COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2010–SC-000782

JAMES E. NEWTON, JR. — APPELLANT

v.

APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002197

JEFFERSON CIRCUIT COURT
CASE NO. 07-CI-00796

UNIVERSITY OF LOUISVILLE — APPELLEE

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BRIEF FOR APPELLEE UNIVERSITY OF LOUISVILLE

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed via first class U.S. Mail, postage prepaid, to the following: Kenneth J. Henry, Henry & Associates, PLLC, 2303 Hurstbourne Village Drive, Suite 1200, Louisville, KY 40299; Hon. Olu A. Stevens, Jefferson Circuit Court Div. 6, Jefferson County Judicial Center, 700 West Jefferson St., Louisville, KY 40202; and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 on this 8th day of March, 2012. I further certify that no part of the record on appeal was withdrawn by, or on behalf of, Appellee.

Counsel for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

Appellee University of Louisville, requests oral argument and believes oral argument would be helpful to the Court in addressing the issues presented in this appeal, which are issues of first impression and which relate to the abrogation of governmental immunity.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee University of Louisville (the "University") does not accept the Statement of the Case set forth in the Brief of Appellant James E. Newton, Jr. ("Newton"). The University's Counterstatement of the Case is as follows:

A. Factual Background.

Newton worked for the University as a groundskeeper from May 10, 2004 until May 10, 2006. (Compl., ¶¶ 9, 18, R.A. 2-3.) Newton sustained a work-related injury on January 19, 2005 and was absent from work from February 15, 2005 until June 10, 2005. (Compl., ¶¶ 10 - 12, R.A. 2.) He returned to light duty work from approximately June 10, 2005 until July 10, 2005 and resumed regular duties from July 10, 2005 until September 13, 2005. (Compl. ¶ 12, R.A. 2.) He left work at that time.

Newton returned to work with restrictions on May 4, 2006, but six days later he left work indefinitely pursuant to a physician's order. Aside from this six-day return to work, the position in which Newton was employed had been vacant for more than seven months. The University filled the position when it became clear in May 2006 that Newton would be unable to return to work.

Newton applied for long-term disability benefits in June 2006. Although there is no evidence to support this assertion, Newton claims that he gave required portions of the disability benefits application to his former supervisor, Greg Gittings. (Compl., ¶¶ 13-17, R.A. 2-3.) The University's Human Resources department received nothing except Mr. Gittings' statement in support of the application in June 2006. (See Newton depo., Exh. 8, attached to the University's Mot. for Sum. J. as Exh. 1, R.A. 176, *et seq.*)

Newton filled out two additional long-term disability benefits applications in February 2007. (See May 8, 2009 correspondence, attached to the University's Mot. for Sum. J. as Exh. 2, R.A. 176, *et seq.*) The University submitted the applications at that time. Newton, however, claims that the University failed to process the long-term disability applications and therefore breached the "contract" arising from the University's employment personnel policy on disability insurance.

B. Procedural History.

Newton filed suit in Jefferson Circuit Court on January 23, 2007, alleging breach of contract and wrongful termination on the basis of disability pursuant to Kentucky Civil Rights Act, KRS 344.040.[1] (Compl., R.A. 1, *et. seq.*) The University moved for summary judgment on Newton's claims on July 15, 2009, and the trial court granted the motion in an Opinion and Order dated September 21, 2009. (Op. and Order, 9/21/2009, R.A. 339.) In addressing Newton's breach of contract claim, the trial court reasoned that the University is entitled to sovereign immunity because the University's "personnel policies do not constitute a written contract between the parties." (Id.) Specifically, the trial court reasoned that the University personnel policies, as contained on its website, do not bear the hallmarks of a written contract sufficient to waive sovereign immunity. (Id.) Newton appealed the judgment.

On appeal, Newton argued that the University's general governance and policy document (commonly referred to as the "Redbook"), along with personnel policies on the University's website, conferred benefits in a manner sufficient to meet the requirements of a written contract under the Model Procurement Code, KRS Chapter 45A. The Court

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[1] The Jefferson Circuit Court dismissed Newton's disability claim on summary judgment, and Newton has not raised the disability on appeal.

of Appeals rejected the argument, first noting that although Newton did not have an express contract, "portions of the Redbook and the personnel policies which have been provided in the record and set forth above contain sufficiently specific and contractual language to create an implied contractual obligation" (Slip Op., 11/05/2010, p. 7) (emphasis added). However, the Court of Appeals declined to agree that "the definition of a written contract in [the] Model Procurement Code [includes] the implied contract which may have been created between Newton and the University." (Id. at 10.) Thus, the Court of Appeals held that Newton's suit is barred by sovereign immunity.

On December 1, 2010, Newton moved for discretionary review in this Court. (Mot. for Discr. Rev., 12/01/2010). On November 16, 2011, the motion was granted. The sole issue before this Court is whether the University's Redbook and the general personnel policies contained on its website constitute a "written contract" sufficient to abrogate sovereign immunity as set forth in the Model Procurement Code, KRS 45A.245(1).

ARGUMENT AND AUTHORITIES

The Court of Appeals correctly held that Newton's implied contract claim is barred by sovereign immunity because the General Assembly did not waive immunity for the kind of implied contract claim that Newton asserts in this case. This Court should affirm the Court of Appeals decision.

I. SOVEREIGN IMMUNITY CAN ONLY BE WAIVED BY SPECIFIC, EXPRESS ENACTMENT OF THE GENERAL ASSEMBLY.

Sovereign immunity is "deeply planted in the law of the Commonwealth through Section 231 of the Kentucky Constitution." Kestler v. Transit Authority of Northern Kentucky, 758 S.W.2d 38, 39 (Ky. 1988). "Once it has been determined that an entity is entitled to sovereign immunity, this Court has no right to merely refuse to apply it or abrogate the legal doctrine." Withers v. University of Kentucky, 939 S.W.2d 340, 344 (Ky. 1997) (*citing* Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995) and Calvert Investments, Inc. v. Louisville & Jefferson Metropolitan Sewer District, 805 S.W.2d 133 (Ky. 1991)). Instead, Kentucky's Constitution provides for the waiver of sovereign immunity only by the General Assembly. Ky. Const. § 231 ("The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."). Unless waived by the General Assembly, sovereign immunity bars actions in tort and contract against the Commonwealth and its agencies, including the University. See, e.g., University of Louisville v. Martin, 574 S.W.2d 676 (Ky. App. 1978); Martin v. Univ. of Louisville, 541 F.2d 1171 (6th Cir. 1976).

Waiver of sovereign immunity can be found only with a specific and express enactment from the General Assembly. Martin, 574 S.W.2d at 677. This Court held in Withers that a waiver of sovereign immunity 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." 939 S.W.2d at 346 (*quoting* Edelman v. Jordan, 415 U.S. 651, 673 (1974)) (internal quotation marks omitted). This Court has repeatedly and consistently held that waiver of sovereign immunity must meet the high threshold of this standard. See, e.g., Madison County Fiscal Court v. Ky. Labor Cabinet, 352 S.W.3d 572 (Ky. 2011); Greene v. Commonwealth, 349 S.W.3d 892, 905 (Ky. 2011); Grayson County Bd. of Educ. v. Casey, 157 S.W.3d 201, 205 (Ky. 2005); Reyes v. Hardin County, 55 S.W.3d 337, 340 (Ky. 2001).

II. THE GENERAL ASSEMBLY DID NOT WAIVE SOVEREIGN IMMUNITY IN THE MODEL PROCUREMENT CODE FOR IMPLIED CONTRACT CLAIMS.

Newton asks this Court to abandon the exacting standard for finding a waiver of sovereign immunity and, instead, to read into the Model Procurement Code a waiver of sovereign immunity for an alleged implied contract arising out of a state agency's general employee personnel policies. The Model Procurement Code clearly does not contain any such waiver.

In relevant part, the Model Procurement Code provides:

> Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both.

KRS 45A.245(1). The language of the statute makes reference only to an "authorized written contract" and does not waive sovereign immunity for claims arising under oral contracts, implied contracts, quasi contracts, or any other type of unwritten contract.

Likewise, the Model Procurement Code's definition of "contract" does not encompass the kind of implied contract that Newton claims in this lawsuit. Specifically, "contract" is defined as follows:

> "Contract" means all types of state agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and insurance contracts except as provided in KRS 45A.022. It includes supplemental agreements with respect to any of the foregoing.

KRS 45A.030(7). Although the definition lists several varieties of written contract, it does not include employee personnel policies. Nor does it include implied contracts arising from such personnel policies. The kinds of contracts contemplated by the Model Procurement Code are definitive written contracts dealing with a fixed amount of money. See id. In fact, under KRS 45A.245(2), a claimant's available recovery is limited in relation to "the original amount of the contract."

Here, Newton claims that the Redbook and the general employment personnel policies constitute an implied contract. However, those documents are not specific to Newton. They do not specify Newton's wages or hours. Nor do they provide a fixed term of employment for Newton. As such, there is no "original amount of the contract" as contemplated in KRS 45A.245(2).

In KRS 45A.010(2), the General Assembly announced the "underlying purposes and policies" of the Model Procurement Code, which include:

> (a) To simplify, clarify, and modernize the law governing purchasing by the Commonwealth;
>
> (b) To permit the continued development of purchasing policies and practices;

(c) To make as consistent as possible the purchasing laws among the various states;

(d) To provide for increased public confidence in the procedures followed in public procurement;

(e) To insure the fair and equitable treatment of all persons who deal with the procurement system of the Commonwealth;

(f) To provide increased economy in state procurement activities by fostering effective competition; and

(g) To provide safeguards for the maintenance of a procurement system of quality and integrity

KRS 45A.010(2). Nothing in its underlying purposes and policies suggests the Model Procurement Code was intended to deal with implied contract claims arising from a state agency's employment personnel policies.[2] Further, the Model Procurement Code imposes certain requirements on the manner in which contracts are "awarded," requiring competetive sealed bidding, competetive negotiation, noncompetetive negotiation, or small purchase procedures. See KRS 45A.075. An alleged implied contract arising from an employee personnel policy is not "awarded" in any of those manners; it is not "awarded" at all.

In its present form, KRS 45A.245 has been in effect for approximately 30 years. Previously, the law had been well-established that sovereign immunity barred suit against a state agency based on an implied contract. See, e.g., Derby Road Bldg. Co. v. Commonwealth, 317 S.W.2d 891, 894 (Ky. 1958) (holding that neither the state nor its agency can be held liable in damages for alleged breach of implied contract). The

[2] The General Assembly has enacted a comprehensive merit system under KRS Chapter 18A for state government employment relating to "the recruitment, examination, appointment, promotion, transfer, lay-off, removal, discipline, and welfare of its classified employees and other incidents of state employment." KRS 18A.010(1). This illustrates that the General Assembly is perfectly capable of enacting a statutory scheme to govern state employment issues. The Model Procurement Code is not such a scheme.

General Assembly could have included in the Model Procurement Code a waiver of sovereign immunity for implied contract claims, but it did not. Further, since its enactment, the Model Procurement Code has never been interpreted as a waiver of sovereign immunity for implied contract claims, and in fact the Court of Appeals has held the opposite. See Stathis v. Univ. of Ky., 2005 Ky. App. Unpub. LEXIS 886, *24-*25 (Ky. App. 2005).[3] Still, while it could have revised KRS 45A.245 to provide for the waiver of sovereign immunity in implied contract claims, the General Assembly chose not to do so.

The General Assembly could easily have included in the Model Procurement Code, or elsewhere, a waiver of sovereign immunity for claims based on implied contract. Indiana's legislature has waived sovereign immunity for "any person having a claim against the state arising out of an express or implied contract ..." Ind. Code Ann. § 34-13-1-1(a) (emphasis added). Similarly, Alaska's legislature has waived sovereign immunity for "a contract, quasi-contract, or tort claim." Alaska Stat. § 09.50.250 (emphasis added). Other state legislatures have enacted similar waivers explicitly encompassing implied contract claims. See, e.g., N.H. Rev. Stat. Ann. § 491:8 ("the superior court shall have jurisdiction to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state") (emphasis added); Haw. Rev. Stat. § 661-1 ("district and circuit courts of the state shall have original jurisdiction for all claims against the state regarding any express or implied contract that a contracting official was authorized to make") (emphasis added); see also 28 U.S.C. § 1491(a)(1) (in which Congress waived sovereign immunity with respect to

[3] Pursuant to CR 76.28(4)(c), a copy of this unpublished decision is attached hereto in the Appendix to this Brief.

"any claim against the United States founded ... upon any express or implied contract with the United States"). As both the United States Congress and many state legislatures have done, Kentucky's General Assembly could have waived sovereign immunity for claims arising from implied contracts, but it did not.

There is no "express language" or "overwhelming implications" in the Model Procurement Code to justify finding a waiver of sovereign immunity for implied contract claims. Withers, 939 S.W.2d at 346. The plain language, overall intent, and legislative history of KRS 45A.245 all strongly support the finding that the General Assembly chose not to waive sovereign immunity for claims based on implied contract. As such, this Court should affirm the decision of the Court of Appeals.

III. NEWTON DID NOT HAVE A "WRITTEN CONTRACT" WITH THE UNIVERSITY UNDER THE MODEL PROCUREMENT CODE.

Newton did not have a "written contract" with the University as is required by the plain language of KRS 45A.245 to waive sovereign immunity. Instead, Newton claims that the University's Redbook and personnel policies establish an implied contract under this Court's holding in Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). Newton makes the novel argument that the alleged implied contract is nonetheless a "written contract" for purposes of KRS 45A.245 because it is based in part upon the Redbook and personnel policies, both of which are written. As such, Newton claims to have had an "implied written employment contract." (Appellant Brf., p. 9.) Yet, there is no such thing because a contract must either be express or implied; it cannot be both. Newton's concept of a hybrid implied-express contract is an oxymoron.

As this Court recognized in Beiswenger, a written personnel policy can form the basis of an implied contract, but that does not mean that the personnel policy itself constitutes a written contract. Beiswenger, 170 S.W.3d at 363 ("Once an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect") (emphasis added). "An implied contract is one neither oral nor written – but rather, implied in fact, based on the parties' actions." Hammond v. Heritage Communications, Inc., 756 S.W.2d 152, 154 (Ky. App. 1988). Newton is incorrect to suggest that a written personnel policy amounts to a "written contract" under Beiswenger or under the Model Procurement Code.

Newton is likewise incorrect to claim that every material term of the alleged implied contract between Newton and the University is written. (See Appellant Brf., p. 11.) "An express contract is one wherein all the terms and conditions between the parties are set forth," whereas "in an implied contract some one or more of the terms or conditions are implied from the conduct of the parties." Dorton v. Ashland Oil & Refining Co., 197 S.W.2d 274, 275 (Ky. 1946) (emphasis added). An enforceable contract "must contain definite and certain terms setting forth promises of performance to be rendered by each party." Kovacs v. Freeman, 957 S.W.2d 251, 254 (Ky. 1997). Here, the Redbook and the policies that Newton claims as his "written contract" fail to meet these basic requirements. Neither the Redbook nor the website contains any information that identifies or refers to Newton. Nor do they deal with any of the basic and fundamental terms of Newton's employment, such as his position, pay rate, work hours, or term of

employment. The Redbook and website merely set forth policies and procedures generally applicable to University employees.

Even under the analysis of Beiswenger, *supra*, Newton is incorrect to suggest that he had an implied contract for the payment of the long-term disability benefits that he seeks in this case. Newton bases his claim primarily upon the University's personnel policy dealing with long-term disability insurance. The policy language explaining long-term disability insurance is precatory, unlike the specific mandatory policy language in Beisweger, which provided that on-call maintenance employees "shall be paid on and one half times their basic hourly rate for all hours worked in excess of eight." 170 S.W.3d at 356-357. Here, the University's personnel policy on long-term disability insurance has no such mandatory language. The policy does nothing more than explain generally how the long-term disability insurance works for qualifying employees. No language discusses how a claim for long-term disability benefits is submitted. No language promises that the University will process applications for benefits in a certain way. No language guarantees that the University will pay long-term disability benefits. To the contrary, determinations of coverage and benefits payments are made by the disability insurance carrier and not by the University.[4] Newton did not have an implied contract for the U niversity to pay or to guarantee long-term disability insurance benefits.

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[4] Newton's implied contract claim is based on his contention that the University's personnel policy on long-term disability benefits somehow guarantees his receipt of such insurance benefits from the insurance carrier. Yet, the policy clearly does not support that alleged implied contractual obligation. Moreover, such a contention is also barred by the statute of frauds. See KRS 371.010(4) ("No action shall be brought to charge any person ... [u]pon any promise to answer for the debt, default, or misdoing of another ... unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent") (emphasis added).

Newton's reliance on this Court's decision in Commonwealth v. Whitworth, 74 S.W.3d 695 (Ky. 2002), is misplaced. Newton cites the decision for the proposition that a written employment contract with the state is enforceable under KRS 45A.245(1). (See Appellant's Brf., pp. 12-13.) Nothing in Whitworth aids Newton in escaping the clear fact that he had no written employment contract with the University. Newton argues that, unless KRS 45A.245 is construed to waive sovereign immunity for written employment contracts, employed physicians at the University of Kentucky Chandler Medical Center could not enforce their contracts and tenured professors would not really be tenured. (See id. at 12.) Those arguments make no sense. The hypothecial physicians can sue to enforce their contracts under KRS 45A.245 if they have actual written contracts (as opposed to implied contracts). As for tenure, that issue is governed by specific laws such as KRS 164.830(1)(b), which provides that professors and teachers may only be removed for specific limited reasons and "that the removal shall be made in accordance with procedures established by law for state institutions."

Also misplaced is Newton's reliance on the New Mexico Supreme Court's decision in Garcia v. Middle Rio Grande Conservancy District, 918 P.2d 7 (N.M. 1996). (See Appellant's Brf., pp. 14-15.) Newton urges this Court to adopt the reasoning of that decision to hold that an implied contract arising from employment personnel policies constitutes a written contract for which sovereign immunity is waived. Yet, the law in New Mexico is unlike that in Kentucky. The New Mexico Supreme Court had the authority to abolish the doctrine of sovereign immunity in Hicks v. State, 544 P.2d 1153 (N.M. 1975). See Garcia, 918 P.2d at 10. New Mexico's legislature then reinstated sovereign immunity by statute. See id. at 10. In Garcia, 918 P.2d 7, the New Mexico

Supreme Court determined that public policy supported its interpretation of the statute to allow claims for an implied contract arising under employment policies. New Mexico's Court of Appeals later refused to expand the holding to other types of implied contracts, primarily based on public policy grounds rather than on the statutory language. See Campos de Suenos, Ltd. v. County of Bernalillo, 28 P.3d 1104 (N.M. App. 2001).

While the courts of New Mexico may have been free to find, or not to find, a waiver of sovereign immunity based upon their view of public policy, the law is very different in Kentucky. Kentucky's Constitution makes it the exclusive province of the General Assembly to waive sovereign immunity. See Ky. Const. § 231. As set forth in Withers and its progeny, Kentucky's courts will find a waiver of sovereign immunity "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." 939 S.W.2d at 346 (internal quotation omitted). If Newton is correct that it would be good public policy for Kentucky to waive sovereign immunity for claims based upon implied contract arising from employment personnel policies, then that is a decision solely for the General Assembly to make.

Because Newton did not have a "written contract" with the University, he cannot sustain a contract claim under KRS 45A.245, and his claim of an alleged implied contract is barred by sovereign immunity.

CONCLUSION

For all the reasons set forth herein, the University respectfully requests this Court affirm the Court of Appeals decision. Newton's contract claim is based only upon an alleged implied contract – not on a written contract. Only the General Assembly can

APPENDIX A

A. Stathis v. Univ. of Ky., 2005 Ky. App. Unpub. LEXIS 886 (Ky. App. 2005)