

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000165-MR

KEITH FERRIELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CI-000028

CITY OF AUDUBON PARK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

VANMETER, JUDGE: Keith Ferriell appeals from the Jefferson Circuit Court's order granting the City of Audubon Park summary judgment on Ferriell's claim under the Kentucky Whistleblower Act. For the following reasons, we affirm.

Ferriell was employed with the City of Audubon Park Police Department from November 2006 through October 2010. In late July and early August 2010,

Ferriell reported a violation of federal law to personnel within the department. Ferriell alleges that as a result of his report, he was subjected to different terms and conditions of his employment, and ultimately terminated on October 6, 2010. Ferriell filed a complaint against the department on January 3, 2011, alleging a violation of Kentucky's Whistleblower Act, KRS¹ 61.101 *et seq.* The City of Audubon Park moved for summary judgment on grounds that the department is not an "employer" within the meaning of KRS 61.102, and the trial court, relying exclusively on *Wilson v. City of Cent. City*, 372 S.W.3d 863 (Ky. 2012), granted the city's motion on December 18, 2012. This appeal follows.

On appeal, Ferriell argues that *Wilson* should not be broadly interpreted so as to exclude all cities from being considered employers under the Whistleblower Act. Next, Ferriell claims that *Wilson* should only apply to city employees who perform non-essential state functions, and police departments who perform essential functions should be considered employers under the Whistleblower Act. Thirdly, Ferriell claims that police departments are "authorized to act on behalf of the Commonwealth" and therefore are employers under the Act, despite the fact that cities are not political subdivisions of the Commonwealth. Finally, Ferriell maintains that the trial court's ruling should be reversed because if police officers are unprotected by the Act, they have no recourse for wrongful termination.

CR² 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

as a matter of law. Summary judgment may be granted when “as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court’s grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010). Further, “[t]he construction and application of statutes is a matter of law and may be reviewed *de novo*.” *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

The Kentucky Whistleblower Act states in pertinent part:

No employer shall subject to reprisal ... any employee who in good faith reports, discloses, [or] divulges ... 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.

Wilson, 372 S.W.3d at 865-66 (citing KRS 61.102(1)). KRS 61.101(2) defines an employer for purposes of the Whistleblower Act as follows:

“Employer” means 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[.]

The Kentucky Supreme Court addressed the issue of whether cities constitute “political subdivisions” of the Commonwealth, and thus whether they are “employers” under the Whistleblower Act, in *Wilson* and held that “cities are not ‘political subdivisions’ under the Whistleblower Act, and that [the city employee] was therefore not protected by its provisions.” *Wilson*, 372 S.W.3d at 869.

Ferriell first argues the trial court erred by granting summary judgment in favor of Audubon Park because the *Wilson* opinion does not say no city can ever be an employer for purposes of the Whistleblower Act. However, while *Wilson* acknowledges that “gray area” entities exist which may or may not be “political subdivisions” of the Commonwealth, the court clearly holds that cities are not political subdivisions. We agree with the trial court that because Audubon Park is indisputably a city, it cannot be considered a “political subdivision” of the Commonwealth, and thus is not an “employer” for purposes of the Whistleblower Act.

Ferriell then points out that the employer at issue in *Wilson* was the Central City Water Works Department, which Ferriell claims performs a non-essential state function unlike his employer, the Audubon Park Police Department, which he claims performs an essential function. Ferriell asserts that a distinction should be made between city employers who perform essential functions and those who perform non-essential functions. We disagree. Ferriell offers no case law in support of this distinction, and we have found none in our own review. *See*

Hadley v. Citizen Deposit Bank, 186 S.W.3d 754, 759 (Ky. App. 2005) (“[A]n alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal.”). Since the *Wilson* court clearly held that cities are not political subdivisions of the Commonwealth, after a thorough analysis of the legislative history of the Whistleblower Act and the General Assembly’s intent to exclude cities from such, and made no distinction for departments performing “essential” functions, we decline to make such a distinction.

Ferriell next claims that because city police departments enforce the laws of the Commonwealth, the departments are “authorized to act on behalf of the Commonwealth” and are thus employers per the second sentence of KRS 61.101(2). This question lies outside the purview of the Supreme Court’s holding in *Wilson*, since *Wilson* only addressed the first sentence of that subsection.

Ferriell likens police officers to firefighters, who are specifically named agents of the Commonwealth per KRS 75.070(1). Unlike firefighters, however, police officers are not explicitly made agents of the Commonwealth by statute. The specific mention of firefighters as agents of the Commonwealth implies that the legislature did not intend to include all public service employees as agents. If the legislature had intended to name police officers agents of the Commonwealth, it could have enacted a statute doing so, but it has not. Therefore, city police departments remain city employers not covered by the Whistleblower Act.

Ferriell further cites KRS 95.019(1), which states:

The chief of police and all members of the police force in cities of the first through fifth classes shall possess all of the common law and statutory powers of constables and sheriffs. They may exercise those powers, including the power of arrest for offenses against the state, anywhere in the county in which the city is located, but shall not be required to police any territory outside of the city limits.

We do not believe that the power to enforce laws outside the city boundaries makes police officers agents of the Commonwealth or persons “authorized to act on behalf of the Commonwealth” for purposes of KRS 61.101(2). Although, as Ferriell argues, police officers do enforce the laws of the Commonwealth, they do so only in a local capacity, and are not empowered to enforce laws throughout Kentucky. Moreover, KRS 95.019 does nothing to alter the status of Audubon Park as a city. Because city police departments, such as Audubon Park’s police department, are still part of their respective cities, they cannot be considered employers as defined in the Whistleblower Act.

Lastly, Ferriell argues that if we do not find police departments to be employers under the Whistleblower Act, then police officers will have no recourse when they are wrongfully terminated. However, we believe that providing recourse for police officers who claim to have been wrongfully terminated is the province of the legislature, not this court.

For the foregoing reasons, we affirm the Jefferson Circuit Court’s order.

ACREE, CHIEF JUDGE, CONCURS.

CAPERSON, JUDGE, CONCURS IN RESULT ONLY.

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