

RENDERED: JULY 28, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001541-MR

LOUISVILLE/JEFFERSON
COUNTY METRO GOVERNMENT

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 13-CI-004055

WILLIAM WILCOX

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JOHNSON, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Louisville/Jefferson County Metro Government (“Metro”)

brings this interlocutory appeal challenging the Jefferson Circuit Court’s

determination it was not entitled to sovereign immunity on claims raised by

William Wilcox. To the extent Wilcox's claims relate to violations of Kentucky's Wage and Hour Act ("KWHA"), KRS¹ 337.010 *et seq.*, we affirm.

Wilcox has worked for Metro and its predecessor since 1987. He began working for Metro as a Building Maintenance Supervisor II, was reclassified as a Facilities Maintenance Supervisor II in April of 2005, received a raise and was assigned new duties in October of that year, and became a Facilities Maintenance Manager I in early 2006. In November 2008, Wilcox requested a voluntary demotion to Facilities Maintenance Supervisor but wanted assurances his pay would not be negatively impacted. The demotion was granted, but the change was accompanied by a five percent decrease in pay upon a finding by the Director of Human Resources that the additional duties warranting Wilcox's higher pay would be removed upon his transfer.² Wilcox immediately began complaining about the "mistake" related to his pay. Although continually assured by various authorities the pay disparity would be corrected, the decrease was never reversed. Wilcox did not file a formal protest, grievance or appeal, nor did he seek any other administrative remedy or institute a civil action. He ultimately retired in mid-2013, shortly thereafter filing the instant suit alleging violations of KRS 337.020

¹ Kentucky Revised Statutes.

² Wilcox had been granted a pay increase of five percent in October 2007 for regularly taking on increased job duties. Upon his transfer, such additional duties would no longer be required.

and 337.055 for failing to pay compensation and/or wages pursuant to KRS 337.010.

Following a period of discovery, Metro moved for summary judgment based on its assertion that even if Wilcox’s allegations were taken as true, he had failed to establish a KWHHA violation. The trial court rejected Metro’s argument upon finding the existence of genuine issues of material fact.

Approximately three months later, Metro moved a second time for summary judgment, this time arguing Wilcox was excluded from coverage under the KWHHA because as a supervisor, he was not an “employee” as that term was defined in KRS 337.010(2)(a)2.³ Metro argued Wilcox had failed to carry his burden of proving qualification under the KWHHA. Additionally, in anticipation of Wilcox’s reliance on *Healthcare of Louisville v. Kiesel*, 715 S.W.2d 246 (Ky. App. 1986), for the proposition that the “context requires otherwise” language of the

³ In pertinent part, KRS 337.010 states:

(2) As used in KRS 337.275 to 337.325, 337.345, and KRS 337.385 to 337.405, unless the context requires otherwise:

(a) “Employee” is any person employed by or suffered or permitted to work for an employer, but shall not include:

.....

2. Any individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesman, or as an outside collector as the terms are defined by administrative regulations of the commissioner[.]

statute creates an exception to the automatic exclusion from coverage for members of the class defined in KRS 337.010(2)(a)2,⁴ Metro contended nothing in the case warranted deviating from the clear statutory exclusion of supervisory employees from coverage and the context did not otherwise require Wilcox to be deemed an employee.

Before the trial court ruled on the second motion, Metro moved for reconsideration of the denial of the first motion. In its request, Metro posited no genuine issues of material fact existed and, for the first time, argued it was entitled to sovereign immunity on all claims against it as none were based on a written contract and no waiver of the protection existed, citing *Commonwealth v. Whitworth*, 74 S.W.3d 695, 700 (Ky. 2002).

On September 15, 2015, the trial court entered an Opinion and Order denying Metro's motion to reconsider and second motion for summary judgment. The trial court found genuine issues of material fact still existed sufficient to overcome a grant of summary judgment; Metro's sovereign immunity claim was

⁴ In *Kiesel*, a defendant healthcare organization appealed a judgment awarding damages, attorney fees, and costs under KRS 337.385 for the defendant's failure to pay agreed-upon benefits to a doctor employed as a medical director. Discussing and applying KRS 337.385 and 337.010, the court determined the plaintiff doctor was an employee entitled to recover under the statute because the context "require[d] otherwise." 715 S.W.2d at 248. Without elaborating upon why the context "required otherwise," the court stated, "[i]t is just as unlawful to fail to pay or to withhold a part of the salary of an executive, administrative, supervisory or professional employee as it would be to do so in the case of any other type of employee." *Id.* Although *Kiesel* has been on the books over thirty years, it has not been cited approvingly but has been soundly criticized, it gives no explanation for its holding, and it appears to be a wholly result-driven decision. Thus, its precedential value is dubious at best.

improperly raised but was nevertheless without merit based on the holding in *Madison County Fiscal Court v. Kentucky Labor Cabinet*, 352 S.W.3d 572, 576 (Ky. 2011); and the exception set forth in *Kiesel* was applicable to Wilcox, thereby entitling him to the protections of the KWA. Metro filed this interlocutory appeal to challenge the trial court's denial of sovereign immunity protection.

At the outset, we note the order at issue is clearly interlocutory which would normally be fatal to an appeal. However, the denial of a claim for absolute immunity is immediately appealable pursuant to *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009), wherein our Supreme Court held:

As we observed recently in *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006), immunity entitles its possessor to be free “from the burdens of defending the action, not merely . . . from liability.” *Id.* at 474 Obviously such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action. For this reason, the United States Supreme Court has recognized in immunity cases an exception to the federal final judgment rule codified at 28 U.S.C. § 1291. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court reiterated its position that “the denial of a substantial claim of absolute immunity is an order appealable before final judgment.” *Id.* at 525, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411, *citing Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

Furthermore, the question of immunity is a matter of law which we review *de novo*. *Sloas*, 201 S.W.3d at 475; *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003).

It is undisputed Metro is a political subdivision of the Commonwealth and is therefore generally entitled to sovereign immunity. This truth is borne out by the discussion and holding in *Jewish Hosp. Healthcare Servs., Inc. v. Louisville/Jefferson County Metro Gov't*, 270 S.W.3d 905, 906 (Ky. App. 2008). Further, the Commonwealth and its agencies are immune from suit unless there has been an express waiver allowing suit. A waiver will be found “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.’” *Withers v. Univ. of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)).

In *Madison County Fiscal Court*, our Supreme Court discussed the issue of sovereign immunity in the context of claims related to violations of Chapter 337. In concluding an express waiver existed, the Court held

[t]he foregoing statutes overwhelmingly imply, as required by *Withers*, 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.

352 S.W.3d at 576. Thus, there can be no doubt Metro is not entitled to stand behind the shield of sovereign immunity on Wilcox's claims insofar as they are grounded in violations of the KWHHA.

To counter this unavoidable conclusion, Metro spends much effort challenging the trial court's determination that Wilcox was an "employee" for purposes of the KWHHA and its reliance on *Kiesel*, in support of that decision. While Metro presents a cogent and persuasive argument—with which we tend to agree—a full discussion of that issue must await another day as the matter is not properly before us in this interlocutory appeal and it appears the record is not yet developed sufficiently to pass on the question were we so inclined. While the trial court has rejected Metro's argument, it appears the decision may have been based on an incomplete record. Wilcox, who has the burden of proof, has not yet fulfilled his task of showing entitlement to the protections of the KWHHA in the face of the clear exception for supervisory personnel contained in KRS 337.010(2)(a)2. While *Kiesel* does support the proposition that, in a given case, an otherwise exempt employee can recover under KRS 337.385 notwithstanding the limitations stated in KRS 337.010 if the context "requires otherwise," as yet there has been no evidence presented in this case of a unique context warranting an exception from the statutory provisions. We are confident going forward the record will be further developed, thereby enabling the trial court to make a well-reasoned decision based on the evidence presented.

For the foregoing reasons, the Jefferson Circuit Court's denial of Metro's request for sovereign immunity is AFFIRMED.

ALL CONCUR.

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