

RENDERED: MAY 4, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002044-MR

MARK BLANKENSHIP AND OTHER
INDIVIDUAL APPELLANTS AS
DESIGNATED IN THE NOTICE OF APPEAL APPELLANTS

ON REMAND FROM KENTUCKY SUPREME COURT
NO. 2010-SC-000622-D

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CI-05024

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND KELLER,¹ JUDGES.

¹ Judge Thomas B. Wine participated in the original opinion rendered on August 20, 2010. Upon remand from the Kentucky Supreme Court, Judge Michelle M. Keller is substituting for Judge Wine due to Judge Wine's retirement effective January 6, 2012.

CLAYTON, JUDGE: This case comes before us on remand from the Kentucky Supreme Court pursuant to an order of the Court entered February 15, 2012. In our original opinion, we held that the trial court was correct in finding that Lexington-Fayette Urban County Government (LFUCG) was entitled to sovereign immunity in this action. After reviewing the recent decision in *Madison County Fiscal Court v. Kentucky Labor Cabinet*, 352 S.W.3d 572 (Ky. 2011), we conclude that the trial court was in error.

OPINION

This action was originally filed in the Fayette Circuit Court in November of 2005. The plaintiffs were 430 currently employed, retired and formerly employed firefighters (firefighters) who worked for LFUCG. The firefighters contended that there was an improper calculation of their overtime wages while they worked for LFUCG. As a result, they argued that there was a violation of Kentucky Revised Statutes (KRS) 337.285 as well as a breach of the implied contract found in county ordinances and policies which required they be paid overtime when they worked in excess of forty (40) hours per week. The firefighters also argued that this was a violation of KRS 67A.630 and asked for liquidated damages in the amount of double the amount originally underpaid as they claimed there was bad faith pursuant to KRS 337.285.

KRS 337.285 provides, in relevant part, as follows:

(1) No employer shall employ any of his employees for a work week longer than forty (40) hours, unless such employee receives compensation for his employment in

excess of forty (40) hours in a work week at a rate of not less than one and one-half (1-1/2) times the hourly wage rate at which he is employed.

.....

(5) (a) Upon the request of the county or city employee, and as provided in subsection (4) of this section, compensatory time shall be awarded as follows:

1. A county or city employee who provided work in excess of forty (40) hours in a public safety activity, an emergency response activity, or a seasonal activity as described in 29 C.F.R. sec. 553.24, may accrue not more than four hundred eighty (480) hours of compensatory time; or

2. A county or city employee engaged in other work in excess of forty (40) hours, may accrue not more than two hundred forty (240) hours of compensatory time.

(b) A county or city employee who has accrued four hundred eighty (480) hours of compensatory time off pursuant to paragraph (a)1. of this subsection, or two hundred forty (240) hours of compensatory time off pursuant to paragraph (a)2. of this subsection, shall for additional overtime hours of work, be paid overtime compensation.

.....

(7) If compensation is paid to a county or city employee for accrued compensatory time off, the compensation shall be paid at the regular rate earned by the county or city employee at the time the county or city employee receives the payment.

(8) Upon a county or city employee's termination of employment, all unused accrued compensatory time shall be paid at a rate of compensation not less than:

(a) The average regular rate received by the county or city employee during the last three (3) years of the county or city employee's employment; or

(b) The final regular rate received by the county or city employee, whichever is higher.

(9) Compensatory time shall not be used as a means to avoid statutory overtime compensation. A county or city employee shall have the right to use compensatory time earned and shall not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period upon the county or city employee making the request for compensatory time off.

(10) Nothing in subsections (4) to (9) of this section shall be construed to supersede any collective bargaining agreement, memorandum of understanding, or any other agreement between the employer and representative of the county or city employees.

(11) As used in subsections (4) to (9) of this section, "county or city employee" means an employee of any county, city, charter county, consolidated local government, unified local government, or urban-county government, including an employee of a county or city elected official.

(12) In addition to the designation of a work week under subsection (1) of this section, local governments, as defined in KRS 95A.210(3), may designate a work period for professional firefighter employees as defined in KRS 95A.210. The designated work period shall be not less than one (1) work week of seven (7) consecutive days and not more than four (4) work weeks of twenty-eight (28) consecutive days for purposes of complying with the requirements of the Federal Labor Standards Act of 1938, as amended, 29 U.S.C. secs. 201 et seq. This subsection shall not exempt local governments from complying with the overtime requirements set forth in subsection (1) of this section and is intended to:

(a) Clarify the option to designate both a work week for compliance with Kentucky law and a work period for compliance with the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. secs. 201 et seq.; and

(b) Allow for the application of the partial exemption set forth in 29 U.S.C. sec. 207(k) in determining overtime pay under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. secs. 201 et seq., only.

After LFUCG's motion for judgment on the pleadings was made, the trial court found that the motion should be granted and the case was dismissed pursuant to the doctrine of sovereign immunity. By order dated October 1, 2008, the circuit court granted the firefighters' motion for Kentucky Rules of Civil Procedure (CR) 54.02 designation, ruling that the court's December 20, 2007, opinion and order was final and appealable. The firefighters then brought this appeal.

In an opinion affirming, on August 20, 2010, we found the trial court correctly held that LFUCG was protected by sovereign immunity. As set forth above, on February 15, 2012, the Kentucky Supreme Court remanded this case to this Court after ordering that we further consider the case in light of the recent decision of *Madison County*, 352 S.W.3d 572.

In *Madison County*, the Court restated the law that while "a waiver of sovereign or governmental immunity will be found only where provided in a statute by the most express language or by such overwhelming implications from the text as to leave no room for any other reasonable construction." Citing *Withers*

v. University of Kentucky, 939 S.W.2d 340, 346 (Ky. 1997). The Court went on to hold that Kentucky Revised Statutes (KRS) Chapter 337 implied:

that the legislature did not intend to cloak city or county governments with governmental or sovereign immunity from the very liability that the statutes expressly placed upon them. A statute directing a governmental unit to pay its employees in a prescribed manner necessarily and overwhelmingly implies a waiver of immunity from liability to the employees for non-payment. Otherwise, the statute requiring such overtime pay is a nullity.

Based upon this holding, we must find that sovereign immunity has been waived in this action and that the trial court erred in dismissing the action based upon this defense. As a result, we must reverse the decision of the trial court and remand this action.

ALL CONCUR.

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