

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2005-SC-0965-DG

FILED

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SUPREME COURT

WORKFORCE DEVELOPMENT CABINET,
DEPARTMENT FOR EMPLOYMENT SERVICES
DIVISION OF UNEMPLOYMENT INSURANCE

APPELLANT

ON APPEAL FROM THE FRANKLIN CIRCUIT COURT
ACTION NO. 02-CI-01523 and

KENTUCKY COURT OF APPEALS NO. 2004-CA-001146-MR

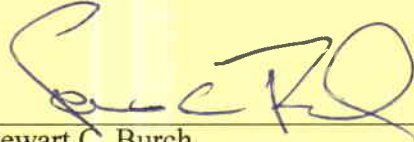
MARY C. GAINES

APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of this Brief were served upon the following individuals by first-class mail, postage prepaid, on August 13th, 2007: Hon. Thomas Wingate, Judge, Franklin Circuit Court, 213 St. Clair Street, Frankfort, Kentucky 40601; Mr. Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Herbert L. Segal, Hon. David O'Brien, Suetholz, Segal, Stewart, Cutler, Lindsay, Janes & Berry, PLLC, 1400 Waterfront Plaza, 323 West Main Street, Louisville, Kentucky 40202. The undersigned also certifies that the record on appeal has been returned to the Franklin Circuit Court Clerk on or before this date.



ATTORNEY FOR APPELLANT

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ARGUMENT

I. THE CHARACTERIZATION OF A STATUTE AS REMEDIAL DOES NOT PERMIT THE ABANDONMENT OF ACCEPTED RULES OF CONSTRUCTION.

In the Appellee's Brief, Mary Gaines invokes the protection of the whistleblower statute as remedial but cannot distinguish or explain the application of the doctrine of ejusdem generis, as it applies to KRS 61.102. Gaines argues that the catch all phrase "or any other appropriate body or authority" does not preclude an intra agency report to the agency itself, even though each and every agency listed in the statute as qualified to receive the report is a third party investigatory authority. Under the doctrine of ejusdem generis, the general words or phrases "any other appropriate body or authority" must be interpreted to include only persons or things of the same type as those listed. Commonwealth v. Plowman, 86 S.W.3d 47, 50 (Ky. 2002); Rainey v. Mills, 733 S.W.2d 756, 758 (Ky. App. 1987). In this instance, none of the persons or agencies listed are the employer itself or an agent or supervisor of the employee. Accordingly, the omission of the offending employer from the list of entities qualified to receive a whistleblower report must be considered intentional.

The omission must also be viewed as intentional in light of the umbrella of other anti-retaliation protections provided by the General Assembly to public servants, under KRS 18A and KRS 344.280. Those statutes permit and envision a direct report to the employer. The Court of Appeals may not rewrite the whistleblower statute simply to achieve a desired result.

At page three of her Brief, Ms. Gaines states:

"not knowing who to contact, Gaines called her attorney, J. Keith Smith (hereinafter "Smith"), and asked him, as her agent, to report the purge to an appropriate authority."

While the transcript of her deposition reveals that Ms. Gaines did not direct Mr. Smith to "report the purge to an appropriate authority", Ms. Gaines does candidly admit the ongoing nature of her litigation with the Appellant. Mr. Smith, who possessed sufficient familiarity with the whistleblower act to later file a claim under the statute, chose not to report the alleged wrongdoing to the Attorney

General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky, the Legislative Research Commission, the judiciary, any law enforcement agency, the Kentucky Personnel Board, or any other third party investigatory authority concerning alleged or suspected violations of law. Within the context of a Kentucky Civil Rights claim under KRS Chapter 344, Ms. Gaines' attorney instead chose to complain directly to his adversary in the litigation.

Ms. Gaines would have the Court believe that the "structure" of state government is too complicated for a grievant to determine the appropriate person to complain to outside of the state agency. To the contrary, KRS 61.102 is very specific, listing seven distinct classes of agencies who may receive the report and thereby trigger the protection of the statute. The question under the whistleblower statute is not the actual truth of the report or the manner in which the investigatory third party agency responds to the report. The statute only requires the making of the report to invoke protection against retaliation. Once the agency accused of wrongdoing is made aware of a protected report to a third party entity, no act of retaliation can be taken against the employee, regardless of how the report is resolved.

More fundamentally, state government is not as complex or bewildering to a career employee as Ms. Gaines would have the Court believe. Merit system employees, through postings, seminars, and training, are made aware of their rights to file grievances, appeal adverse employment actions, and avoid illegal employment practices. Ms. Gaines, for one, was an experienced litigant with an understanding of the Personnel Board and Civil Rights law.

KRS 61.102 provides a map for those public employees who wish to report wrongdoing and invoke the protection of the whistleblower statute. The statute instructs the public employee as to where the report should be made. The public employee need only select one of the specified third party investigatory agencies in order to invoke the protection of the whistleblower statute. The ease in which a public employee may invoke the whistleblower statute should have been made even more apparent in this instance since Ms. Gaines solicited and acted upon the advice of counsel.

The fact that neither Ms. Gaines nor her attorney chose to properly invoke the protection of the whistleblower statute must be viewed in the context of the ongoing litigation. As a party in pending civil rights litigation, Ms. Gaines was likely more concerned with spoliation of evidence. As an active litigant, Ms. Gaines enjoyed the protection of the anti-retaliation measures contained in KRS 344.280. As such, neither Ms. Gaines nor her attorney could have felt any pressing need to invoke the duplicative protections of the whistleblower statute. In fact, KRS 344.280 provided Ms. Gaines with a vehicle for airing all of her unfounded allegations before a Franklin Circuit Court jury.

II. THE ABSENCE OF A CAUSAL CONNECTION BETWEEN THE ALLEGED WHISTLEBLOWER REPORT AND THE ACT OF RETALIATION CONSTITUTES AN ALTERNATIVE GROUND FOR AFFIRMING THE SUMMARY JUDGMENT OF THE FRANKLIN CIRCUIT COURT.

Ms. Gaines urges the Court to ignore the absence of a causal connection between her alleged report and the alleged act of retaliation because the Franklin Circuit Court dismissed her whistleblower complaint based on a legal interpretation of the whistleblower statute. In labeling the absence of a causal connection a “red herring”, Ms. Gaines relies upon the language of the Court’s Judgment, which dismissed the whistleblower complaint because “as a matter of law, the facts alleged do not constitute whistleblowing under the statute”. The Judgment of the Franklin Circuit Court merely mirrors the standard for granting summary judgment under Civil Rule 56. The Judgment of the Franklin Circuit Court did not make any specific findings or limit the failure of Ms. Gaines to establish a whistleblower complaint under any specific element of the statute. Since the Franklin Circuit Court did not make specific findings or limit its determination to any particular failure to establish a whistleblower complaint, the Judgment must be affirmed or sustained if the judgment is sustainable on any ground, even if alternative rationales exist. See, e.g., Sloan v. Jewel Ridge Coal Corp., 347 S.W.2d 504, 506 (Ky. 1961); Milby v. Mears, 580 S.W.2d 724, 727 (Ky. App. 1979); Richmond v. Louisville and Jefferson County Metropolitan Sewer District, 572 S.W.2d 601, 603 (Ky. App. 1978); Tresslar Co., Inc. v. Fritts, 665 S.W.2d 314, 316 (Ky. App. 1984); Bryant

v. Kentucky Department for Human Resources, 548 S.W.2d 165, 167 (Ky. App. 1977). Consequently, the Court may consider the absence of a causal connection between the Gaines “report and the alleged act of retaliation” in reviewing the Summary Judgment.

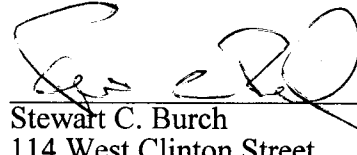
Woodward v. Commonwealth, 984 S.W.2d 477 (Ky. 1998), required Ms. Gaines to establish a causal connection between the alleged report and the act of retaliation. In this instance, neither Ms. Gaines nor her attorney denied that she had been specifically advised that she would be moved to Preston Highway before her alleged whistleblower report. The move to Preston Highway, which constituted the alleged act of retaliation in this instance, had been planned as early as July of 2000 and acknowledged by Mary Gaines as early as February of 2002 through e-mail. See Defendant’s Memorandum of Law in Support of Motion for Summary Judgment, Exhibits 4, 5, and 6. On January 14, 2003, more than three weeks prior to the alleged act of retaliation, both Mary Gaines and her attorney were called to a meeting during which she was specifically advised that she would be moved to the Preston Highway office. *Id.*, Exhibit No. 3. The fact that Ms. Gaines was moved to the Preston Highway office after her “report” does not alter the irrefutable evidence that the decision to move Ms. Gaines had been made far in advance of the alleged report and communicated to Ms. Gaines repeatedly prior to her alleged whistleblower report. Since the act of moving Mary Gaines to the Preston Highway office had been planned and announced prior to the alleged whistleblower report, Ms. Gaines cannot establish a causal connection between making her alleged report and being moved to the Preston Highway office. The failure of Ms. Gaines to establish a causal connection between her “report” and her alleged act of retaliation constitutes an alternative ground for affirming the Summary Judgment granted by the Franklin Circuit Court.

CONCLUSION

For the reasons set forth in the Brief for Appellant, the Commonwealth respectfully requests that the Court reverse the Opinion of the Kentucky Court of Appeals and affirm the Partial Summary Judgment granted by the Franklin Circuit Court.

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