REL: September 8, 2023

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2023

2200821

Anthony Keith, Ronald C. Smith, William T. Gipson, and Latonya J. Gipson

v.

Lance R. LeFleur, in his official capacity as Director of the Alabama Department of Environmental Management; and Marilyn G. Elliott, in her official capacity as a Deputy Director and the Nondiscrimination Coordinator of the Alabama Department of Environmental Management

Appeal from Montgomery Circuit Court (CV-19-900283)

On Application for Rehearing

MOORE, Judge.

This court's opinion released on June 23, 2023, is withdrawn, and the following is substituted therefor.

Anthony Keith, Ronald C. Smith, William T. Gipson, and Latonya J. Gipson ("the landowners") appeal from a judgment entered by the Montgomery Circuit Court ("the trial court") in favor of Lance R. LeFleur ("the director"), in his official capacity as the director of the Alabama Department of Environmental Management ("ADEM"), and Marilyn G. Elliott, in her official capacity as a deputy director at ADEM who serves as ADEM's nondiscrimination coordinator ("the nondiscrimination coordinator"). We reverse the trial court's judgment and remand with instructions for the trial court to enter a summary judgment in favor of the landowners.

Background

The Civil Rights Act of 1964 provides that "[n]o person ... shall ... be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Section 42 U.S.C. § 2000d-1, requires federal agencies "empowered to extend Federal financial assistance to any program or activity" to issue rules and regulations to achieve the objective of preventing and redressing unlawful discrimination committed by the recipient of the financial

assistance. Pursuant to 42 U.S.C. § 2000d-1, the United States Environmental Protection Agency ("the EPA") promulgated a rule generally prohibiting unlawful discrimination, including racial discrimination, "under any program or activity receiving EPA assistance ...." 40 C.F.R. § 7.30. Furthermore, the EPA directed that "each recipient [of EPA financial assistance] shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of[, among other subparts, 40 C.F.R. § 7.30]." 40 C.F.R. § 7.90(a).

ADEM is a state agency that receives financial assistance from the EPA. On November 5, 2018, the director, expressly citing 40 C.F.R. § 7.90(a), issued a memorandum ("the November 5, 2018, memorandum") to the nondiscrimination coordinator, adopting procedures for resolving complaints of unlawful discrimination ("the grievance procedures"). The November 5, 2018, memorandum provides, in pertinent part:

> "The Nondiscrimination Coordinator will process complaints alleging discrimination by ... []ADEM[] on the basis of race, color, national origin, disability, age, sex, retaliation or intimidation against any individual or group as protected by 40 C.F.R. Parts 5 and 7 (see paragraph (10) below), as follows:

"(1) Complaints alleging discrimination by ADEM will be forwarded to ADEM's Nondiscrimination Coordinator in Montgomery.

"(2) In cases where the complainant is unable or incapable of providing a written statement, a verbal complaint of discrimination will be forwarded to the Nondiscrimination Coordinator at [a specified telephone number]. The complainant will be interviewed by an ADEM employee who, if necessary, will assist the person in converting [oral] complaints to writing.

"(3) All complaints alleging discrimination by ADEM shall be reviewed for the following information:

> "a. the specific action(s) by ADEM that allegedly discriminate or result in discrimination in violation of 40 C.F.R. Parts 5 and 7.
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> "b. the specific impact that allegedly has occurred or will occur as the results of such action(s); and
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> "c. the identity of the parties subjected to, impacted by, or potentially impacted by the alleged discrimination.

"(4) Within ten working days of receipt of the complaint, ADEM will provide the complainant or his/her representative with a written acknowledgement of receipt and notice of how the complaint will be investigated. ADEM will also notify complainants that their complaint may also be filed with the U.S. EPA, External Civil Rights Compliance Office, 1200 Pennsylvania Avenue, N.W., Mail Code 1201A, Washington, DC 20460-1000 in accordance with 40 C.F.R. Parts 5 and 7.

"(5) The Nondiscrimination Coordinator, based on the information in the complaint and any additional information provided by the complainant, will determine if the matters alleged are within the jurisdiction of 40 C.F.R. Parts 5 and 7, and whether the complaint has sufficient merit to warrant an investigation. These determinations will be made within fifteen working days after the receipt of the complaint by ADEM. A complaint will be regarded as meriting investigation unless:

> "a. it clearly appears on its face to be frivolous or trivial;
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> "b. Within the time allotted for making the determination of jurisdiction and investigative merit, ADEM voluntarily concedes noncompliance and agrees to take appropriate remedial action or reaches an informal resolution with the complainant; or
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> "c. Within the time allotted for making the determination of jurisdiction and investigative merit, the complainant withdraws the complaint.

"(6) If the Nondiscrimination Coordinator accepts the complaint, the Coordinator will designate an individual to investigate the allegation(s). After examining all of the information in light of the requirements of 40 C.F.R. Parts 5 and 7, the investigator will draft a report with findings and recommendations.

"(7) In the event that the complainant has not submitted sufficient information to make a determination of jurisdiction or investigative merit, ADEM may request additional information. This request shall be made within fifteen working days of the receipt of the complaint by ADEM. The

complainant is under no obligation to provide any requested information.

"(8) In the case of complaints involving third party entities[,] e.g.[,] a sub-recipient, permit applicant or permittee, ADEM will notify the third party entity that the complaint has been received no later than the time of the written notice provided to a complainant that the complaint has been accepted. At such time, ADEM will ask the third party entity to provide information necessary for ADEM to investigate the complaint. ADEM will use the information provided by the third party entity and the complainant in resolving the complaint.

"(9) Within 120 days of accepting the complaint, the Office of the Director will respond in writing to the complainant approving or disapproving the findings and recommendations made in the investigative report, based upon a preponderance of the evidence. ADEM will implement the recommendations approved by the Office of the Director.

"(10) ADEM employees shall not retaliate, intimidate, threaten, coerce, or discriminate against any individual or group for the purpose of interfering with any right or privilege granted under 40 C.F.R. Parts 5 and 7, or because an individual has filed a complaint or has testified, assisted, or participated in any way in an investigation, or has opposed any practice made unlawful under 40 C.F.R. Parts 5 and 7.

"By and through this delegation of responsibilities to the ADEM Nondiscrimination Coordinator, the above procedures are hereby adopted to assure the prompt and fair resolution of complaints which allege unlawful discrimination under Title VI, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7."

On February 18, 2019, the landowners filed a complaint in the trial court seeking a judgment declaring that the grievance procedures developed and adopted by the director in the November 5, 2018, memorandum are invalid and seeking to enjoin their implementation. In the complaint, the landowners alleged that each of them had been subjected to racial discrimination by certain permitting activities of ADEM relating to landfills and wastewater facilities operating near their residences. The landowners asserted that they each have an interest in filing a grievance against ADEM based on the alleged racial discrimination but that ADEM had impaired their ability to file such a grievance by failing to validly adopt the grievance procedures.

The director and the nondiscrimination coordinator filed an answer to the complaint on March 25, 2019. The parties later filed competing motions for a summary judgment, and, on June 11, 2021, the trial court entered a summary judgment against the landowners, concluding that the landowners lacked standing to maintain a challenge to the validity of the grievance procedures. Having concluded that the landowners had failed to establish standing, which is a jurisdictional defect, see State v.

Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999), the trial court dismissed the landowners' complaint. The landowners timely appealed to this court, which has jurisdiction over the appeal pursuant to Ala. Code 1975, § 12-3-10 ("The Court of Civil Appeals shall have exclusive appellate jurisdiction of all ... appeals from administrative agencies other than the Alabama Public Service Commission ...."), as construed by our supreme court in Kimberly-Clark Corp. v. Eagerton, 433 So. 2d 452, 454 (Ala. 1983) ("We hold that § 12-3-10, in referring to 'appeals from administrative agencies,' was intended to grant to the Court of Civil Appeals exclusive jurisdiction of all appeals involving the enforcement of, or challenging, the rules, regulations, orders, actions, or decisions of administrative agencies.").

Standard of Review

Although the trial court ordered that the case be "dismissed," it determined that the landowners lacked standing when ruling on the motions for a summary judgment, and, thus, this court must apply the standard of review applicable to a summary judgment. See Elgin v. Alfa Corp., 598 So. 2d 807, 810 (Ala. 1992) (addressing the dismissal of a

complaint without prejudice based on a lack of standing pursuant to the standard of review for a summary-judgment motion because the trial court had considered matters outside the pleadings).

> "Our standard of review for a summary judgment is as follows:
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> > "'We review the trial court's grant or denial of a summary-judgment motion de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Bockman v. WCH, L.L.C., 943 So. 2d 789 (Ala. 2006). Once the summary-judgment movant shows there is no genuine issue of material fact, the nonmovant must then present substantial evidence creating a genuine issue of material fact. Id. "We review the evidence in a light most favorable to the nonmovant." 943 So. 2d at 795. We review questions of law de novo. Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330 (Ala. 2006).'"

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 793 (Ala. 2007) (quoting Smith v. State Farm Mut. Auto. Ins. Co., 952 So. 2d 342, 346 (Ala. 2006)).

The Evidence

The evidence relevant to our disposition of this appeal is as follows. In their sworn answers to interrogatories, each of the landowners

indicated that ADEM had permitted the operation of the landfills and wastewater-treatment facilities near their residences. According to the landowners, ADEM permitted those facilities to operate in such a manner as to interfere with the use and enjoyment of their properties by exposing them to foul odors, disease vectors, and dust emissions, and that those conditions diminished the value of their properties. The landowners claimed that ADEM's permitting actions had had a discriminatory effect on them due to their race. The landowners stated that they wanted ADEM to investigate the permits of the various facilities and to take actions to abate those conditions. The landowners claimed that they each intended to file a racial-discrimination grievance with ADEM. The landowners maintained that none of them had actually filed a grievance with ADEM because, they alleged, the grievance procedures had not been validly adopted by ADEM. It is undisputed that the grievance procedures are wholly contained within the November 5, 2018, memorandum, which was issued by the director without any public notice, comment, or hearing. The landowners asserted that, because of the alleged invalidity of the grievance procedures, any relief they

obtained through following those procedures would be ineffective. The landowners did not present any evidence indicating that any third party would challenge any relief provided to them by ADEM through the grievance procedure.

Analysis

The landowners argue on appeal that the trial court erred in concluding that they lacked standing to challenge the grievance procedures and in entering a summary judgment in favor of the director and the nondiscrimination coordinator. The landowners maintain that the trial court should have entered a summary judgment in their favor. We agree.

Generally speaking, "[t]he concept of 'standing' refers to a plaintiff's ability to bring the action; the plaintiff must have a legally sufficient interest in that lawsuit, and, if he or she does not, the trial court does not obtain jurisdiction over the case ...." Ex parte Merrill, 264 So. 3d 855, 862 (Ala. 2018).

> "A party establishes standing to bring a ... challenge ... when it demonstrates the existence of (1) an actual, concrete and particularized 'injury in fact' -- 'an invasion of a legally protected interest'; (2) a 'causal connection between the injury

> and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.' Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). A party must also demonstrate that 'he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.' Warth [v. Seldin], 422 U.S. [490,] 518, 95 S.Ct. 2197 [(1975)]."

Alabama Alcoholic Beverage Control Bd. v. Henri–Duval Winery, L.L.C., 890 So. 2d 70, 74 (Ala. 2003). See also Ex parte Alabama Educ. Television Comm'n, 151 So. 3d 283, 287 (Ala. 2013).

More particularly, when a citizen challenges the validity of an administrative rule or regulation through an action for declaratory and injunctive relief, the determination whether that citizen has standing to maintain that challenge in court is controlled by the language of Ala. Code 1975, § 41-22-10, a part of the Alabama Administrative Procedures Act ("the AAPA"), Ala. Code 1975, § 41-22-1 et seq. See Medical Ass'n of State of Alabama v. Shoemake, 656 So. 2d 863, 866 (Ala. Civ. App. 1995); see also Health Care Auth. of Athens & Limestone Cnty. v. Statewide Health Coordinating Council, 988 So. 2d 574, 579 (Ala. Civ. App. 2008); Ex parte Alabama State Bd. of Chiropractic Exam'rs, 11 So. 3d 221, 226 (Ala. Civ. App. 2007). Section 41-22-10 provides:

> "The validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed by injunctive relief in the circuit court of Montgomery County, unless otherwise specifically provided by statute, if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. In passing on such rules the court shall declare the rule invalid only if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in this chapter."

"Section 41-22-10 provides that one has standing to challenge an administrative rule if he shows that the rule 'interferes with or impairs, or threatens to interfere with or impair, [his] legal rights or privileges.'" Shoemake, 656 So. 2d at 866.

In this case, the landowners brought an action for declaratory and injunctive relief to challenge the validity of the grievance procedures adopted by ADEM in the November 5, 2018, memorandum. The landowners maintain in their complaint that the grievance procedures are invalid because neither ADEM nor the director had the statutory authority to adopt the grievance procedures and because ADEM and the director did not subject the grievance procedures to public notice,

comment, and hearing as required by the rulemaking procedures within the AAPA. We conclude that the landowners' action is based on § 41-22-10. We recognize that ADEM, the director, and the nondiscrimination coordinator contest that the grievance procedures fall within the AAPA statutory definition of the term "rule" contained in Ala. Code 1975, § 41-22-3(9), and that § 41-22-10 expressly provides for actions to challenge "the validity or applicability of a rule." However, before the trial court could decide whether the grievance procedures were invalid for failing to comply with the rulemaking procedures set forth in the AAPA, the trial court had to first determine whether the grievance procedures were, in fact, a "rule." See Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179, 1182 (Ala. 1988). We agree with other jurisdictions that have held that an administrative-procedure statute bestowing upon a court jurisdiction to hear an action challenging the validity of an agency rule necessarily authorizes that court to decide the threshold question of whether that agency's action qualifies as a rule in the first place. See Phoenix Children's Hosp. v. Arizona Health Care Cost Containment Sys. Admin., 195 Ariz. 277, 281, 987 P.2d 763, 767 (Ct. App. 1999) ("[T]he superior

court's jurisdiction ... to determine the validity of a 'rule' requires an affirmative resolution of a critical threshold question: whether the challenged practice or policy is a 'rule' ...."); see also King v. Gorczyk, 175 Vt. 220, 227, 825 A.2d 16, 23 (2003); State Dep't of Admin., Div. of Pers. v. Harvey, 356 So. 2d 323, 325 (Fla. Dist. Ct. App. 1977). Thus, the entirety of the controversy between the parties fell within the ambit of § 41-22-10.

"[T]he phrase 'interferes with or impairs, or threatens to interfere with or impair, [the plaintiff's] legal rights or privileges' is liberally construed to confer standing on a broad class of plaintiffs who seek to challenge administrative regulations." Shoemake, 656 So. 2d at 866. The landowners fall within that class. In Alexander v. Sandoval, 532 U.S. 275, 289 (2001), the United States Supreme Court held that 42 U.S.C. § 2000d-1 does not establish a private right of action to redress disparate-impact racial discrimination. It does not follow, however, that a citizen claiming that ADEM has subjected him or her to such discrimination has no remedy. 40 C.F.R. § 7.90(a) requires ADEM to "adopt grievance procedures that assure the prompt and fair resolution of complaints"

alleging disparate-impact racial discrimination. Although under Sandoval, 40 C.F.R. § 7.90(a) does not establish a private right of action, it can -- and does -- provide the procedure for private citizens to obtain administrative relief directly from a state agency. In this case, if ADEM did not comply with 40 C.F.R. § 7.90(a) by failing to validly promulgate the grievance procedures, the landowners could be deprived of access to that specific remedy.

ADEM maintains that the landowners lack standing because, it says, it could still provide relief to the landowners even if the grievance procedures are invalid and that it is unlikely that a third party would challenge that relief. However, pursuant to Ala. Code 1975, § 41-22-4(b), any action taken by an agency based on an invalid rule is generally void. See Brunson Constr. & Env't Servs. Inc. v. City of Prichard, 664 So. 2d 885, 893 (Ala. 1995) (discussing § 41-22-4(b) and concluding that an agency's failure to comply with the rulemaking requirements of the AAPA, among other things, voids any action taken by the agency based on that rule). Even if ADEM was to afford the landowners an administrative remedy and no third party came forward to contest that

relief, it remains that any remedy ADEM instituted pursuant to the grievance procedures would be unenforceable by the landowners if those procedures were not valid. Accordingly, the landowners have demonstrated that the application of the grievance procedures at least threatens their ability to obtain valid administrative relief from ADEM, which is sufficient for them to have standing to maintain an action under § 41-22-10.

We acknowledge that, in the proceedings below, the parties did not specifically litigate the question of standing under § 41-22-10 and that the trial court decided that the landowners lacked standing based on general standing principles. Nevertheless, as explained by our supreme court in Munza v. Ivey, 334 So. 3d 211, 220 (Ala. 2021), the language contained in § 41-22-10 is intended to incorporate the traditional elements of standing. Moreover, standing concerns the question of the subject-matter jurisdiction of the trial court, which remains open for review at all stages of the litigation. Ex parte Howell Eng'g & Surveying, Inc., 981 So. 2d 413, 418 (Ala. 2006). This court is not limited to the precise arguments of the parties made in the trial court or to the analysis

used by the trial court in deciding this jurisdictional issue. See generally Ex parte Thompson Tractor Co., 227 So. 3d 1234, 1239 (Ala. Civ. App. 2017).

For the foregoing reasons, we conclude that the trial court erred in dismissing the action below based upon the asserted lack of standing of the landowners. That error does not necessarily require reversal of the summary judgment, however. This court reviews the trial court's granting of the motion for a summary judgment de novo. Smith, supra. "In reviewing a trial court's judgment, we are not limited by the reasoning the trial court applied in reaching its judgment. Instead, we can affirm a trial court's judgment if it was correct for any valid legal reason." Rogers v. Penske Truck Leasing Co., L.P., 37 So. 3d 780, 789 (Ala. Civ. App. 2009). In this case, however, we find no other valid legal basis for affirming the judgment. The November 5, 2018, memorandum sets forth a "rule" regulating the procedure for resolving complaints of unlawful discrimination, and that rule was subject to the rulemaking procedures of the AAPA. Because it is undisputed that ADEM did not follow the proper rulemaking procedures before adopting the grievance

procedures by an informal memorandum, the grievance procedures are invalid. Thus, the trial court committed reversible legal error in entering a summary judgment in favor of the director and the nondiscrimination coordinator.

The AAPA, which governs the procedure for all state agencies, see Ala. Code 1975, § 41-22-2(a), generally defines the term "rule" to include "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency," Ala. Code 1975, § 41-22-3(9). The November 5, 2018, memorandum unquestionably contains a "statement of general applicability ... that implements ... law or policy [and] ... describes the ... procedure, or practice requirements ... of [the] agency." The November 5, 2018, memorandum was written solely to provide a grievance procedure to comply with 40 C.F.R. § 7.90(a). The grievance procedures contained within the November 5, 2018, memorandum apply generally to all discrimination complaints received by ADEM. The November 5, 2018, memorandum describes step-by-step exactly how ADEM will process each and every

discrimination complaint "to assure the prompt and fair resolution of complaints which allege unlawful discrimination under Title VI, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7." The directives contained within the November 5, 2018, memorandum are not merely guidelines or recommendations on how to process discrimination grievances; the director uses mandatory terms throughout that memorandum to establish uniform grievance procedures that ADEM is bound to follow in every case. See Families Concerned About Nerve Gas Incineration v. Alabama Dep't of Env't Mgmt., 826 So. 2d 857, 864 (Ala. Civ. App. 2002) (noting that court shall consider intent of agency to be bound by standard in deciding whether that standard is a rule within the meaning of the AAPA). Every characteristic of the November 5, 2018, memorandum falls neatly within the general definition of a "rule" contained within the AAPA. See also Ala. Code 1975, § 41-22-4(a)(2) (requiring each administrative agency to "[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures available"); Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179, 1183 (Ala. 1988) (recognizing that a rule need not

concern substantive law, but may be entirely procedural in nature and concluding that an amendment to the state health plan was a procedural rule because it established a mandatory methodology for obtaining a certificate of need).

The director and the nondiscrimination coordinator contend that the November 5, 2018, memorandum cannot be considered a "rule" because the definition of that term specifically excepts from the term "rule" "statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public" and "[i]ntergovernmental, interagency, and intra-agency memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public or any segment thereof." §§ 41-22-3(9)(a) & (c). The director and the nondiscrimination coordinator bore the burden of proving each element necessary to bring them within those statutory exceptions. See Wood v. State Pers. Bd., 705 So. 2d 413, 416 (Ala. Civ. App. 1997). We conclude that they did not satisfy that burden.

Under 40 C.F.R. § 7.90, ADEM is required to develop a valid, fair, and prompt administrative procedure for resolving complaints of unlawful discrimination made against ADEM by members of the public. It is undisputed that ADEM has not adopted any grievance procedures other than those contained within the November 5, 2018, memorandum and that the legislature has not enacted any law establishing or regulating the grievance procedures to be employed in this context. Thus, the November 5, 2018, memorandum establishes the only administrative-grievance procedures available to the public for resolving complaints alleging unlawful discrimination against ADEM. Concededly, the November 5, 2018, memorandum describes mainly the internal procedures by which ADEM personnel shall process discrimination complaints once they are received from the public, but the grievance procedures cannot be characterized as "statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public." § 41-22-3(9)(a) (emphasis added). Indisputably, the November 5, 2018, memorandum is an "intra-agency memorandum" but, as explained, the directives within that

memorandum "substantially affect the ... procedures available to, the public or any segment thereof." § 41-22-3(9)(c).

In Byrne v. Galliher, 39 So. 3d 1049 (Ala. 2009), our supreme court considered the statutory exceptions to the term "rule" contained in §§ 41-22-3(9)(a) and (c) in ascertaining whether the policy of the State Board of Education providing that "'[e]mploying authorities may not employ any elected state official'" was a "rule" under the AAPA. 39 So. 3d at 1051. Our supreme court opined that the challenged policy dealt with internal-management matters -- that it was "not analogous to 'legislation applicable to all persons or a relatively large segment of the population outside the context of any specific controversy,'" but was instead "more like 'administrative activity that has a judicial character' because [the policies] arise[] out of a specific controversy,'" that is, whether an employee who had become an elected official could maintain his or her employment within the two-year-college system, which that court determined was a matter of "'personal rights within the context of a personnel action.'" 39 So. 3d at 1058 (quoting Wood, 705 So. 2d at 417).

"The term 'rule' is intended to have a broad definition in regard to

the procedural requirements of the AAPA." Hartford Healthcare, Inc. v. Williams, 751 So. 2d 16, 20 (Ala. Civ. App. 1999). Accordingly, the exceptions to the term "rule" must be applied narrowly in cases like Byrne in which the statement of the agency clearly and unmistakably falls within the exceptions. This case differs materially from Byrne because the November 5, 2018, memorandum does not deal with internal personnel management, regulate the employment practices of an administrative agency, or concern the private rights of agency employees. The November 5, 2018, memorandum legislates the procedures available to the public at large for resolving any discrimination grievance filed with ADEM. The grievance procedures do not arise from any specific controversy; the grievance procedures establish a uniform procedure to be followed to resolve each and every discrimination complaint submitted to ADEM. The November 5, 2018, memorandum sets forth a procedural rule that is mandatory in nature and is generally applicable to any discrimination complaint, whether based on racial disparities or any other form of unlawful discrimination. The exceptions found in § 41-22-9(3)(a) and (c) cannot be construed to apply to the grievance procedures.

According to § 41-22-4(b), "[n]o agency rule ... shall be valid or effective against any person or party nor may it be invoked by the agency for any purpose until it has been made available for public inspection and indexed as required by this section and the agency has given all notices required by [Ala. Code 1975, §] 41-22-5." In turn, § 41-22-5 provides that, except in certain emergency circumstances not relevant to this case, before an agency adopts a rule, the agency shall give at least 35 days' written notice of the intended action and afford interested persons a reasonable opportunity to present their views on the merits of the proposed rule. Section 41-22-5(d) provides that no rule adopted is valid without substantial compliance with the public-notice and comment requirements. The director and the nondiscrimination coordinator do not dispute that the November 5, 2018, memorandum was issued without complying with the public-notice and comment provisions of § 41-22-5. Accordingly, the grievance procedures established in the November 5, 2018, memorandum are not valid and effective and, therefore, cannot be invoked by ADEM for any purpose, including for the purpose of resolving

the racial-discrimination complaints of the landowners in this case. See Ex parte Legal Env't Assistance Found., Inc., 832 So. 2d 61 (Ala. 2002).

The landowners brought this action to obtain a judgment declaring that the grievance procedures set forth in the November 5, 2018, memorandum are invalid and to obtain injunctive relief preventing ADEM from implementing those procedures. The landowners were entitled to a summary judgment as a matter of law on each point. Under § 41-22-4(b) and § 41-22-5(d), the grievance procedures are invalid, so the landowners were entitled to a declaratory judgment stating as much. See Ala. Code 1975, § 41-22-10. Furthermore, because § 41-22-4(b) provides that an invalid rule cannot be invoked for any purpose, the landowners were entitled to an injunction prohibiting the implementation of the grievance procedures by ADEM. Id. The trial court erred in failing to enter a summary judgment in favor of the landowners. We, therefore, reverse the judgment and remand the case with instructions for the trial court to vacate the final judgment and to enter a summary judgment in favor of the landowners.

APPLICATION GRANTED; OPINION OF JUNE 23, 2023,

WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Fridy, J., concur.

Hanson, J., concurs in part and dissents in part, with opinion.

Edwards, J., dissents, with opinion.

HANSON, Judge, concurring in part and dissenting in part.

I agree with the conclusion in the main opinion that Anthony Keith, Ronald C. Smith, William T. Gipson, and Latonya J. Gipson ("the landowners") had standing to challenge the November 5, 2018, memorandum.[1] However, the November 5, 2018, memorandum issued by Lance R. LeFleur, in his official capacity as the director of the Alabama Department of Environmental Management ("ADEM") setting forth policies governing the work responsibilities of ADEM's employees responding to or otherwise investigating or assessing environmental-discrimination complaints lodged with ADEM does not abridge or enlarge the rights of members of the public to ADEM's due consideration of such complaints. Accordingly, I agree with the director of ADEM that although the Alabama Administrative Procedures Act ("AAPA") requires

[1]Although I believe the trial court erred in finding that the landowners lacked standing, this does not preclude this court from affirming a summary judgment if it was properly entered even though the wrong reasons were given. See McMillan, Ltd. v. Warrior Drilling & Eng'g Co., 512 So. 2d 14, 26 (Ala. 1986)(on rehearing)(stating that appellate court "will affirm a summary judgment if it was properly [entered], notwithstanding the fact that the trial court gave the wrong reasons for [entering] it").

state agencies to give public notice and an opportunity for public comment on proposed rules, the AAPA excepts certain agency pronouncements and that the November 5, 2018, memorandum falls within an exception. Therefore, I respectfully dissent.

Initially, I note that the director had statutory authority to act on behalf of ADEM to issue the November 5, 2018, memorandum. The Alabama Environmental Management Act ("AEMA"), Ala. Code 1975, § 22-22A-1 et seq., was first adopted in 1982 and contains a statement of legislative intent bearing directly on the reasons why ADEM, the agency under the control of the director, was formed:

> "The Legislature finds the resources of the state must be managed in a manner compatible with the environment, and the health and welfare of the citizens of the state. To respond to the needs of its environment and citizens, the state must have a comprehensive and coordinated program of environmental management. It is therefore the intent of the Legislature to improve the ability of the state to respond in an efficient, comprehensive and coordinated manner to environmental problems, and thereby assure for all citizens of the state a safe, healthful and productive environment.
>
> "(1) To this end [ADEM] is created by this chapter within the Executive Branch of State Government in order to effect the grouping of state agencies which have primary responsibility for administering environmental legislation into one

> department, to promote economy and efficiency in the operation and management of environmental programs, to eliminate overlapping or duplication of effort within the environmental programs of the state, to provide for timely resolution of permitting actions, to improve services to the citizens of the state, to protect human health and safety, to develop and provide for a unified environmental regulatory and permit system, to provide that the responsibility within the Executive Branch for the implementation of environmental programs and policies is clearly fixed and ascertainable, and to insure that government is responsive to the needs of the people and sufficiently flexible to meet changing conditions.
>
> "(2) It is also declared to be the intent of the Legislature to retain for the state, within the constraints of appropriate federal law, the control over its air, land and water resources and to secure cooperation between agencies of the state, agencies of other states, interstate agencies and the federal government in carrying out these objectives."

§ 22-22A-2, Ala. Code 1975 (emphasis added). In accordance with that policy, our legislature provided in the AEMA that ADEM would be "designated as the State Environmental Control Agency for the purposes of federal environmental law" and "authorized to take all actions necessary and appropriate to secure to this state the benefits of federal environmental laws." § 22-22A-4(n), Ala. Code 1975.

The United States Environmental Protection Agency ("EPA") requires every "recipient" of federal environmental "financial assistance" -- including every state instrumentality "to which Federal financial assistance is extended directly or through another recipient" -- to "adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of" EPA nondiscrimination regulations, including one setting forth a specific prohibition on "choos[ing] a site or location of a facility that has the purpose or effect of ... subjecting [individuals] to discrimination ... on the grounds of race, color, or national origin or sex." 40 C.F.R. §§ 7.25(e), 7.35(c), & 7.90(a). Thus, in order for the State of Alabama to continue to "secure ... the benefits of federal environmental laws" under Ala. Code 1975, § 22-22A-4(n), it is necessary that federally-mandated environmental-grievance procedures with respect to race be in effect, and, to that end, ADEM is directed in the AEMA to "serve as the State Agency responsible for administering federally approved or federally delegated environmental programs" and to "[p]erform any other duty or take any other action necessary for the

implementation and enforcement of" the AEMA. Ala. Code 1975, §§ 22-22A-5(4) & 22-22A-5(20).

To the extent that the landowners' challenge to the November 5, 2018, memorandum focuses on the involvement of the director, I note that, pursuant to Ala. Code 1975, § 22-22A-4(b), ADEM is "under the supervision and control of" the director, and "[a]ll powers, duties and functions transferred to [ADEM] under the [AEMA], except those specifically granted to the [Alabama] Environmental Management Commission ["the AEC"], shall be performed by the director" subject to his discretion to delegate his powers and duties to ADEM employees. Thus, the director, acting on behalf of ADEM, had the statutory authority to issue a memorandum touching and concerning the proper handling by ADEM personnel of complaints alleging discrimination in the administration of environmental laws within the meaning of the federally-mandated environmental-grievances procedures.

The director's November 5, 2018, memorandum was not a "rule" under the AAPA (and, by natural extension, the AEMA, which, unlike

the AAPA, contains no definition of "rule").[2] As our supreme court noted in Byrne v. Galliher, 39 So. 3d 1049, 1053 (Ala. 2009), Ala. Code 1975, § 41-22-5 (a portion of the AAPA), "sets forth certain requirements that notice be given before an administrative agency adopts" a "rule"; see also 39 So. 3d at 1053 n.9 (setting forth procedural requirements involved in adopting "rules"). On the other hand, the AAPA does not include all agency pronouncements within the scope of its general definition of "rule," i.e., "[e]ach agency rule, regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency." Ala. Code 1975, § 41-22-3(9). Specifically excepted from the scope of the term "rule" under the AAPA are "[s]tatements concerning only the internal management of an agency and not affecting private rights or procedures available to the public" and "[i]ntergovernmental, interagency, and intra-agency memoranda,

[2]That omission is perhaps explained by the legislature's decision in 1982 initially to exempt ADEM from the AAPA entirely, see Ala. Code 1975, § 22-22A-14, which statute was repealed in 1986 (see Act No. 86-472, Ala. Acts 1986, § 3).

directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public or any segment thereof." §§ 41-22-3(9)a. & c. (emphasis added).

In this case, the November 5, 2018, memorandum is in the form of a document addressed from the director to a subordinate ADEM employee, i.e., the nondiscrimination coordinator. The November 5, 2018, memorandum is thus an "intra-agency memorand[um]" within the scope of the exception set forth in § 41-22-3(9)c. The key question is, therefore, whether the memorandum can properly be said to "substantially affect the legal rights of, or procedures available to, the public" within the restrictive clause in the exception.

My review of the director's November 5, 2018, memorandum and its contents leads me to the conclusion that that memorandum does not act to "substantially affect" rights held by the public to seek redress of alleged environmental discrimination. It is important in this regard to remember that the source of the right to pursue a grievance within ADEM concerning environmental discrimination is the federal regulatory scheme requiring that complaints raising such grievances be

entertained at the state level. In other words, the legal right to file a complaint with ADEM as a recipient of federal environmental funds (as opposed to with EPA[3] or a judicial body) stems from that agency's duty to hear and consider such complaints pursuant to 40 C.F.R. § 7.90(a) regardless of the lack of any state-level legislation on the matter. All that the November 5, 2018, memorandum does is specify that oral or written complaints of that nature directed at ADEM will be "forwarded to" the nondiscrimination coordinator and will be reviewed to ascertain specific actors and actions that allegedly discriminate or result in discrimination and may impact or have impacted the complainants, after which the complaints will be acknowledged and evaluated and any third parties notified. In my opinion, the memorandum thus does not "substantially affect" public rights, but merely sets forth the internal-operations process of ADEM when a party having the "legal right" under federal law to file

[3]EPA's own environmental-discrimination grievance procedures are set forth in 40 C.F.R. § 7.120, and under subsection (a) of that section, complainants are "encouraged but not required" to make use of recipients' separate environmental-discrimination grievance procedures first.

a complaint alleging unlawful environmental discrimination with ADEM does so.

The present case is distinguishable from Ex parte Legal Environmental Assistance Foundation, Inc., 832 So. 2d 61 (Ala. 2002) ("LEAF"). In LEAF, the procedures developed and adopted by ADEM prescribed the pollution policy of the State of Alabama, allowing for the maximum pollution allowable under federal law, and prescribed the criteria and procedures to be followed by applicants for permits to discharge pollutants into Alabama waterways. Here, the November 5, 2018, memorandum affects no rights or procedures available to the public. Instead, the memorandum provides instructions to ADEM employees.

Our supreme court, in Byrne v. Galliher, supra, considered whether the State Board of Education's adoption of a policy regarding its two-year-college system providing, among other things, that that system's "'[e]mploying authorities may not employ any elected state official'" was a "rule" under the AAPA. 39 So. 3d at 1051. Our supreme court, reversing a trial court's judgment, concluded that the policy in question

was not, as a matter of law, a "rule" under the AAPA based upon the same exceptions relied upon by ADEM in its summary-judgment motion filed in the trial court in this case. See Byrne, 39 So. 3d at 1055-58. In pertinent part, our supreme court opined that the challenged policy dealt with internal management matters: it was "'not analogous to'" legislation applicable to all persons or a relatively large segment of the population outside the context of any specific controversy, but was instead "'more like "administrative activity that has a judicial character" because [the policies] arise[] out of a specific controversy,'" that is, whether an employee of an entity within the two-year college should be required to forgo that employment after becoming an elected official, which that court equated to a matter of "'personal rights within the context of a personnel action.'" 39 So. 3d at 1057 (quoting Wood v. State Pers. Bd., 705 So. 2d 413, 417 (Ala. Civ. App. 1997)).

In Wood v. State Personnel Board, 705 So. 2d 413 (Ala. Civ. App. 1997), an officer employed by the Department of Corrections ("DOC") was terminated from his employment because he failed a random drug screen. DOC had adopted an administrative regulation setting out the procedure

for random drug testing of its employees. The officer argued that the regulation was not promulgated in accordance with the advance public notice and the opportunity to comment provisions of the AAPA. This court held that the regulation was not subject to the formal rulemaking requirements of the AAPA because the regulation was not an action affecting the rights and duties of the public. Instead, the regulation was an internal policy and procedure statement relating strictly to DOC personnel. This court noted that the Court of Appeals of Hawaii dealt with an exclusion like that appearing in § 41-22-3(9)(a), in In the Interest of Doe, 9 Haw. App. 406, 844 P.2d 679 (1992). In that case, the Court of Appeals of Hawaii held that a police department's field sobriety testing procedures were not subject to administrative rulemaking because they came within a statutory exclusion for matters "'concerning only the internal management of an agency ... not affecting private rights.'" 9 Haw. App. at 410, 844 P.2d at 681 (quoting Haw. Rev. Stat. § 91-1 (1985), a part of the Hawaii Administrative Procedure Act).

I perceive no meaningful legal distinction with Byrne or Wood here -- the director, as the ultimate authority within ADEM, has given intra-

agency instructions on how complaints alleging environmental discrimination are to be handled by ADEM employees and has not abridged or enlarged the rights of members of the public to ADEM's due consideration of such complaints. As a result, I agree with the director that the November 5, 2018, memorandum falls within the exception to the term "rule" in the AAPA pertaining to intra-agency memoranda not substantially affecting legal rights or procedures of the landowners.

EDWARDS, Judge, dissenting.

I agree with Judge Hanson's conclusion that the November 5, 2018, memorandum from Lance R. LeFleur, the director of the Alabama Department of Environmental Management ("ADEM"), to Marilyn G. Elliott, the nondiscrimination coordinator for ADEM, is not a rule under the pertinent provision of the Alabama Administrative Procedure Act, Ala. Code 1975, § 41-22-1 et seq. Nevertheless, I would pretermit discussion of that issue because, in my opinion, the trial court correctly concluded that it lacked jurisdiction over the purported claims of Anthony Keith, Ronald C. Smith, William T. Gipson, and Latonya J. Gipson because of the speculative nature of their claims, whether that conclusion is grounded in terms of the lack of a justiciable controversy or a lack of standing.