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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002165-MR

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01144

PERRY PUCKETT;
AND KENTUCKY
PERSONNEL BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

MAZE, JUDGE: The Cabinet for Health and Family Services (the Cabinet) appeals from an order of the Franklin Circuit Court which denied its motion to dismiss a declaratory judgment action brought by Perry Puckett in conjunction with his appeal from a final order of the Kentucky Personnel Board (the Board).

The Cabinet argues that the circuit court erred by allowing Puckett to file an amended complaint asserting the claim and by denying its motion to dismiss the claim based upon sovereign immunity. We conclude that the amended complaint properly asserts a claim for declaratory relief which is not barred by the doctrine of sovereign immunity. Hence, we affirm.

The relevant facts of this appeal are not in dispute. Puckett was employed by the Cabinet in its Department for Income Support, beginning in 2009. The parties agree that he was a classified merit employee and was thus subject to the provisions of KRS Chapter 18A. On September 16, 2009, the Cabinet terminated Puckett on a charge of “lack of good behavior” based on allegations of excessive and inappropriate email usage. The letter was signed, purportedly, by his appointing authority, J.P. Hamm, on the letterhead of the Cabinet Secretary, Janie Miller. The letter set out in detail the circumstances supporting the Cabinet’s decision to terminate Puckett.

On October 16, 2009, Puckett filed a timely appeal from his termination to the Personnel Board. Following a hearing, the hearing officer issued Findings of Fact, Conclusions of Law, and a Recommended Order on April 15, 2010. The hearing officer concluded that, while Puckett’s actions amounted to misconduct, the termination was excessive and should be reduced to a 30-day suspension. The Recommended Order also stated that Puckett should be reinstated to his previous position or a position of like pay and status with back pay and all other related benefits.

Upon review, the Personnel Board disagreed with the hearing officer's conclusion and upheld Puckett's termination. Puckett alleges that the Board's decision was improperly influenced by a newspaper article which came out after the hearing officer's decision which portrayed him and his appeal in a negative light. Shortly before the Board issued its final order on June 11, 2010, Puckett filed an Open Records Request to review whether Hamm had actually signed the letter of dismissal. However, Puckett did not raise this issue before the Board.

On July 19, 2010, Puckett filed a timely appeal to the Franklin Circuit Court, seeking judicial review from the Board's final order pursuant to KRS 18A.100(2) and 13B.140. Thereafter, Puckett moved to file two amended complaints alleging, respectively, that the termination violated his constitutional rights and that his termination was void because his appointing authority did not sign the termination letter. The Cabinet moved to dismiss these two counts arguing that they were barred under the doctrine of sovereign or governmental immunity.

In an Opinion and Order entered on October 3, 2012, the circuit court granted the Cabinet's motion to dismiss the constitutional claims, but denied the motion to dismiss his claims relating to the validity of the termination letter. The circuit court did not address whether this claim would be barred by sovereign immunity, but concluded that Puckett could raise the issue as part of his statutory appeal pursuant to KRS 13B.150. Since this issue had not been raised before the

Board, the circuit court ordered that the declaratory judgment be stayed and remanded the matter to the Board for additional proceedings on this matter.

In a subsequent order entered on November 16, 2012, the circuit court denied the Cabinet's motion to alter, amend or vacate the prior order. The court found that Puckett's action was not untimely because the Cabinet possessed all information about the validity of the termination letter while the matter was pending before the Board. Consequently, the court determined that Puckett was entitled to raise the issue in the current proceeding because those facts did not come to light until shortly before the Board made its final decision. The circuit court further concluded that remand was appropriate because the factual and legal matters are within the Board's statutory expertise and involve matters on which the Board has not previously received evidence.

The Cabinet now brings this interlocutory appeal from the circuit court's order denying its motion to dismiss this claim. Generally, under Kentucky Rule of Civil Procedure (CR) 56.03, the denial of a motion for summary judgment is not appealable. However, sovereign immunity entitles its possessor to be free from the burdens of not only liability, but also of defending the action. *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). *See also Lexington–Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004).

Therefore, an order denying a claim of sovereign immunity is immediately appealable. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009).

Furthermore, we review the case on a *de novo* basis, as it presents a question of

law. *See Sloas*, 201 S.W.3d at 475; *Northern Kentucky Area Planning Commission v. Cloyd*, 332 S.W.3d 91, 93 (Ky. App. 2010).

On appeal, the Cabinet argues that the circuit court should have addressed the issue of sovereign immunity and that this issue would have been dispositive of Puckett's claim challenging the validity of the termination letter. The Cabinet acknowledges that these types of claims may be permitted as part of a declaratory judgment action as set out by the recent decision of the Supreme Court of Kentucky in *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013). However, the Cabinet contends that the claim raised in Puckett's second amended complaint is distinguishable from the issue presented in the *Kentucky Retirement Systems* case.

In the *Kentucky Retirement Systems* case, a group of county employees who were members of the County Employees Retirement Systems (CERS) brought a declaratory judgment action challenging the constitutionality of KRS 61.637(1). The employees sought declaratory and injunctive relief, asserting that the statute impaired their contractual rights to pension payments. In response, the Commonwealth, through the Kentucky Retirement Systems (KERS), moved for dismissal on the basis of sovereign immunity, maintaining that its immunity cannot be waived in declaratory judgment actions.

The Supreme Court extensively addressed the application of the doctrine of sovereign immunity. The Court agreed that the KERS is a statutorily created agency which performs an integral function of state government. As a

result, the Court held that the KERS is entitled to the protection of sovereign immunity. *Id.* at 837. However, the Court went on to note that sovereign immunity can be waived either expressly or by overwhelming implication of statute. *Id.* at 838. *See also* Ky. Const. § 231. The Court concluded that the statutory and contractual relationship between KERS and its members, when read in conjunction with the Declaratory Judgment Act, KRS 418.075, created an overwhelming implication waiving the KERS's sovereign immunity. *Id.* at 838.

Although the Court's decision was primarily based upon the specific statutory scheme relating to the KERS, the Supreme Court went on to address the general application of these principles to contractual actions against the Commonwealth. In pertinent part, the Court explained that a declaratory judgment action is not a claim for damages, but rather it is a request that the plaintiff's rights under the law be declared. As such, a declaratory judgment does not implicate the liability of the Commonwealth for damages except to the extent that it is based upon a contractual or statutory obligation owed by the state. *Id.* at 839-40.

The Cabinet points out that, unlike in the *Kentucky Retirement Systems* case, Puckett's claim arises out of his statutory rights as a classified merit employee rather than a contractual relationship. The Cabinet also contends that Puckett's requested remedy – reinstatement to his previous position with payment of back wages and benefits – would directly implicate the liability of the Commonwealth for monetary damages. We agree with the Cabinet that a litigant cannot use a declaratory judgment action to obtain relief which would be denied to

him in a direct proceeding to obtain that relief. *St. Matthews Fire Protection Dist. v. Aubrey*, 304 S.W.3d 56, 60 (Ky. App. 2009).

But as the *Kentucky Retirement Systems* case holds, a declaratory judgment action is not a claim for damages, but is simply an action to declare the litigant's rights under a contract, statute or the Constitution. *Kentucky Retirement Systems*, 396 S.W.3d at 838. While such a declaration of rights may ultimately entitle the petitioner to relief, a declaratory judgment does not actually award damages. Rather, it simply compels the Commonwealth to comply with its legal obligations. *Id.* at 839-40.

In the current case, Puckett alleges that his termination letter was not signed by Hamm, his appointing authority, but was signed by another individual who did not possess the authority to sign the termination letter and who did not indicate that he was signing in a representative capacity on Hamm's behalf. Puckett contends that this action amounts to misconduct, which is ground for discovery and relief in his statutory appeal under KRS 13B.150(1). Puckett further seeks declaratory relief whether the purported signature by Hamm was valid as required by KRS 18A.095. In addition to the factual determination, Puckett seeks a legal determination that his initial termination was void based upon the improper signature.¹

¹ We note that the same issue was recently presented to this Court on direct appeal from a declaratory judgment. *Cabinet for Health & Family Services v. Pigman*, No. 2011-CA-002085-MR, 2013 WL 1003469 (Ky. App. 2013).

If the evidence and the law support these determinations, then the circuit court could set aside the Board's action as part of the statutory appeal under KRS 13B.150. In that event, Puckett may be entitled to reinstatement, back wages and benefits under the provisions of KRS Chapter 18A. However, this is always a possibility in any judicial review from an action of the Personnel Board. The mere fact that an administrative decision is set aside and certain statutory remedies may flow from that action does not implicate the sovereign immunity of the Commonwealth.

Moreover, these remedies would not arise directly from the judgment, but only as an indirect consequence of the circuit court's decision on Puckett's appeal. Thus, while Puckett cannot recover damages from in circuit court, he is entitled to raise the issue in a declaratory judgment action. Furthermore, since the circuit court remanded this matter to the Board for additional proceedings, the Board must ultimately determine the relief, if any, to which Puckett is entitled. Consequently, the circuit court's decision does not implicate the absolute immunity of the Commonwealth in any way. Therefore, the circuit court properly denied the Cabinet's motion to dismiss this claim for declaratory relief.

Finally, the Cabinet argues that the circuit court's order of remand impairs its ability to raise defenses such as Puckett's failure to preserve the issue before the Board and his failure to exhaust his administrative remedies. However, the Cabinet's interlocutory appeal is limited to the circuit court's denial of a substantial claim of absolute immunity. *Prater*, 292 S.W.3d at 887, *citing Mitchell*

v. Forsyth, 472 U.S. 511, 525 (1985). The other matters, including the circuit court's order remanding this case to the Board, are not before this Court at this time.²

Accordingly, the order of the Franklin Circuit Court denying the Cabinet's motion to dismiss is affirmed.

ALL CONCUR.

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² Since these issues cannot be raised in an interlocutory appeal, we conclude that the Cabinet's prior filing of a petition for a writ of prohibition does not bar the current appeal under the doctrine of election of remedies. However, on June 10, 2013, this Court denied the writ, rejecting the Cabinet's claim that it lacks an adequate remedy to challenge the circuit court's order of remand by direct appeal.