been spent working directly for the State Department of Education, which is not a "two-year educational institution." ___ So. 3d at ___. Thus, our holding in Holland does not apply in this case.

Franks next argues that he was not bound to follow the statutory guidelines regarding the dismissal of employees protected by the FDA because, he says, Jordan's "temporary" employment was not terminated but, instead, simply expired. Franks asserted that argument before the ALJ, but the ALJ did not render a decision as to that argument; instead, the ALJ dismissed the case exclusively on the ground that Jordan had not been employed by the same two-year educational institution for three years. Likewise, the circuit court did not make a ruling on that issue. Hence, under our limited scope of review, we cannot reach the merits of that argument. See, e.g., Holland, ___ So. 3d at ___. We note, however, that nothing in our opinion should be construed as preventing the ALJ from addressing that argument on remand.

Finally, Franks argues that the circuit court exceeded its authority by not only quashing the ALJ's decision, but by also ordering that the termination of Jordan's employment be rescinded and that Jordan be awarded backpay. We agree. "'"[T]he only matter to be determined [on certiorari review] is the quashing or the affirmation of the proceedings brought up for review."'" G.W. v. Dale County Dep't of Human Res.,

939 So. 2d 931, 934 n.4 (Ala. Civ. App. 2006) (quoting City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919)). Pursuant to the circuit court's limited standard of review, the only issue before the circuit court was whether the ALJ had erred in dismissing Jordan's appeal on the ground that Jordan had not been employed by the same two-year educational institution for three years. By correctly determining that the ALJ had erred in its legal conclusion, the only remedy the circuit court could render under a petition for a common-law writ of certiorari was to declare that error, quash the dismissal, and remand the case to the ALJ for further proceedings. The circuit court exceeded the scope of its review by ordering further relief.

Conclusion

Based on the foregoing, we reverse the circuit court's judgment to the extent that it ordered that the termination of Jordan's employment be rescinded and that Jordan be awarded backpay. We otherwise affirm the judgment of the circuit court. The circuit court is directed to remand the case to the ALJ for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman and Thomas, JJ., concur.

Bryan, J., concurs specially.

BRYAN, Judge, concurring specially.

It seems to defy logic that an employee who agrees to "temporary" positions will achieve "permanent," nonprobationary status by merely remaining employed in those temporary positions for a total of three years. However, based on the well-reasoned analysis of the main opinion and the authorities cited therein, I am compelled to concur.