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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003051-MR

FRANKLIN COUNTY, FRANKLIN COUNTY FISCAL COURT; DAVID W. HUGHES, IN HIS OFFICIAL CAPACITY AS FRANKLIN COUNTY JUDGE EXECUTIVE; AND JAMES KEMPER, JR., IN HIS OFFICIAL CAPACITY AS FRANKLIN COUNTY JAILER — APPELLANTS

APPEAL FROM SCOTT CIRCUIT COURT
v. HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 97-CI-00283

JENNIFER VEST; KAREN POOLE, VICKI HULETTE, JENNY WILSON, AND EVIN EVINS — APPELLEES

AND: NO. 1998-CA-000330-MR

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JENNIFER VEST; KAREN POOLE; VICKI HULETTE; JENNY WILSON; EVIN EVANS; DOROTHY M. PITT; AND RAYMOND L. SMITH — APPELLEES

OPINION AND ORDER

AFFIRMING IN PART AND REVERSING IN PART
** ** ** ** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Appellants Franklin County (the County), Franklin County Fiscal Court (the fiscal court), David W. Hughes in his capacity as Franklin County Judge Executive (Hughes), and James Kemper, Jr., Jailer of Franklin County(Kemper)(collectively the Appellants)[1] appeal from various orders of the Franklin and Scott Circuit Courts entered in conjunction with a civil action filed by Jennifer Vest (Vest), Karen Poole (Poole), Vicki Hulette (Hulette), Jenny Wilson (Wilson) and Evin Evins (Evins)(collectively the Appellees).[2] We affirm in part and reverse in part.

BACKGROUND FACTS

While employed at the Franklin County Correctional Facility, the Appellees herein were subjected to acts of sexual harassment by Hunter Hay (Hay), the former Franklin County Jailer, and were retaliated against when they resisted his advances. Appellees Vest, Poole, Hulette, and Wilson, all of whom are female, were subjected to acts of sexual abuse by Hay during the course of their employment. Evins, a male, was also a

[1]It appears that Hughes and Kemper were substituted for Robert Arnold, in his capacity as Franklin County Judge Executive, and Hunter Hay, Franklin County Jailer, by order of this Court entered December 4, 1998.

[2]The civil action was originally filed in the Franklin Circuit Court. Judge William W. Trude, Jr., was designated as Special Judge for the purpose of presiding over the matter. Venue was ultimately transferred to the Scott Circuit Court with Judge Trude still presiding. Hence, the orders appealed from were entered in both the Franklin and Scott Circuit Courts.

victim of sexual harassment as well as retaliation. Hay was ultimately convicted and imprisoned for numerous criminal acts committed in conjunction with his conduct towards some of the Appellees herein and other individuals.

On December 15, 1994, the Appellees and four other individuals[3] filed an action in the Franklin Circuit Court against the Appellants herein alleging that they were sexually harassed in violation of the Kentucky Civil Rights Act (KRS Chapter 344 et seq.)(the KCRA) and/or retaliated against in violation of both the KCRA and Kentucky's Whistleblower Act (KRS 61.010 et seq.)(the KWA). The basis of the Appellees' complaint was that the County and its elected officials had knowledge of Hay's conduct and failed to take steps to end it and/or acquiesced in or furthered Hay's conduct.

For purposes of this appeal, the following orders entered by the trial court are relevant. On May 23, 1996, the trial court entered an order of partial summary judgment in which it found that (a) the County and/or the fiscal court was the employer of the Appellees; and (b) the Appellants were not immune from suit under the KCRA.

On January 13, 1997, the trial court entered partial summary judgement in favor of the Appellees, finding:

> there is no genuine issue of material fact as to whether or not the Defendants are collaterally estopped from denying that Hay subjected the Plaintiffs to sexually harassing conduct and subjected the Plaintiffs to a sexually hostile work place.

[3]These four individuals ultimately accepted offers of judgment in regard to their claims and are not parties to this appeal.

On June 18, 1997, the trial court entered an order changing the venue of the action from Franklin County to Scott County. The reasons given for the change of venue were as follows:

> [T]he plaintiffs cannot have a fair or impartial trial in Franklin County. This finding is based on the fact that several of the Defendants are elected officials of Franklin County and is further based on the fact that recent newspaper articles in Franklin County have openly discussed the fiscal impact that this litigation may have on the County. It is clear from these articles that a potential exists for an increase in tax liability to the citizens (and jurors) of Franklin County depending on the outcome of this action.

On July 21, 1997, the trial court entered an order granting summary judgment in favor of the Appellees, "holding Franklin County liable as a matter of law for the Plaintiffs' damages related to the quid pro quo and hostile work environment sexual harassment suffered by the female plaintiffs[.]" The order further recited that "[t]he only issue left to be resolved during the trial of this matter, pertaining to the sexual harassment of the female plaintiffs, is the amount of damages each is entitled to receive."

Following a jury trial, the trial court entered a judgment in accordance with the jury's verdict on October 23, 1997 (the October judgment). The judgment found that Vest, Poole, Hulette, and Wilson were retaliated against and subjected to sexual harassment and that they were entitled to damages for embarrassment, humiliation, and mental distress as follows:

Vest	$ 200,000
Poole	$ 250,000
Hulette	$2,000,000
Wilson	$2,500,000

The judgement also found that Hulette and Wilson were constructively discharged and awarded damages representing lost wages and benefits as follows:

Hulette	$21,528
Wilson	$21,757.44

In regard to Evins, the judgment found that although he was sexually harassed and retaliated against, he was not entitled to damages for humiliation and embarrassment. However, he was awarded $8,892 for lost wages and benefits stemming from his claims of retaliation. Evins was further awarded punitive damages in the amount of $75,000 for retaliation in violation of the KWA.

The Appellees were further found to be entitled to recover their attorneys' fees and costs. The judgment further provided that the damages awarded were subject to a statutory post-judgment interest rate of 12%.

On January 9, 1998, the trial court entered an order denying the Appellants' various post-judgment motions for relief (the January order). In the same order, the Appellees were awarded attorneys' fees in the amount of $364,512 and costs in the amount of $16,956.87, both of which were subject to the statutory post-judgment interest rate of 12%. This appeal followed.

Before discussing the merits of the appeal, we must first consider a matter which was passed for our consideration by a three-judge motion panel of this Court. As noted above, the first judgement was entered in this case in October 1997. It is

clear from a review of that judgement that it is not final and appealable. The Appellants filed their motions for post-judgment relief on November 3, 1997 and a hearing on those motions was held on November 21, 1997. Prior to the hearing, the Appellees contended that the post-judgment motions were defective because they were improperly served. Acting on the Appellees' concerns and also due to their own belief that the motions, if defective, would not suspend the time for appealing from the October judgment, the Appellants filed a notice of appeal from the October judgment on November 24, 1997. This appeal was designated as 97-CA-3051. On February 5, 1998, the Appellants filed a notice of appeal from the January order, which was designated as 98-CA-0330.

On July 10, 1998, the Appellants filed two motions with this Court regarding its notices of appeal. The first motion, filed in 98-CA-0330, asked that the Appellants be given leave to amend their notice of appeal to include an appeal from the October judgment as well as the January order. The second motion, filed in 97-CA-3051, asked that the notice of appeal in that case be permitted to relate forward and treated as filed after entry of the trial court's January order. In response to the Appellants' motions, the Appellees argued that the motions should be denied on the ground that they have been prejudiced by the Appellants' actions. We note that 97-CA-3051 and 98-CA-0330 were consolidated by order of this Court entered September 9, 1998.

After reviewing the parties' arguments relating to this issue, we feel the proper way to resolve this dispute is to allow the notice of appeal filed in 97-CA-3051 to relate forward. There is little doubt that the notice of appeal taken from the trial court's October judgment is premature as that judgment is not final and appealable. We also find that the Appellants' action in filing the notice of appeal prematurely was taken in good faith in regard to the concerns raised regarding the filing of their motions for post-judgment relief.

In Johnson v. Smith, Ky., 885 S.W.2d 944 (1994), the Kentucky Supreme Court construed the Kentucky rules of appellate procedure to allow a prematurely filed notice of appeal to relate forward and mature as of the date on which the trial court enters final judgment. In so holding, the Court stated:

> [I]n the leading case on the subject, Ready v. Jamison, Ky., 705 S.W.2d 479 (1986), we held that defects in the notices of appeal consisting of "fail[ure] to properly designate a final judgment" . . . did not require automatic dismissal. As here, the notices of appeal, albeit defective, were sufficient to put the appellees on notice of the intent to appeal. In Ready, we stated:
>
> > While our court continues to have a compelling interest in maintaining an orderly appellate process, the penalty for breach of a rule should have a reasonable relationship to the harm caused. Likewise, the sanction imposed should bear some reasonable relationship to the seriousness of the defect.
>
> . . .
>
> > With this new policy we seek to recognize, to reconcile and to further three significant objectives of appellate practice:

> achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal."
> Id. at 482.

> Consistent with the policy announced in Ready, there is no reason why, even assuming these appeals should be deemed "premature," this should require dismissal. . . . [T]he notices of appeal filed here put appellees on notice of the intent to appeal before expiration of the thirty day time limit in CR 73.02(1)(a), and thus served the essential purpose of the rule. A rule of relation forward, as in the federal courts, invoking appellate jurisdiction as of the time post-judgment motions are ruled on, is adequate to protect the needs of the appellees.

Johnson, 885 S.W.2d at 949.

We will address each of the Appellants' arguments on appeal separately . Further facts will be developed where necessary.

I. SHOULD ALL CLAIMS AGAINST THE APPELLANTS HAVE BEEN DISMISSED ON THE GROUND OF SOVEREIGN IMMUNITY?

Under the doctrine of sovereign immunity, all claims brought against the state for monetary damages are precluded by Section 231 of the Kentucky Constitution, which provides:

> The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.

The protection afforded by the doctrine of sovereign immunity extends not only to the state, but also to counties, county agencies, and elected county officials when sued in their capacity as such. See First National Bank v. Christian County,

Ky., 106 S.W. 831 (1908)(holding that doctrine of sovereign immunity precludes suits for damages against counties); Franklin County, Kentucky v. Malone, Ky., 957 S.W.2d 195 (1997)(holding that any action filed against elected county official in his official capacity is precluded by doctrine of sovereign immunity).; Cullinan v. Jefferson County , Ky. App., 418 S.W.2d 407 (1967)(holding that protection of sovereign immunity extends to county school board). Thus, there is no question at the outset that the Appellants are protected by the doctrine of sovereign immunity. However, the analysis does not end there.

Once we determine that an entity is entitled to sovereign immunity protection, we cannot refuse to apply it or otherwise ignore the protection it affords. Withers v. University of Kentucky, Ky., 939 S.W.2d 340, 344 (1997). However, we are entitled to "consider whether or in what manner there has been a legislative waiver of immunity." Withers, 939 SW.2d at 344. In determining whether a waiver of sovereign immunity has occurred due to legislative action, the Withers Court adopted the following test enunciated by the United States Supreme Court:

> [W]e 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."

Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662, 678 (1974), citing Murry v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464-465, 53 L.Ed 742, ____ (1909). In light of the foregoing standard, the Appellants'

argument that a waiver of sovereign immunity by the General Assembly must be express in nature as opposed to implied is without merit. If the Appellees can show that a particular statute waives sovereign immunity by overwhelming implication, their claims are properly allowed to proceed. We will now evaluate each of the Appellees' claims under the Withers standard to determine whether sovereign immunity has, in fact, been waived.

KENTUCKY CIVIL RIGHTS ACT

Appellants contend that there is nothing in the KCRA which can possibly be construed as a waiver of their sovereign immunity protection. We disagree.

At the outset, we note that the Appellants correctly argue that there is nothing in the KCRA which acts as an express, straightforward waiver of sovereign immunity. However, there are several provisions of the KCRA which, when read and considered as a whole, constitute an overwhelming implication that the General Assembly intended to waive sovereign immunity for purposes of claims brought against the state under the KCRA.

Under KRS 344.040, it is unlawful:

> for an employer:
>
> (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's . . . sex[.]

KRS 344.010(1) (emphasis added). Under KRS 344.030, "employer" is defined for purposes of KRS 344.030-344.110 as:

> a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or proceeding calendar year and an agent of such a person[.]

KRS 344.030(2) (emphasis added). Finally, for the purposes of the KCRA, "person" is defined to specifically include "the state, any of its political or civil subdivisions or agencies." KRS 344.010(1). Thus, when construing KRS 344.040 alongside the relevant definitions contained in KRS 344.030 and KRS 344.010, it becomes clear that sovereign immunity has been waived by overwhelming implication to allow claims for violation of the KCRA to proceed against the state.[4] To interpret the KCRA to hold that it is unlawful for the State to discriminate against its employees on the basis of sex but then find that there is no remedy for state employees who have been discriminated against would be absurd.

Federal courts construing the same provisions of the KCRA have reached the same conclusion. In Lococo v. Barger, 958 F.Supp. 290 (E.D. Ky. 1997), the federal court utilized the same definitions of "employer" and "person" in finding that both Perry County and its elected officials were "not immune from suit under KRS Chapter 344 and are considered an employer if they employ either (8) or more persons[.]" Lococo, 958 F.Supp. at 294. Pursuant to KRS 344.020, the general purposes of the KCRA include

[4]The same conclusion was reached by a three-judge panel of this Court in the unpublished opinion of Furr v. Department of Corrections, 1997-CA-002550-MR, rendered January 29, 1999, which was affirmed by the Kentucky Supreme Court. Department of Corrections v. Furr, Ky., ___ S.W.3d ____ (2000).

providing "for execution within the state of the policies embedded in the Federal Civil Rights Act of 1964 as amended [Title VII][.]" KRS 344.020(1). Although the KCRA and Title VII, its federal counterpart, are not identical, this Court has noted that due to the many similarities between the two pieces of legislation, federal case law construing the provisions of Title VII "are most persuasive, if not controlling, in interpreting the Kentucky statute." Kentucky Commission on Human Rights v. Commonwealth, Department of Justice, Bureau of State Police, Ky., 586 S.W.2d 270, 271 (1979).

Based on the foregoing, the trial court did not err in allowing Appellees' claims under the KCRA to proceed.

KENTUCKY WHISTLEBLOWER ACT

Like the previous argument, the Appellants contend that there is nothing in the KWA which acts as a waiver of sovereign immunity. Again, and for reasons quite similar to our previous analysis, we disagree.

Under KRS 61.102:

> 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, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research

> Commission or any of its committees, members, or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, 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 pubic health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

KRS 61.102(1). For purposes of the KWA, "employee" is defined as:

> a person in the service of the Commonwealth of Kentucky, or any of its political subdivisions, who is under contract of hire, express or implied, oral or written, where the Commonwealth, or any of its political subdivisions, has the power or right to control and direct the material details of work performance[.]

KRS 61.101(1). "Employer" is defined as:

> the Commonwealth of Kentucky or any of its political subdivisions. Employer also includes any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions, with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees[.]

KRS 61.101(2).

Once again, in construing KRS 61.102 in light of the definitions contained in KRS 61.101, it becomes clear that sovereign immunity has been waived by overwhelming implication to allow claims for violation of the KWA to proceed against the state. Like our holding regarding the KCRA, it would be absurd to hold under the KWA that it is illegal for the State to retaliate against a "whistleblowing" state employee but provide no cause of action for redress.

II. DID THE TRIAL COURT ERR IN CHANGING VENUE OF THE TRIAL FROM FRANKLIN COUNTY TO SCOTT COUNTY?

On February 13, 1997, some two years after the filing of their original action, the Appellees moved the trial court for a change of venue from Franklin County. In the motion, the Appellees stated the following grounds for the change sought:

> a. Fear that the citizens of Franklin County will be unwilling to award the Plaintiffs adequate compensation for their injuries for fear that their taxes will be raised.
>
> b. Plaintiffs' belief that it will be impossible to obtain a jury that does not include people who voted for or support Hunter Hay, Robert Arnold, or any of the other fiscal court magistrates, who have sternly and aggressively denied liability in this action.

The Appellees indicated that the granting of the change of venue would not affect the pending trial date.

The Appellants responded to the motion of the Appellees on February 27, 1997. The Appellants argued that the allegations in the Appellees' motion were unsupported by any evidence, namely affidavits from individuals stating their belief that the

Appellees would not receive a fair and impartial trial in Franklin County. Appellants further contended that the Appellees' motion was untimely.

The Appellants supplemented their motion on May 21, 1997, to include two newspaper articles from the Frankfort State Journal. The first article, dated May 14, 1997 and titled "County pay raise remains hot issue," dealt with topics discussed during a County budget meeting. The article briefly discussed the Appellees' law suit, in particular the concerns of one county magistrate that "We are in a big lawsuit that we may wind up spending a lot of money on very soon." The balance of the article dealt with other budget concerns which did not address the Appellees' law suit. The Appellees alleged that after this article appeared, one of the non-appellee plaintiffs was approached by other co-workers with their concern that it was the plaintiffs' fault that county employees may not get pay raises.

The second article was an editorial entitled "Not a dime" which appeared on May 18, 1997. The editorial focused on the payment of a total of $530,000 to the four plaintiffs who settled their claims against the Appellants from the County's surplus fund. The focus of the article was not the payment of the settlement itself, but rather that no payment should be made unless and until concerns regarding conflicts of interest regarding several of the defendants and their ties with the County's insurer could be addressed.

The trial court heard the parties' arguments concerning the change of venue in a telephonic hearing on April 18, 1997.[5] The trial court entered its order changing venue on June 18, 1997.

The Appellants claim that based on their affidavits, there was no showing that the Appellees would have been unable to receive a fair trial in Franklin County. We note at the outset that the decision as to whether to change venue is soundly vested in the discretion of the trial court and will not be reversed on appeal unless an abuse of that discretion can be shown. Lemings' Adm'r v. Leachman, Ky., 105 S.W.2d 1043, 1044 (1937). We do not believe that an abuse of discretion has occurred in this case.

Pursuant to KRS 452.010, a change of venue is appropriate "when it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county." KRS 452.010(2). Once a party decides that a change of venue is warranted, he is to petition for it by filing a verified motion with the trial court which sets forth the grounds as to why a change of venue is appropriate. KRS 452.030. The trial court is then required to hold a hearing, and either

[5]The hearing was heard over the telephone pursuant to a scheduling order dated January 5, 1996, which provided that all motions would be heard telephonically unless a party tendered a motion requesting that the matter be heard in open court. As the Appellants never requested that the arguments on this motion be heard in person and raised no objection to the proceedings until after the trial court entered its order changing venue, they cannot now be heard to complain that the telephonic hearing was somehow improper.

party may at that time present witnesses to support his position. Id. Contrary to the Appellants' assertions, there is nothing in the statutes dealing with venue and the change thereof which required the Appellees to submit affidavits in support of their motion.

The Appellants are correct in their assertion that the fact that those called to serve as jurors in this case if tried in Franklin County had an indirect interest in the matter as county taxpayers is not enough to warrant a change in venue. See Rand, McNally & Co. v. Commonwealth, Ky., 106 S.W. 238, 239 (1907); Graziani v. Burton, Ky., 97 S.W. 800, 801 (1906).[6] Had that been the only ground on which the trial court could have based its finding, we may have been inclined to agree with the Appellants that a change of venue was inappropriate. But there are other factors involving this case which we believe support the trial court's decision. All of the parties in this case are either former or current county employees and/or elected county officials. The facts of this case involve a county jailer who subjected county employees to sexual harassment and humiliation and county officials who allegedly looked the other way. It goes without saying that the facts of this case, both salacious and otherwise, have been the source of widespread publicity throughout the community and the state not only during the pendency of this case but also before and during Hay's criminal

[6]The cases of Big Sandy Ry. Co. v. Floyd County, Ky., 101 S.W.2d 354 (1907) and City of Pikeville v. Riddle, Ky., 230 S.W.2d 37 (1921) relied on by the Appellants have no application here as both deal with the issue of disqualification of jurors and not the issue of change of venue.

trial. Although the trial court named the potential for an increase in taxes in Franklin County as grounds for change of venue, there are other factors which support the trial court's holding that the Appellees "cannot have a fair or impartial Trial [sic] in Franklin County." "The trial court's decision [as to venue] must be given great weight due to the fact that it was present in the county and aware of the environment." Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 299 (1997). We find no abuse of discretion in regard to the change of venue in this case.

III. DID THE JURY'S VERDICT IMPERMISSIBLY HOLD THE APPELLANTS LIABLE FOR THE CRIMINAL ACTS OF HUNTER HAY?

During the trial, the Appellees testified in regard to the incidents for which Hay had been indicted and convicted. Vest testified regarding two instances of sexual assault inflicted upon her by Hay, one in 1987 and one in 1990.[7] Hulette testified that Hay was indicted for sexual assault and attempted rape, and she further described the acts to the jury.[8] The testimony of Wilson and Poole was along similar lines.[9]

Evins, who brought causes of action for both sexual harassment and violation of the KWA, testified that Hay

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[7]As to Vest, the grand jury charged that Hay committed first degree sexual abuse by subjecting her to sexual contact through forcible compulsion.

[8]As to Hulette, the grand jury charged that Hay committed first-degree attempted rape and first-degree sexual abuse.

[9]As to Wilson, Hay was charged with first-degree rape, first- degree sodomy, and first-degree attempted rape. As to Poole, Hay was charged with two counts of first-degree sexual abuse.

repeatedly made comments about wanting to have sex with Evins' wife and on several occasions hinted that Evins' job security hinged on his giving consent. Evins also alleged that Hay retaliated against him when he contacted the state police, FBI, and Department of Corrections regarding Hay's conduct.

At the close of evidence, the jury was instructed that the Appellees were victims of both quid pro quo sexual harassment and hostile environment sexual harassment inflicted by Hay, that they were all County employees, that the County knew about Hay's conduct, and that the County failed to take corrective measures and was therefore liable for the damages, if any, resulting from Hay's conduct. The jury was further instructed to award damages to the female appellees if it found that (a) Hunter's conduct was a substantial factor in causing their injuries; and (b) if it believed they were retaliated against for opposing Hay's conduct. As set forth earlier, the jury awarded damages to all of the female appellees, with Wilson and Hulette receiving the largest verdicts.

The Appellants contend that because the female appellees only testified in regard to the criminal acts committed against them by Hay, the jury's verdict impermissibly holds them liable for Hay's criminal activity. In support of their argument, the Appellants cite Southeastern Greyhound Lines v. Harden's Adm'x, Ky., 136 S.W.2d 42 (1940) for the proposition that an employer is not liable for its employee's commission of an intentional criminal act against a third person. As proof of their argument, the Appellants point to the fact that the

verdicts awarded to each of the female appellees reflect the seriousness of Hay's conduct as to them (ranging from an award of $2,500,000 to Wilson for rape, sodomy, and attempted rape to $0 for Evins because no proof of criminal conduct was set forth). We disagree.

In the seminal and oft-cited case of Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), the United States Supreme Court recognized a cause of action for hostile environment sexual harassment. Under that decision, an employer can be held liable for sexual acts of an employee "which are sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."[citation omitted]." Vinson, 477 U.S. at 67, 106 S.Ct. at 2405, 91 L.Ed.2d at 60, citing Henson v. Dundee, 682 F.2d 897, 904 (1982). The Court further held that Vinson's allegations that she had sexual relations with a supervisor some 40-50 times at his request out of fear that refusal would cost her her job, "are plainly sufficient to state a claim for hostile environment sexual harassment." Vinson, 477 U.S. at 67, 106 S.Ct. at 2405-2406, 91 L.Ed.2d at 60. As the Appellees point out in their brief, there is a veritable myriad of case law which holds that a criminal act such as the rape of one employee by another is sufficient to show the existence of a hostile environment.

We believe that in making this argument, the Appellants lost sight of the fact that their liability hinges not on the acts of Hay alone, but on the fact that they knew about his

atrocious behavior and failed to do anything to end it. If the evidence showed that Hay committed his acts and that the Appellants had no knowledge whatsoever of what he was doing, we would be inclined to agree with the Appellants' argument that they were being punished solely for Hay's criminal conduct. Unfortunately for the Appellants, that is not the case.

IV. DID THE TRIAL COURT ERR IN AWARDING STATUTORY POST-JUDGMENT INTEREST TO THE APPELLEES?

The Appellants argue that even if we find that sovereign immunity has been waived as to the Appellees' causes of action, there was no waiver of sovereign immunity which would allow an award of post-judgment interest at the rate of 12% pursuant to KRS 360.040.[10] We agree.

This Court addressed this same issue in Powell v. Board of Education of Harrodsburg, Ky. App., 829 S.W.2d 940 (1991). We held:

> Merely because a state agency has waived its sovereign immunity for purpose of suit, it does not necessarily follow that the agency has also waived its liability for payment of interest in such suit.
>
> . . .
>
> Since a state can be sued only with its consent, a statute waiving

[10]Although the Appellees argue that this issue is not preserved for our review because it was not presented to the trial court, we note that the defense of sovereign immunity "is a constitutional protection that can be waived only by the General Assembly and applies regardless of any formal plea." Wells v. Commonwealth, Department of Highways, 384 S.W.2d 308, 308 (1964). Thus, this is one case where the fact that the Appellants did not raise this particular issue before the trial court does not preclude us from reviewing it on appeal.

> immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified. [citations omitted]. Furthermore, we do not believe that the general interest on judgment statute . . . applies to state agencies without an explicit declaration by the legislature or contract provisions expressly so stating.

Powell, 829 S.W.2d at 941. See also Kenton County Fiscal Court v. Elfers, Ky. App., 981 S.W.2d 553 (1998)(holding that general interest on judgment statute does not apply to judgment against state or its subdivisions).

Appellees argue that Powell does not automatically bar interest in all actions based on the "it does not necessarily follow" language cited above. In support of their argument, the Appellees cite Commonwealth, Department of Highways v. Young, Ky., 380 S.W.2d 239 (1964), for the proposition that an award of interest is proper in this case. However, Young, is easily distinguished from the case at hand because it is a Board of Claims action. In that case, it was noted that under the Board of Claims Act (KRS Chapter 44.070 et seq.), any judgment entered "shall have the same effect and be enforceable as any other judgment of the court in civil cases." Young, 380 S.W.2d at 240, citing KRS 44.140(2).[11] Based on its interpretation of that statute, the Court held:

> KRS 44.140(2) prescribes the nature and effect which a judgment of the circuit court shall have when entered on appeal from the Board of Claims . . . . [Thus, under the language of the statute], if any other

[11]The current counterpart to KRS 44.140(2) is KRS 44.140(5).

> judgment in the Nelson Circuit Court would draw interest from the date of its entry, then so would this one.

Young, 380 S.W.2d at 240. The Powell Court recognized that the exception set forth in Young is only applicable to Board of Claims cases, noting that interest is recoverable in those instances "because KRS 44.140(5) expressly provides that such judgment shall be "enforceable as any other judgment"." Powell, 829 S.W.2d at 942, citing Bush v. Department of Highways, Transportation Cabinet, Ky. App., 777 S.W.2d 608, 609 (1989). Based on the foregoing, the trial court erred in awarding post-judgment interest in its October judgment and January order, and the portions of those orders awarding interest are hereby reversed.

In regard to the motions of the Appellants filed in with this Court, the Appellants' motion to allow their notice of appeal in 97-CA- 3051 to relate forward is granted, and their motion to amend their notice of appeal in 98-CA-0330 is dismissed as moot. Having considered the parties' arguments on appeal, the orders of the Franklin and Scott Circuit Courts are affirmed in part and reversed in part.

COMBS, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS.

Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: September 8, 2000

ORAL ARGUMENT FOR APPELLANTS: ORAL ARGUMENT FOR APPELLEES:

Armer H. Mahan, Jr.

BRIEF FOR APPELLANTS:
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BRIEF FOR APPELLEES:
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