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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001877-MR

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF AGRICULTURE — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 93-CI-000886

DONALD R. VINSON; CHARLES ANDERSON;
and ROBERT S. PETERS, Secretary of
the Personnel Cabinet — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, DYCHE, and GUIDUGLI, Judges.

COMBS, JUDGE: Donald R. Vinson and Charles Anderson (hereinafter "the appellees") filed this action against the Commonwealth of Kentucky, Department of Agriculture ("Agriculture") pursuant to KRS 61.101 et seq., Kentucky's "whistleblower" act. Following extensive pre-trial proceedings, a trial was conducted before the court. An advisory jury was also impaneled. Ultimately, the appellees prevailed and were awarded punitive damages as well as permanent injunctive relief. Agriculture appeals. We affirm.

The appellees worked as Pesticide Inspector Supervisors with the Department of Agriculture. In a 1993 reorganization of the Division of Pesticides, however, their positions were eliminated. As a result, the appellees filed this action in Franklin Circuit Court on June 18, 1993. The complaint alleged that the elimination of their positions occurred in direct retaliation for their disclosures related to mismanagement within the division and thus violated Kentucky's "whistleblower" act. In their amended complaint, the appellees claimed that other actions taken against them by Agriculture also amounted to violations of the act. At trial, the appellees won a substantial award of punitive damages. The trial court also entered a permanent injunction, which required Agriculture to void its reorganization as far as it pertained to the appellees; to re-create the Pesticide Inspector Supervisor positions which had been eliminated; and to return the appellees to their former positions.[1]

On appeal, Agriculture contends that the judgment must be reversed. The issues it has presented for our review are quite numerous. We have re-ordered them for purposes of our analysis in this opinion.

Kentucky's "whistleblower" act prohibits any reprisal by an "employer" against an "employee" who in good faith discloses:

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[1]Agriculture's requests to have enforcement of the injunctive relief portion of the judgment stayed pending appeal have been denied. Appellees were reinstated as Pesticide Inspector Supervisors in September 1997.

> any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.

KRS 61.102(1).[2] (Emphasis added.) The statute was enacted to shield from retribution those governmental employees who "blow the whistle"; that is, employees who expose instances of wrongdoing or illegality on the part of their supervisors. Other states, as well as the federal government, have enacted similar statues aimed at encouraging employees to report violations of law or mismanagement. See 82 Am.Jur.2d Wrongful Discharge § 55 (1992).

Agriculture advances three separate arguments in support of its position that Kentucky's "whistleblower" act is unconstitutional. First, it contends that the rebuttable presumption created by KRS 61.103(1)(b) is arbitrary and capricious.[3]

KRS 61.103 provides public employees with a private right of action: it authorizes an employee to enforce the

[2]For purposes of KRS 61.102, KRS 61.101(2) defines "employer" as "the Commonwealth of Kentucky or any of its political subdivisions." The term also includes "any person authorized to act on behalf of the Commonwealth . . . with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees. . . ." "Employee" is defined as "a person in the service of the Commonwealth of Kentucky. . . ." KRS 61.101(1).

[3]In a separate argument, Agriculture contends that this provision should not apply to the facts of this case. This issue is resolved later in the opinion.

"whistleblower" act by way of a civil action against the alleged offender. In order to prevail, the act requires employees to "show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action" taken against them. KRS 61.103(3). (Emphasis added). "Contributing factor" is defined as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision." KRS 61.103(1)(b). KRS 61.103(1)(b) further provides as follows:

> It shall be presumed there existed a 'contributing factor' if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action.

Agriculture observes that the presumption of one fact from evidence of another is permissible only where there is a rational connection between the fact proven or established and the ultimate fact which is being presumed. It argues that there is no rational connection between the fact which the employee must prove (that the government official knew that the employee had disclosed misconduct and then, within a short time, took some personnel action against the whistleblower) and the ultimate fact which is then presumed (that the employee's disclosure was a "contributing factor" in the personnel action taken against him). We disagree.

When an employer has taken an adverse action against an employee/whistleblower at or near the time that he became aware of a protected disclosure by that employee, it is not unreasonable or arbitrary to infer that such a disciplinary (adverse) action was causally connected with the employee's

disclosure (blowing of the whistle, so to speak). On the contrary, the inference is both a logical and natural consequence of an employer's offended sensibilities and feelings of resentment under such circumstances. Additionally, the statutory presumption applies only where a "reasonable person would conclude the disclosure was a factor in the personnel action." The overlay of "reasonableness" creates a common-sense kind of litmus test by which to evaluate the overall scenario. Thus, there is a rational connection between the fact proved (the reprisal) and the ultimate fact which is presumed (that the whistle-blowing was a contributing factor in the reprisal). We cannot, therefore, agree that the provision is unconstitutional on this basis. Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446 (1994).

Next, Agriculture contends that Kentucky's "whistleblower" act is void for vagueness. It asserts that

> the statute is written in such broad, wide-sweeping and vague terms that persons of ordinary intelligence must necessarily guess as to the statute's intended meaning and persons of ordinary intelligence may very easily differ as to the statute's proper application.

(Appellant's brief at 22). The challenge is directed specifically at the provisions of KRS 61.102(1) and 61.103(3).

KRS 61.102(1) provides as follows:

> No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports . . . to the attention of the

> Kentucky Legislative Ethics Commission, the Attorney General . . . any facts or information relative to an actual or suspected violation of any law . . . .

KRS 61.103(3) provides as follows:

> Employees filing court actions under the provision of subsection (2) of this section shall show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action. Once a prima facie case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action.

Agriculture maintains that the provisions of KRS 61.102(1) can be construed to prohibit "any conduct by the employer which in any way involves or affects the employee." (Appellant's brief at 21). As an example, it contends that an employer might be prohibited from discussing with the whistleblower any problem with the employee's work performance because such activity constitutes the use of "official authority" in a manner which "tends to discourage, restrain, dissuade, deter, prevent, interfere with, coerce, or discriminate against" the disclosing employee in some way. Agriculture contends that the act is made even more vague and ambiguous by the inclusion of the term "personnel action" in the provisions of KRS 61.103(3). It asks: "[d]oes the Whistleblower Statute apply only to a 'personnel action' as set forth in KRS 61.103(3) or does it apply to other conduct by an employer which does not rise to the level of a 'personnel action'?"

A statute is void for vagueness if it fails to provide adequate notice of prohibited conduct. However, the determination of whether a statute is vague often is not based solely upon the text of the provision but additionally upon how that text has been construed by the courts. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Thus, it is necessary not only to examine the explicit provisions of the act but also to review the trial court's construction of them.

The term "personnel action" is not defined by the statute. We agree with Agriculture's assessment that the term encompasses a wide variety of activities. In fact, we find that the term can be read a great deal more broadly than Agriculture submits. Additionally, the statute names a litany of proscribed exercises of "official authority" in thesaurus-like fashion. However, that detailed breadth of the statute is limited and somewhat defined by the exclusions contained in 61.102(3), exclusions which clearly delineate the duty of an employee to behave responsibly and honestly in performing his duties.[4] After

[4]KRS 61.102(3) provides as follows:

> This section shall not be construed as:
> (a) Prohibiting an employer from requiring that an employee inform him of an official request made to an agency for information, or the substance of testimony made, or to be made, by the employee to legislators on behalf of an agency;
> (b) Permitting the employee to leave his assigned work area during normal work hours without following applicable law. . .;
> (c) Authorizing an employee to represent his personal opinions as the opinions of his employer; or
> (d) Prohibiting disciplinary or punitive action if an
> (continued...)

examining the text of the legislation in its entirety and the manner in which it was construed by the trial court, we cannot conclude that the act is so vague as to be rendered void.

The "whistleblower" act was designed to protect employees from reprisal for the disclosure of violations of the law. Boykins v. Housing Auth. of Louisville, Ky., 842 S.W.2d 527 (1992). Interpretations effectuating the goals of the statute, though many and varied, are nonetheless permissible. Supervisors have engaged in creative means of retribution and have perpetrated a prolific variety of abuses against whistleblowers. In order to anticipate and to prohibit such mistreatment, the act must necessarily use broad terms and descriptions. Although Agriculture argues otherwise, the act conveys a fair and sufficiently definite warning as to the proscribed conduct. As a result, we hold that the statute is not void for vagueness.

Next, Agriculture contends that Kentucky's "whistleblower" act is unconstitutional because it permits an impermissible encroachment by the legislature upon exclusively executive power. Specifically, Agriculture objects to the trial court's judgment voiding the agency's 1993 reorganization.

KRS 61.103(2) provides, in part, as follows:

> Notwithstanding the administrative remedies granted by KRS Chapters 16, 18A, 78, 90, 95, 156, and other chapters of the Kentucky Revised Statutes, employees

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[4](...continued)
employee discloses information which he knows:
1. To be false or which he discloses with reckless disregard for its truth or falsity;
2. To be exempt from required disclosure under the provisions of KRS 61.870 to 61.884; or
3. Is confidential under any other provision of law.

> alleging a violation of KRS 61.102(1) or (2) may bring a civil action for appropriate injunctive relief or punitive damages, or both. . . .

Once an employee has proven a violation of the "whistleblower" act, the statute's remedial purpose is then activated to provide recourse to the kind of injunctive relief granted by the trial court in this case. The trial court did not intend to void Agriculture's reorganizational scheme altogether; rather the reorganization was voided only to the degree that it related to the appellees. Moreover, KRS 61.990(4) authorizes the court to order the reinstatement of employees. The trial court's order amounted to no more than reinstatement of the appellees to the positions that they held immediately before the agency's act of reprisal; thus, the court's order did not impermissibly interfere with an executive function. It merely put the employees in the position they had occupied before the illegal reprisal occurred — wholly in accordance with the statutory provisions.

There is a strong presumption of validity of statutes. United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). It is the responsibility of the reviewing court "to read the statutes of the General Assembly so as to save their constitutionality whenever such can be done consistent with reason and common sense." Diener v. Commonwealth of Kentucky, Transp. Cabinet, Ky., 786 S.W.2d 861, 863 (1990). After having carefully considered each of the appellant's arguments, we cannot agree that Kentucky's "whistleblower" is unconstitutional on any of the grounds advanced by Agriculture.

Next, Agriculture contends that the trial court erred in rendering its judgment because sovereign immunity bars an action against the agency. It argues that

> the statute is ambiguous as to whether an action may be maintained directly against a state government agency . . . . [T]he statute strongly suggests that the action may be maintained only against a person who is employed by a state government agency.

(Appellants' brief at 25). Again, we disagree.

Agriculture is a state agency, and any claim against it for monetary damages is precluded by Section 231 of the Kentucky Constitution unless waived by the General Assembly. The Kentucky Supreme Court has recently announced that the test for waiver of sovereign immunity is a stringent one. In Withers v. University of Kentucky, Ky., 939 S.W.2d 340, 346 (1997) the court held as follows:

> We will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'

Citing, Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347 1361, 39 L.Ed.2d 662, 678 (1974) and Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct.458, 464-65, 53 L.Ed. 742 (1909). While Kentucky's "whistleblower" act contains no express waiver of the immunity protection, we find that an overwhelming implication of waiver can be found in the statutory text — thus satisfying the Withers test.

As has been noted, through the enactment of the "whistleblower" statute, the General Assembly sought to grant broad protections to state employees from retaliation for their

disclosure of violations of the law. KRS 61.103(2) specifically grants public employees the ability to enforce the "whistleblower" provisions by means of a civil action. If either public officials or the agencies who employ them were permitted to act against whistleblowers without the threat of a lawsuit and damages, the purposes of the act would be essentially emasculated. Kentucky's "whistleblower" act is directed specifically at inhibiting wrongdoing by the Commonwealth and all of its political subdivisions — as well as those persons authorized to act on behalf of the Commonwealth. We hold that the statute's explicit inclusion of the language, the "Commonwealth of Kentucky or any of its political subdivisions" (defining the scope of the act), operates as an implied waiver of sovereign immunity.

Similar conclusions have been reached by the courts of our sister states. In deciding whether sovereign immunity of the state and its agencies had been waived by the state's "whistleblower" act, the North Carolina Court of Appeals noted that waiver would not be inferred lightly. Minneman v. Martin, 114 N.C. App., 616, 442 S.E.2d 564 (1994). However, the court ultimately determined that because the act provided specific remedies for employees who were injured as contemplated by the statute (including the right to sue for redress), there had indeed been a waiver of sovereign immunity. Id.

In a more detailed analysis, the Court of Appeals of Texas also determined that sovereign immunity had been waived by implication. In Texas Dept. of Human Serv. v. Green, 855 S.W.2d

136, 142 (Tex. Civ. App. 1993), the court emphasized that the state's "whistleblower" act evidenced two legislative purposes: 1) to protect public employees from retaliation by their employer when, in good faith, employees reported a violation of law; and as a corollary, (2) to secure lawful conduct on the part of those who direct and conduct the affairs of public agencies and entities.

Like Kentucky's "whistleblower" act, the statute enacted in Texas prohibits a state or local governmental body from suspending or terminating the employment of (or otherwise discriminating against) a public employee who acts as a whistleblower. The court reasoned that since the legislature had directed its proscription against "a state or local governmental body," it also intended to direct the act's penalties at those same entities. Id. The court concluded that this interpretation of the act was consistent with the act's second goal — that of securing lawful conduct on the part of those who manage the affairs of the governmental body. Id. The court held as follows:

> Because it thus bears the primary risk for violation of the Act, the governmental body has the principal incentive to oversee the conduct of its agents to the greater protection of public employees.
>
> Even a strict construction of sections 2, 3, and 4 [of the "whistleblower" act] would not lead us to conclude that the Act, which purports to prohibit retaliation against public employees by state and local governmental bodies, withholds the authority to sue those very bodies.
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> * * * * *
>
> [T]he Act unambiguously waives the governmental immunity from suit and from liability of state and

> local governmental entities in suits seeking redress for retaliation against public employees.

Id. at 143-143.

While Kentucky's "whistleblower" act also applies expressly to individual supervisors acting on behalf of the Commonwealth, we do not believe that this fact alone relieves the governmental entities (for which the supervisors serve as agents) from liability under the act. On the contrary, we agree with the Texas court that when the agency bears a risk for violation of the act, the governmental body has an incentive to oversee the conduct of its agents for the greater protection of public employees. We believe that the text of Kentucky's statute similarly evidences such an intention.

Finally, we note that the Supreme Court of Minnesota has construed provisions of its state's "whistleblower" act to operate as an implied waiver of sovereign immunity. Janklow v. Minnesota Bd. of Examiners for Nursing Home Admin., 552 N.W.2d 711, (Minn. 1996). After examining the purposes of the legislation, the court determined that the application of sovereign immunity would be directly inimical to the protections granted state employees by the act. The court concluded as follows:

> [W]e hold that the state cannot claim the protection of statutory immunity to protect it from claims under the Whistleblower Act. To do so would contravene the legislature's decision to include the state in the list of employers who must abide by the Whistleblower Act's provisions.

Accordingly, we are persuaded that Agriculture cannot be shielded by sovereign immunity from the action instituted

against it. Because the legislation is directed specifically at the Commonwealth and its political subdivisions, we find that a reasonable construction of the act will admit of no other conclusion but that a waiver of sovereign immunity has been accomplished overwhelmingly by implication.

Next, Agriculture argues that the trial court erred by applying the amended version of Kentucky's "whistleblower" statute to this action. It contends that the amendment (enacted after the appellees filed their action) constitutes a change in the law with respect to the type of proof necessary to establish a viable cause of action. Thus, it constitutes a substantive change in the law which cannot be applied retroactively. We do not agree that the amendment effected a substantive change in the law. In any event, however, due to the remedial nature of the amendment, we hold that the trial court did not err by applying the amendment to this case.

KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless expressly so declared." However, legislation has been applied to causes of action which arose before its effective date in the absence of an express declaration that the provision is to be so applied in those instances where the courts have determined that the provision was remedial or procedural in nature and that retroactive application of the provision was consistent with the legislation intent. Benson's Inc. v. Fields, Ky., 941 S.W.2d 473 (1997). In Peabody Coal Co. v. Gosset, Ky., 819 S.W.2d 33, 36 (1991), the Kentucky

Supreme Court noted that a retrospective law has been defined as one which:

> takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. [A] remedial statute must be [construed retroactively] as to make it effect the evident purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty. 73 Am.Jur.2d Statutes §354 (1974) (footnotes omitted).

(Emphasis added.)

We agree with Agriculture's assessment that prior to September 16, 1993, the burden of proof under the act was entirely upon the employee to show by clear and convincing evidence that he — or someone acting on his behalf — had reported or was about to report a violation or a suspected violation of the law. But, as the appellees note, the "clear and convincing" requirement dealt with proving that a disclosure had occurred — or was about to occur — not with proving that a violation of the act had occurred.

The act as amended requires the employee to prove a prima facie case of reprisal; i.e., that the employee's

disclosure was a "contributing factor" in the action taken against him. KRS 61.103. Thus, in both the former and the amended versions, the plaintiff bore the burden of going forward with the evidence. Once a prima facie case had been made, then the burden of proof shifted to the defendant. Under the statute as amended, the defendant has the obligation to show "by clear and convincing evidence that the disclosure was not a material fact in the personnel action." Id. Previously, there had been no provisions detailing the burdens of proof and persuasion. We hold that the subsequent amendment to the act merely refined its former provisions by specifically setting forth in what manner the proof would be presented. The amended version of the statute did not alter the underlying claim or liability — only the presentation of some of the proof required. The duty imposed upon Agriculture under KRS 61.102(1) — to refrain from subjecting "whistleblowers" to reprisal — did not change. The defense available to the agency also remain unchanged — that an adverse personnel action taken against the "whistleblower" was not a result of the disclosure and that there was no violation of the act's provisions. As a result, we conclude that the trial court did not err by applying the amended version of the statute to this action as no vested rights were either created or taken away. Peabody Coal, supra.

Next, Agriculture contends that the appellees' original complaint should have been dismissed because it was filed prematurely. We disagree.

Agriculture argues that the appellees' action was not viable because it was commenced before the accrual of the cause of action. It notes that while the appellees' complaint was filed on June 18, 1993, the reorganization under which the appellees' positions were dissolved did not become final and effective until July 13, 1993. However, as the appellees assert, they were notified of their demotions on May 26, 1993. Furthermore, evidence at trial indicated that the reorganization of the Division of Pesticides was effective by May 16, 1993. In fact, throughout the trial, the date of May 16, 1993, was used by both parties as the effective date of the reorganization. We note that Agriculture initially argued below that the complaint had been filed too late. We agree with the appellees that Agriculture's argument on this point lacks credibility.

Agriculture next contends that the court erred by permitting appellees to file an amended complaint. Again, we disagree.

CR 15.01 provides that leave to amend a pleading shall be freely given by a court when justice so requires. The granting of an opportunity to amend is within the discretion of the trial court and should not be disturbed unless an abuse of discretion is clearly shown. Floyd v. Humana of Virginia, Inc., Ky. App., 787 S.W.2d 267 (1989). Prejudice to the nonmoving party is the touchstone for the denial of an amendment. Cornell & Co. v. Occupational Safety and Health Review Comm'n, 573 F.2d 820, 822 (3rd Cir. 1978).

In this case, we cannot say that the trial court abused its discretion by permitting the appellees to amend their complaint. The appellees' amended complaint sets out facts and claims of violations of the "whistleblower" act which either occurred or continued following the filing of the original complaint. There was a clearly reasonable basis for permitting the appellees to amend their complaint. Moreover, the court continued the trial date originally scheduled and granted Agriculture an additional four months within which to prepare its defense to the allegations contained in the amended complaint. As a result, we cannot say that the agency suffered prejudice as a result of the amendment.

Next, Agriculture contends that the trial court erred by failing to dismiss the counts contained in the amended complaint. In their amended complaint, the appellees alleged that one or both of them had endured further reprisal for having "blown the whistle" about supervisors, including: 1) receiving internal memoranda chastising them for improper work performance; 2) becoming the subject of a bogus internal investigation; and 3) suffering derogatory comments. Agriculture argues that the conduct complained of is simply not actionable under the statute because it does not amount to "personnel action" within the meaning of the act. We do not agree that the reprisals suffered by the appellees as detailed in their amended complaint fail to constitute a colorable claim against the agency.

As we have noted, Kentucky's "whistleblower" act does not provide a definition for the term "personnel action."

However, that term does appear in the federal Whistleblower Protection Act. 5 U.S.C. § 2303 (1994).[5] In Saul v. United States, 928 F.2d 829 (9th Cir. 1991), the appellate court considered whether a supervisor's alleged unauthorized opening of personal mail, alleged defamatory remarks, and alleged infliction of emotional distress upon an employee fell within the purview of "personnel action" as defined by the federal act. Citing the legislative history, the Ninth Circuit rejected a "cramped construction of the term 'personnel action'. Ultimately, it held that the term 'corrective action' contained in the definition of 'personnel action'" was expansive enough to encompass such claims. See also, Frederick v. Department of Justice, 73 F.3d 349 (Fed. Cir. 1996).

In light of both the purposes for which the statute was enacted and the inclusive language employed by lawmakers, the broad interpretation of the statute given by the trial court was

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[5]The federal Whistleblower Protection Act provides that:

> (b) Any employer who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --
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> * * * * *
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of -- (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -- (i) a violation of any law, rule, or regulation. . . .

5 U.S.C. § 2302(b) (1994).

justified. The court did not err by refusing to dismiss those counts included in the amended complaint.

Agriculture next argues that the trial court erred by granting the appellees a jury trial. We agree that Kentucky's "whistleblower" act does not expressly provide plaintiffs the right to trial by jury. Instead, the act implies that an employee filing an action under the statute is to have his claim adjudicated by the court. KRS 61.990(4) states as follows:

> A court, in rendering a judgment in an action filed under 61.102 and 61.103, shall order as it considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, exemplary or punitive damages, or any combination thereof. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees.

(Emphasis added). Critical to our resolution of this issue, however, is the trial court's decision to have the jury serve in an advisory capacity pursuant to CR 39.03.[6]

CR 39.03 provides as follows:

> Advisory Jury and Trial By Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try an issue with an advisory jury; or the court, with the consent of all parties noted of record, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Following the initial pre-trial conference held in November 1996, the trial court advised the parties that an

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[6]While the appellees contend that they should not have been denied the right to a jury trial, they have not raised or contested that issue by means of a cross-appeal. In any event, where the parties have apparently consented, the unauthorized used of an advisory jury in cases where the parties are entitled to trial by jury has been held not to be reversible error. See Brock v. Farmer, Ky. App., 291 S.W. 2d 531 (1956).

advisory jury would be impaneled to hear the appellees' proof. No objection appears of record. The issue was discussed again in a pre-trial conference held in early March of 1997. Again, no objection to the court's intentions appears of record. Following presentation of the evidence and the advisory jury's deliberation, the court entered its findings of fact, conclusions of law, and judgment. While the court initially indicated that the action "came on for trial by jury," the judgment went on to provide as follows:

> [T]he Court having heard all the testimony and having reviewed all evidence presented, based upon the record as a whole . . . .
>
> It is the finding of the Court that the Plaintiffs have proven a violation of the Kentucky Whistleblower Statute, KRS 61.102 et seq. by the Defendant, the Commonwealth of Kentucky, Department of Agriculture and that the Plaintiffs are entitled to the relief requested as set out within this judgment. This Court adopts the Verdict of the jury and affirms the findings of the jury as its own.

On appeal, Agriculture argues that the impaneled jury cannot be characterized as merely advisory. However, it concedes that a claim filed pursuant to the "whistleblower" act is a proceeding that is equitable in nature. "[W]here the issue is equitable . . . absent expressed consent, the jury is advisory only, regardless of what the court may characterize it." Emerson v. Emerson, Ky. App., 709 S.W.2d 853 (1986). Having decided to conduct this trial with the assistance of an advisory jury, the trial court was at liberty to accept the verdict rendered by the panel and to treat it as its own. 47 Am.Jur.2d Jury §94 (1992). As a result, we cannot conclude that the trial court erred in conducting the proceedings as it did.

Next, Agriculture enumerates several alleged evidentiary errors committed by the trial court. Rather than addressing each alleged error individually, however, we note that allegations of error cannot be based upon the erroneous admission of evidence in a case tried by the court without a jury.[7] For purposes of appellate review, a trial with an advisory jury is tantamount to a trial to the court alone. Thus, any error committed by admitting evidence before an advisory jury is not reviewable on appeal. Separate and apart from this procedural point, Agriculture failed to show substantively that the trial court's judgment was in any way based on the evidence it alleges to be inadmissible.

Agriculture next argues that the trial court erred by failing to grant its motion for directed verdict. We disagree.

The standard to be applied by the trial court in ruling on a motion for a directed verdict is set out in Sutton v. Combs, Ky., 419 S.W.2d 775 (1967), and Taylor v. Kennedy, Ky. App., 700 S.W.2d 415 (1985). It is settled that the trial court must construe the evidence "in its strongest light in favor of the party against whom the motion was made", Sutton at 777, and must deny the motion unless "no disputed issue of fact exists upon which reasonable men could differ." Taylor at 416. Agriculture insists that the appellees failed to present sufficient evidence to overcome its motion for directed verdict. In essence, it contends that the proof failed to establish that the personnel

[7]In the same vein, objections to instructions provided the advisory jury cannot become the basis for an allegation of error sufficient to justify reversal of the court's determination.

action taken against the appellees was causally related to their protected disclosures. On the contrary, having reviewed the evidence presented at trial, we hold that the appellees' proof amply sufficed to prove a violation of Kentucky's "whistleblower" act. The trial court did not err in refusing to direct a verdict against the appellees.

Next, Agriculture contends that the court erred by awarding the appellees punitive damages. However, Kentucky's "whistleblower" act expressly authorizes an award of punitive damages. KRS 61.103(2) provides that "employees alleging a violation of KRS 61.102(1) or (2) may bring a civil action for appropriate injunctive relief or punitive damages, or both." KRS 61.990(4) specifically provides for an award of punitive damages as well. Furthermore, the appellees' evidence was sufficient to support the finding that punitive damages were appropriate. Since the legislation specifically permits an award of punitive damages, we have no basis to hold that the trial court erred by awarding punitive damages — especially in light of the facts of this case. Neither can we conclude that the award in this case was excessive. In reaching this conclusion, we have reviewed the criteria set out in CR 59.01 and those factors set forth in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

Finally, Agriculture briefly asserts that the trial court erred in granting additional relief to the appellees, including: reinstatement of personal leave time expended in prosecuting their case; $257.65 to reimburse a lay witness; and

$293.04 in lodging expenses. With respect to the reinstatement of the appellees' personal leave time, we conclude that the statute specifically envisions such relief upon proof of an employer's violation of the "whistleblower" act. With respect to the lay witness fee and the lodging expenses requested by the appellees, we note that Agriculture raised no specific objection until after the award had already been made. As a result, we conclude that Agriculture is not in a position to contest the award on appeal.

Based upon the foregoing, the judgment of the Franklin Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT.

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