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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000889-OA

KENTUCKY DEPARTMENT OF MILITARY AFFAIRS
AND KENTUCKY NATIONAL GUARD — PETITIONERS

v. ORIGINAL ACTION
REGARDING FRANKLIN CIRCUIT COURT
ACTION NOS. 99-CI-00311, 99-CI-00954,
99-CI-00956, and 99-CI-01093

HON. ROGER L. CRITTENDEN,
JUDGE, FRANKLIN CIRCUIT COURT — RESPONDENT

AND

ROBERT A. JONES, CYNTHIA WHITE,
LARRY WHITE, AND REGINALD P.
YOUNGBLOOD — REAL PARTIES IN INTEREST

* * * * * * * * * * * *

OPINION AND ORDER GRANTING CR 76.36 RELIEF

BEFORE: BUCKINGHAM, GUIDUGLI AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE. Petitioners, Kentucky Department of Military Affairs and Kentucky National Guard, have filed a petition for writ of prohibition or mandamus pursuant to Ky. R. Civ. P.(CR) 76.36. Petitioners request that this Court direct the respondent trial judge, Honorable Roger L. Crittenden, "to refrain from compelling petitioners to stand trial on the discrimination and retaliation claims against them" and to direct him to dismiss those claims. The real parties in interest, Robert A. Jones, Cynthia White, Larry White, and Reginald Youngblood, have

responded to this petition.

Petitioners are defendants below to four consolidated actions brought against them by the real parties in interest, who are current or former members of the Kentucky National Guard, pursuant to the Kentucky Civil Rights Act, Ky. Rev. Stat. (KRS) 344.010, et seq. Petitioners moved the circuit court for summary judgment, arguing that the actions raise a federal constitutional question which is preempted from state regulation and is not justiciable in a civilian court by virtue of application of the Supremacy Clause and the Militia Clause of the United States Constitution. Franklin Circuit Court denied the motion.

Hence, this original action, which claims that the circuit court is acting without jurisdiction and that petitioners are entitled to dismissal based on, among other grounds, two decisions issued by the U.S. Supreme Court, i.e., Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed.2d 152 (1950)(where the Supreme Court held that the federal government is not liable under the Federal Tort Claims Act for servicemen's injuries arising from activities incident to military duty), and Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983)(where the Supreme Court held that military personnel may not maintain civil actions against their superior officers for alleged constitutional violations). In this original action, petitioners allege that they would suffer irreparable injury from which they have no adequate remedy by appeal were the actions allowed to proceed because they would "forever lose or forfeit some of the protections of the Feres-Chappell doctrine, namely,

the right not to stand trial before a civilian court and have a civilian jury second-guess the decisions of respondents' military superiors."

In its decision denying petitioners' motion for summary judgment, the trial court stated the issue before it was one of first impression in Kentucky. First, it determined that there is nothing in KRS Chapter 344 that would exclude petitioners from its provisions. It then went on to distinguish this case from Feres on the basis that, in the latter, the acts complained of were negligent, not intentional. The court noted that different tests have been applied by various jurisdictions to decide the justiciability of military-related actions filed in civil courts and that the Sixth Circuit has adopted the "per se test", i.e., whether the challenged activity is incident to military service. The circuit court relied on Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999), a case which declines to apply the provisions of the Posse Comitatus Act to members of the Kentucky National Guard on the basis that the guardsmen remained within state command when they engaged in the activities at issue therein. The circuit court also found helpful a decision written by then Circuit Judge Martin Johnstone finding that the National Guard was subject to suit under KRS Chapter 344. Therefore, the court concluded, it had subject matter jurisdiction to adjudicate the actions pending before it.

In this original action, petitioners contend that federal regulations make it clear that the federal anti-discrimination laws do not apply to National Guard personnel and,

therefore, that "it should be evident that Congress does not want KRS 344 to apply to the National Guard." They argue that, regardless of the test they have used, all jurisdictions, including the Sixth Circuit, which have reviewed the matter as it pertains to discrimination claims between enlisted personnel and their employer or superior officer have decided that federal law has preempted this field from state regulation, thereby placing this type of claim outside the ambit and jurisdiction of civilian courts. Consequently, they argue that "[t]o the extent that the General Assembly arguably intended to include the Kentucky National Guard as an employer subject to the discrimination provisions of KRS Chapter 344, the General Assembly has exceeded its authority and this legislation is void pursuant to the Supremacy Clause and the Militia Clause of the United States Constitution."

In response, the real parties in interest contend that their claims have not been preempted by federal law because, as members of the Kentucky National Guard, they remain state officers until called into federal service. Perpich v. Department of Defense, 496 U.S. 334 (1990). They also rely on Gilbert, supra, for the proposition that the status of a guardsman is based upon which entity exercises control over the individual when the alleged injuries occurred. They reject petitioners' reliance on Feres and on Chappell because they contend these cases may be distinguished from the specific matter at issue in this case, which has yet to be addressed by the U.S. Supreme Court. They argue that the provisions of KRS Chapter 344

are neither preempted by the Supremacy Clause, nor the Militia Clause, because the state statutory scheme does not conflict with federal law and because the discrimination claimed by them has nothing to do with military discipline.

A writ of prohibition or mandamus is an extraordinary and discretionary remedy. Generally, in a case where a petitioner seeks relief on the ground that the trial court is proceeding, or about to proceed, outside its jurisdiction, the petitioner is required to make a preliminary showing that it has no adequate remedy by appeal. See, e.g., Shumaker v. Paxton, Ky., 613 S.W.2d 130 (1981). However, remedy by appeal is not always the controlling consideration as ". . . it would be a most inept ruling to deny the writ, require a trial on the merits, and then on an appeal be forced to reverse the case on the very question which is now before us." Chamblee v. Rose, Ky., 249 S.W.2d 775, 777 (1952). In addition, although we recognize that the circuit court was exercising its discretion when it denied petitioners' motion, we have determined that the question presented to this court in this original action is one of law. Therefore, this court is not restricted to the abuse of discretion standard of review and may issue its opinion without deferring to the trial court. Southeastern United Medigroup, Inc. v. Hughes, Ky., 952 S.W.2d 195, 199 (1997); Sisters of Charity Health Systems, Inc. v. Raikes, Ky., 984 S.W.2d 464 (1998).

Based on our application of the foregoing standard, and our review of the parties' arguments, the partial record, and the

law cited to us, this petition is GRANTED and a writ of mandamus shall issue.

We begin our analysis by noting that, at first blush, the arguments made by the real parties in interest appear reasonable. Pursuant to KRS 36.010, the Kentucky Department of Military Affairs is "attached to Office of Governor," to whom it reports regarding "the proper functioning of the Kentucky National Guard, . . ." Pursuant to KRS 36.020-040, the executive head of the Department of Military Affairs is the adjutant general, an appointee of the Governor.

Further, pursuant to KRS 35.390, a guardsman "who believes himself wronged by his commanding officer, . . . may complain to any superior officer who shall forward the complaint to the Governor through the adjutant general;. . ." And, KRS 35.420 "presumes" the jurisdiction of military courts. Even petitioners recognize that these two statutes do not clearly show the full intent of the General Assembly as it pertains to the jurisdiction of civilian courts over guardsmen's discrimination grievances.

We also note that both the Kentucky Department of Military Affairs and the Kentucky National Guard are state agencies.[1] KRS 344.010(1) specifically includes within its provisions "the state, any of its political or civil subdivisions or agencies". See Department of Corrections v. Furr, Ky., 23 S.W.3d 615 (2000).

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[1] In fact, the real parties in interest point out they are "enjoying the benefit" of representation by the Office of the Kentucky Attorney General in this action.

In addition, we have considered the argument made by the guardsmen that, while the federal preemption doctrine often applies to override state statutory provisions which conflict with federal law, or would frustrate the uniformity intended by the federal scheme, KRS Chapter 344 was modeled after federal law, i.e., Title VII of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000e-16. See Palmer v. International Association of Machinists, Ky., 882 S.W.2d 117, 119 (1994). Further, we have taken note of their argument that "discriminatory acts cannot be condoned as discipline".[2]

As previously stated, those are arguments that initially appear well-taken. However, upon reaching the completion of our review of the authorities currently available in this complex and sensitive area of the law, we are compelled to conclude that the issue presented to us for determination must be analyzed within the confines of a different framework.

The Constitution of the United States, Article VI, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of

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[2] A similar point was made by a plaintiff in an action for sexual harassment brought against her superior officers in the United States Air Force. The plaintiff argued that the activities she was challenging "simply cannot be viewed as acceptable in any fashion [because they] do not implicate issues of judgment, discretion or command. . . ." In rejecting that argument, the reviewing court referred the plaintiff to the holding of United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 38 (1985), and its emphasis on the "negative impact" such an action would have on military discipline. Mackey v. United States, 226 F. 3d 773 (6th Cir. 2000). This case also clarifies that the Feres doctrine applies to claims of intentional torts, not merely to those of negligence.

> the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Constitution of the United States, Article I, Section 8, clause 16, gives Congress the power:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;...

The Constitution of Kentucky, Section 220, gives to the Kentucky Legislature the power to maintain and regulate the "Militia". However, Section 221 includes the following directions:

> The organization, equipment and discipline of the militia shall conform as nearly as practicable to the regulations for the government of the armies of the United States.

Language set forth in Perpich, supra, well defines the status of a state National Guard. The following quoted excerpts are particularly instructive:

> Since 1933, all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. Id., at 345.

> In a sense now, all of them now must keep three hats in their closets -- a civilian hat, a state militia hat, and an army hat — only one of which is worn at any particular time. When the state militia hat is being worn, 'drilling and other exercises'... are performed pursuant to 'the Authority of training the Militia according to the discipline prescribed by Congress.' Id., at 348.

> [The Militia Clause] merely recognizes the supremacy of federal power in the area of military affairs. Id., at 351.
>
> ...[T]he constitutional allocation of powers in this realm [gives] rise to a presumption that federal control over the Armed Forces [is] exclusive. Id., at 353.

Also of significance is language found in Feres[3] and in Chappell, supra:

> To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequence of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.
>
> This Court . . . cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. Feres, at 143-44.
>
> Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of such suits on discipline . . . .' Chappell, at 299.

Likewise, we are guided by the holdings issued by the Sixth Circuit in the reported cases cited by petitioners. Recent language on the subject includes the following:

> Consistent with the reasoning in Chappell, courts of appeals have consistently refused to extend statutory remedies available to civilians to uniformed members of the armed forces absent a clear direction from Congress

[3] The Feres doctrine has been held to apply to suits brought by members of the National Guard. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L. Ed. 2d 665 (1977).

> to do so. Thus, uniformed members of the armed forces have no remedy under Title VII of the Civil Rights Act of 1964. Coffman v. State of Michigan, 120 F.3d 57, 59 (6th Cir. 1997).

Petitioners have provided the court with a copy of the National Guard Military Discrimination Complaint System, issued by the Departments of the Army and the Air Force. The regulation sets forth a uniform mechanism for the processing of guardsmen's discrimination claims and clearly applies to the real parties in interest. Further, it expressly provides that it implements Title VI of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000d, and not Title VII, codified in 42 U.S.C. § 2000e-16 from which KRS Chapter 344 was modeled.

While the respondent judge relied on Gilbert, supra, we have determined that this authority has no application to the controversy before us. The case merely decided that 18 U.S.C. § 1385 was not violated when Kentucky National Guardsmen participated in a search and seizure operation while under state, rather than federal, command. As made clear by the Militia Clause, and also exemplified in KRS Chapters 35 and 36, a variety of functions related to military affairs is solely within the jurisdiction of the particular state and its agencies. Gilbert clarifies the point we are making regarding the control which the state may exercise over its military personnel when performing certain activities that have been defined as being within the realm of state regulation. However, Gilbert provides no guidance regarding the issue before us because it does not deal with "the effects of the maintenance of [discrimination] suits on

discipline . . . ." Chappell, supra at 299.

It is our conclusion that, although Congress has not enacted statutes expressly preempting state regulation of discrimination suits against military authorities, the federal scheme referred to in this Opinion strongly suggests that the field has been impliedly preempted by federal law. Additional support for this conclusion is found in the long line of U.S. Supreme Court cases beginning with Feres and continuing with its progeny on a consistent pattern of expansion of the Feres doctrine.[4] We shall borrow language authored by the Sixth Circuit in order to emphasize this point:

> Review of these Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose. Major v. United States, 835 F. 2d 641, 644 (1987)

It is clear that the question is not whether discriminatory acts may or may not "be condoned as discipline". Rather, the question is whether the unique and delicate relationship between uniformed personnel and their superiors would be negatively affected if civilian courts, federal or

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[4] United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985); United States v. Johnson, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987); United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987).

state, were empowered with the jurisdiction to adjudicate discrimination claims brought by servicemen, which would necessarily involve testimony by the officers accused of misconduct and would require the court to analyze military decisions taken with regard to the controversy. As decided in Chappell, civilian courts are "ill-equipped" to evaluate the impact of such actions on military discipline and "must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers." Id. at 300. In addition, it seems obvious that the uniformity intended by Congress for the compensation of injuries incurred by those in the armed services would be greatly undermined were this determination left to be made by civilian courts, acting within their own separate and distinct spheres of empowerment and applying conceivably incompatible statutory and regulatory schemes. We are of the opinion that such a scenario is not what Congress wants. While this might seem harsh, it must be remembered that the real parties in interest do have a remedy by availing themselves of the provisions of the National Guard Military Discrimination Complaint System, as discussed above.[5]

In accordance with the views expressed in this opinion and order, the respondent trial court is hereby DIRECTED to issue

[5] It is not clear whether the guardsmen in this case have formally initiated the administrative grievance process. The response asserts they "fully complied with the provisions of the Kentucky National Guard's internal complaint system. . . ." The petition states they "rejected [the process] in favor of seeking relief in Franklin Circuit Court."

an order dismissing the actions filed by the real parties in interest for lack of subject matter jurisdiction.

HUDDLESTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

ENTERED: August 24, 2001

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

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