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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001832-MR

MARY WILSON APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 15-CI-00379

NORTHERN KENTUCKY
AREA DEVELOPMENT DISTRICT APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CHIEF JUDGE CLAYTON; COMBS AND JONES, JUDGES.

CLAYTON, CHIEF JUDGE: Mary Wilson appeals from a summary judgment of the Boone Circuit Court dismissing her claims under Kentucky Revised Statutes (KRS) 61.102, *et seq*., otherwise known as the "Kentucky Whistleblower Act" ("KWA") and finding that, as a matter of law, the Northern Kentucky Area Development District ("NKADD") is not a political subdivision as described in KRS 61.101.

After careful consideration, we reverse.

BACKGROUND

NKADD is one of fifteen area development districts in the state of Kentucky created by KRS 147A.050. Area development districts are inter-county bodies which work with local governments in their particular regions on a wide-ranging number of projects and issues. NKADD provides a variety of services to eight counties in the Northern Kentucky region, including programs focused on ensuring quality of life for the elderly, mentally and physically impaired, homeless, and impoverished, as well as providing employment and educational opportunities.

One such program offered by NKADD is a regional adult homecare service operated in conjunction with the Cabinet for Health and Family Services ("Cabinet"). The Cabinet, either directly or through a contracting entity, is tasked with funding and implementing in each area development district formed under KRS 147A.050 a program "of essential services" designed at preventing "the unnecessary institutionalization of functionally impaired elderly persons." *See* KRS 205.460(1). To that end, NKADD provides case management services to eligible elderly clients, with case workers working to develop a plan to assist the client to stay in their home for as long as they can, as well as providing day-to-day assistance with chores, meals, and personal care. *See* 910 Kentucky Administrative Regulations (KAR) 1:180.

In this case, Wilson was employed as an NKADD case manager from December 2011 until January 2015. Wilson's services included providing periodic home assessments of individuals receiving elder care services through NKADD. Wilson wrote a letter to the Executive Director in June 2014 expressing concerns that some of her clients had not actually received services that NKADD employees were billing to the county and that official NKADD records were being altered to show that such services were being received. Following her letter, an internal investigation was conducted, resulting in Wilson's supervisor receiving disciplinary action for falsification of records. Thereafter, Wilson asserts that she was subject to retaliatory actions by other employees of NKADD because of her report, and eventually resigned from her employment with NKADD as a result of such retaliatory actions.

Wilson subsequently filed a complaint with the Boone Circuit Court against NKADD alleging that NKADD violated the KWA by subjecting her to reprisals after she reported the suspected fraud and asking for compensatory and punitive damages. NKADD moved for summary judgment on the issue that NKADD was excluded from KWA liability, as it was not a political subdivision of the state. The court overruled the motion due to its concern that factual issues remained to be decided regarding the actual functions of NKADD and whether

those functions led to a finding that NKADD was a political subdivision of the state.

After additional discovery, NKADD renewed its motion for summary judgment that NKADD was not a political subdivision under the KWA. Upon briefing of the issues and a hearing, the Boone Circuit Court granted NKADD's renewed motion for summary judgment, relying on the test for sovereign immunity set forth in *Comair, Inc. v. Lexington-Fayette Urban Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), and determining that NKADD was not a "political subdivision" of the state, and therefore not subject to the KWA. Specifically, the court found that the interests that NKADD serves are not functions "integral to state government" as required under the *Comair* test. Wilson now appeals the granting of NKADD's motion for summary judgment.

ISSUES

On appeal, Wilson offers the following arguments: (1) the trial court erred when it granted NKADD's motion for summary judgment because, pursuant to the plain language of the KWA and the legislative intent behind the statute, area development districts are political subdivisions subject to the KWA and therefore, the *Comair* analysis need not be utilized and (2) even if the court finds that the *Comair* test should be utilized, Wilson has still provided sufficient evidence to the

trial court that NKADD is subject to the KWA because NKADD performs functions that are integral to state government.

NKADD responds that: (1) the trial court correctly found that the *Comair* analysis is appropriate in this case because it falls within the "gray area" discussed in the *Comair* opinion, (2) NKADD does not meet the *Comair* test because the functions that NKADD performs are not an integral part of state government, and (3) the General Assembly's passage of a specific House Bill, as subsequently discussed herein, clarifies that area development districts were not subject to the KWA prior to January 1, 2018.

ANALYSIS

At the outset, we note that the applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that it

without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482. Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

With this standard in mind, we turn to a discussion of the legislative intent and statutory language of the KWA. The KWA was enacted to discourage governmental abuses of power and to encourage those who may have knowledge of any such abuses to step forward with that knowledge without the fear of retaliation. *See Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792-93 (Ky. 2008). The Supreme Court of Kentucky has observed that the KWA is a "remedial statute" and should therefore naturally be "liberally construed in favor of [its] remedial purpose." *Id.* at 792.

Specifically, the KWA, codified as KRS 61.102 *et seq.*, provides in pertinent part: s"No employer shall subject to reprisal . . . any employee who in good faith reports . . . any facts or information relative to an actual or suspected violation of any law . . . ." In turn, "employer" is defined as "the Commonwealth of Kentucky *or any of its political subdivisions*[.]" KRS 61.101(2) (emphasis

added). Thus, we must first address the meaning of "political subdivision" to determine whether NKADD is subject to the provisions of the KWA.

The Kentucky Supreme Court observed in *Wilson v. City of Central City*, 372 S.W.3d 863, 869 (Ky. 2012), that it is not immediately clear whether some entities fall under the definition of "employer" for purposes of the KWA. To make such a determination, the *Wilson* Court endorsed its analysis in *Comair* in the context of sovereign immunity as a test to determine if such "gray area" entities were political subdivisions subject to the KWA. *Id*.

Turning to the KWA's specific language and definitions, as previously discussed, NKADD is a statutorily-created entity pursuant to KRS 147A.050(7), and KRS 147A.080(10) states that "[a]n area development district shall be deemed a 'public agency' as defined by . . . KRS Chapter 65." In turn, KRS 65.230 defines a "public agency" as:

> *any political subdivision of this state*, *any agency of the state government* or of the United States, a sheriff, any county or independent school district, and any political subdivision of another state.

(Emphasis added).

Therefore, the plain language of the statutes, when read together as a whole and by process of elimination under KRS 65.230, indicates that area development districts potentially fall into one of two categories, either of which falls under the KWA: a political subdivision of the Commonwealth of Kentucky

or an agency of the Commonwealth of Kentucky. *See Stanford v. U.S.*, 948 F.Supp.2d 729, 736 (E.D. Ky. 2013) (a federal court applying Kentucky law found that an area development district was a political subdivision of the state pursuant to KRS 147A.080(10) and KRS 65.230). Therefore, we find that, pursuant to the plain language of the foregoing statutes and taking the statutory framework as a whole, area development districts are political subdivisions subject to the KWA.

Even if NKADD fell under the "gray entity" category discussed in *Wilson*, pursuant to *Comair*, NKADD is still subject to the KWA because it performs a function integral to state government. Specifically, *Comair* determined that resolving an entity's immunity status under Kentucky law requires a two-part test. *Comair*, 295 S.W.3d at 99-100. First, the court examined whether an entity "is an agency (or alter ego) of a clearly immune entity . . . ." *Id*. at 99. Next, the court assessed whether the entity performed "a function integral to state government." *Id*. (internal quotation marks omitted).

In this case, the parties disagree as to whether NKADD performs functions that are integral to state government. When determining whether an entity performs a function that is integral to state government, courts look to "whether the entity's function is 'governmental' as opposed to proprietary, and whether it is a matter of 'statewide' concern." *Kentucky River Foothills Development Council, Inc. v. Phirman*, 504 S.W.3d 11, 16 (Ky. 2016) (internal

quotations omitted). Further, "[t]he focus is on state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties)." *Comair*, 295 S.W.3d at 99. To be an "integral" function, the Kentucky Supreme Court has stated that the function must be "traditional and necessary" to the state government "such as those functions performed by the state police, our public schools, the corrections system, and public highways and airways." *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855, 864 (Ky. 2015).

Kentucky courts have noted that a function may be made integral to the state through legislative mandate. As stated in *Bowman v. Frost*, 289 Ky. 826, 158 S.W.2d 945, 947 (1942), "[c]are of . . . those unable to care for themselves has long been recognized as a public duty, and as civilization progressed the care of the state for its dependent classes grew and expanded." Moreover,

> [r]elief by the state of the needy and afflicted who are unable to care for themselves *is an accepted exercise of valid authority under the police power in promotion of the general welfare*, and when the Legislature provides for the performance of this governmental function constitutional provisions should be construed, if possible, so as not to interfere with its proper exercise.

Id. at 948 (emphasis added). Therefore, where the state has, pursuant to statute, assumed the task of providing for the health and well-being of a particular group of

individuals, it is carrying out a state governmental function comparable to the conservation and advancement of law and order under the state's police power.

In the case at bar, the state has undertaken, by statute, the task of initiating and facilitating programs and resources to keep the elderly population as independent as possible. Moreover, the state has tied the delivery of its legislatively-mandated task of aiding the elderly to area development districts through administrative regulations aimed at implementing such programs on a local level. KRS 205.460(1) provides that:

> The [C]abinet shall fund, directly or through a contracting entity or entities, in each [area development district designated pursuant to KRS 146A.050] a program of essential services which shall have as its primary purpose the prevention of unnecessary institutionalization of functionally impaired elderly persons.

Moreover, administrative regulations establish the standards of operation for a homecare program and the interplay between the requirements for Cabinet's approval for an area development district's plan for providing the homecare plan applicable to this appeal. *See* 910 KAR 1:180.

Here, we feel that the trial court took an unnecessarily strict view of the functions performed by the NKADD. As previously stated, a large portion of NKADD's programs and resources involve programs to benefit the health and welfare of elderly citizens, including the case management program relevant to this appeal. By enacting KRS 205.460, the General Assembly has determined that the

establishment and facilitation of programs for the health and welfare of the elderly is an integral government function. In turn, the statute and regulations permit, and in practice mandate, that the Cabinet carry out its statutory duty on a local level through NKADD. The Cabinet's services are analogous to and integrated by NKADD at a local level – the very essence of a state concern being "addressed by smaller entities." *Comair*, 295 S.W.3d at 99. Therefore, although we have already determined that NKADD is a political subdivision pursuant to the applicable statutory language, we further find that NKADD is a political subdivision pursuant to the *Comair* analysis.

Finally, NKADD argues that Section 3 of the recently-passed House Bill 189 clarifies that area development districts were not subject to the KWA prior to January 1, 2018. The applicable provision of House Bill 189 creates a new section of KRS 147A as follows:

> By January 1, 2018, each area development district and any board, committee, or other organization created by an area development district shall: . . . (f) Be subject to the provisions of KRS 61.101 to 61.103.

We disagree with NKADD's assertion that the passage of the bill necessitates a finding that the legislature never intended area development districts to be subject to the KWA. To do otherwise would be pure conjecture on our part and would necessitate making a significant inference. We could just as easily say that, in

passing House Bill 189, the General Assembly was merely clarifying what they had always intended – that area development districts be subject to the KWA.

Therefore, viewing the record in the light most favorable to Wilson and resolving all doubts in her favor, we find that summary judgment was not proper in this situation, as NKADD is a political subdivision under the KWA.

CONCLUSION

For the foregoing reasons, the judgment of the Boone Circuit Court is reversed, and the matter remanded for proceedings consistent with this opinion.

ALL CONCUR.

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