

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002076-MR

MARK D. BIRDWHISTELL;
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-00170

DONNA BONE, AS GUARDIAN
FOR THE MINOR T.G.B.; LISA
KAY LABB, AS GUARDIAN FOR
THE MINOR S.A.L.; AND CHILD
WATCH CHILDREN'S ADVOCACY
CENTER, INC.

APPELLEES

OPINION
REVERSING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

VANMETER, JUDGE: Mark D. Birdwhistell appeals from an order of the Franklin Circuit Court denying his motion to dismiss claims filed against him by Donna Bone, as Guardian for the Minor T.G.B.; Lisa Kay Labb, as Guardian for the Minor S.A.L.; and Child Watch Children’s Advocacy Center, Inc. (collectively referred to as “Child Watch”). For the following reasons, we reverse in part and remand.

This action was brought by the parents of children on behalf of themselves, their children, and a larger class of children who, as a result of being alleged victims of child abuse and neglect, received services from the Kentucky Cabinet for Health and Family Services (“Cabinet”) through the Cabinet’s designated Children’s Advocacy Center (“CAC”), an agency that advocates on behalf of children alleged to have been abused.

On June 7, 2006, the Cabinet entered into a contract with Child Watch designating it as a CAC to receive funding. The contract was to expire on June 30, 2007. Before the contract expired, Governor Ernie Fletcher and Birdwhistell promulgated an emergency administrative regulation on June 4, 2007, which later became effective as 920 KAR² 2:040.³ The regulation addresses the standards for designated CACs in Kentucky.

In January 2008, Child Watch filed suit against the Cabinet as well as Birdwhistell, individually and in his official capacity as former Secretary of the Cabinet, alleging wrongful termination of the contract. Specifically, Child Watch

² Kentucky Administrative Regulations.

³ Originally promulgated as 920 KAR 2:040E.

alleged that termination of the contract was accomplished by the promulgation of the emergency administrative regulation, which Child Watch claims was “the product of partisan political effort carried out in violation of the Kentucky Constitution, statutes, and regulations.”

Birdwhistell filed a motion to dismiss the suit on the basis that he was entitled to (1) absolute official immunity for claims against him in his official capacity and (2) qualified official immunity for claims against him in his individual capacity. The trial court denied his motion and this appeal followed.

On appeal, Birdwhistell argues the trial court erred by denying his motion to dismiss claims against him in his official capacity since as head of a state agency, he was entitled to absolute immunity for promulgating an administrative regulation. We agree.

As an initial matter, “an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.” *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). Thus, this appeal is properly before us for review.

Turning to Birdwhistell’s claim of entitlement to absolute official immunity, “[s]uch immunity derives from the doctrine of sovereign immunity, which holds that the state, legislators, prosecutors, judges, and others doing the essential work of the state enjoy an absolute immunity from suit.” *Autry v. W. Kentucky Univ.*, 219 S.W.3d 713, 717 (Ky. 2007). Further,

[g]overnmental immunity extends to state agencies that perform governmental functions (i.e., act as an arm

of the central state government) and are supported by money from the state treasury. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). However, unless created to perform a governmental function, a state agency is not entitled to governmental immunity. *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990). An analysis of what an agency actually does is required to determine its immunity status.

If a state agency is deemed to have governmental immunity, its officers or employees have official immunity when they are sued in their official or representative capacity. The immunity that an agency enjoys is extended to the official acts of its officers and employees. However, when such officers or employees are sued for negligent acts in their individual capacities, they have qualified official immunity.

Qualified official immunity applies to public officers or employees if their actions are discretionary (i.e., involving personal deliberation, decisions and judgment) and are made in good faith and within the scope of their authority or employment. This is intended to protect governmental officers or employees from liability for good faith judgment calls in a legally uncertain environment. An act is not “discretionary” merely because some judgment is used in deciding on the means or method used. However, even if an act is discretionary, there is no immunity if it violates constitutional, statutory, or other clearly established rights, or if it is done willfully or maliciously with intent to harm, or if it is committed with a corrupt motive or in bad faith. The burden is on the plaintiff to show that the public official or employee was not acting in good faith. *Yanero*, 65 S.W.3d at 522-23.

If the negligent acts of public officers or employees are ministerial, there is no immunity. An act is ministerial if the duty is absolute, certain, and imperative, involving mere execution of a specific act based on fixed and designated facts. If ministerial acts are proper, then the public officer or employee has official immunity without qualification. *Id.* at 522. Any act done by a public officer or employee who knows or should have known that his

actions, even though official in nature, would violate constitutional rights or who maliciously intends to cause injury, has no immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Id. (emphasis added). *See also Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010) (qualified official immunity applies based on the act or function performed, rather than the status or title of the officer or employee).

The Cabinet has been identified as “the primary state agency for operating the public health, Medicaid, certificate of need and licensure, and mental health and intellectual disability programs in the Commonwealth.” KRS⁴ 194A.010(1). As such, the Cabinet’s function is “to improve the health of all Kentuckians[.]” *Id.* The Cabinet is to carry out its function “through direct and contract services for planning and through the state health plan and departmental plans for program operations, for program monitoring and standard setting, and for program evaluation and resource management.” *Id.* In addition, “the secretary [of the Cabinet] may enter into any contracts and agreements . . . as may be deemed necessary to carry out the general intent and purposes of the cabinet.” KRS 194A.025(3).

As an agency of state government, therefore, the Cabinet is entitled to governmental immunity for performance of governmental functions. Birdwhistell, as the former Secretary of the Cabinet, also enjoys absolute official immunity for functions performed in his official or representative capacity. Accordingly, the

⁴ Kentucky Revised Statutes.

trial court erred by denying Birdwhistell's motion to dismiss claims against him in his official capacity.

The order of the Franklin Circuit Court is reversed to the extent it denied Birdwhistell's motion to dismiss on grounds of absolute official immunity. This case is hereby remanded with directions for the trial court to enter an order granting Birdwhistell's motion to dismiss claims against him in his official capacity. The portion of the trial court's order denying Birdwhistell's motion to dismiss claims against him in his individual capacity is undisturbed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian T. Judy
Cabinet for Health and
Family Services
Frankfort, Kentucky

BRIEF FOR APPELLEE:

No appellee brief filed.