UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 09-5119
ELECTRONICALLY FILED

MELVIN KINDLE, BRADLEY SILVERIA, DIEDRA ADKINS

Plaintiffs-Appellants

v.

CITY OF JEFFERSONTOWN, KENTUCKY; CLAY FOREMAN, Mayor, individually and in his Official capacity; JEFFERSONTOWN CIVIL SERVICE COMMISSION

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Kentucky at Louisville
Civil Action No. 07-158
Hon. Charles R. Simpson

APPELLANTS' RESPONSE TO APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC AND TO CERTIFY QUESTION OF LAW TO THE KENTUCKY SUPREME COURT

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Appellees' petition for rehearing or rehearing en banc and to certify a question of law to the Kentucky Supreme Court should be denied.

1. The Petition to Grant Rehearing and to Certify a Question of Law to the Kentucky Supreme Court Should Be Denied

Appellees' request that this Court grant rehearing and certify to the Kentucky Supreme Court the question of whether Jeffersontown, a municipality, is an "employer" under the Kentucky Whistleblower Act should be denied. The panel majority correctly reached its ruling based on two recent Kentucky Supreme Court decisions, *Consolidated Infrastructure Mgmt. Auth., Inc. v. Allen*, 269 S.W.3d 852 (Ky. 2008) and *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008).

This Court, as to state law issues on which the state's highest court has not directly spoken, must determine "what the state law is and apply it." *Olsen v. McFaul*, 843 F.2d 918, 928 (6th Cir. 1988). This Court is not bound in this process "by a decision of an intermediate state appellate court when [it is] convinced that the highest state court would decide differently." *Dale Baker Oldsmobile, Inc. v. Fiat Motors of North America, Inc.,* 794 F.2d 213, 218 (6th Cir. 1986). An unpublished

decision of a state intermediate appellate court that fails to consider principles pertinent to the issue is a factor but "not a very weighty one" in this process. *Olsen*, 843 F.2d at 928.

The Kentucky Supreme Court's decision in *Allen, supra,* indicates that a municipality is an "employer" under the Act. In *Allen*, the pertinent question presented was whether a judgment against a dissolved municipal corporation (Consolidated Infrastructure Management Authority (CIMA)), was enforceable against the municipal corporations, the cities of Russellville and Auburn, which absorbed it. The court answered affirmatively quoting the legal encyclopedia *Am.Jur.2d* as follows: "Thus, if a municipal corporation goes out of existence by being annexed to, or merged in, another corporation, and if no legislative provision is made respecting the property and liabilities of the corporation which ceases to exist, the corporation to which it is annexed, or in which it is merged, is entitled to all the property is answerable for all its liabilities." 269 S.W.3d at 857, *quoting* 56 Am.Jur.2d, *Municipal Corporations, Etc.* § 80 (2008). If a judgment obtained pursuant to the Act is enforceable against a municipal corporation, a municipal corporation is *a fortiori* a suable "employer"

under the Act. Accordingly, as the panel majority correctly observed, *Allen* does strongly indicate that the City of Jeffersontown, a municipal corporation, is an "employer" under the Act.

The Kentucky Supreme Court in *Gaines* detailed the purpose of the Act and the principles of statutory construction applicable to interpreting it. First, in Kentucky "statutes are to be 'liberally construed with a view to promote their objects and carry out the intent of the legislature[.]'" 276 S.W.3d at 792-93, *quoting* Ky.Rev.Stat. § 446.080(1). Second, the Act "has a remedial purpose in protecting public employees who disclose wrongdoing" and "statutes which are remedial in nature should be liberally construed in favor of their remedial purpose." 276 S.W.3d at 793-96. Third, the Act's purpose "is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." 276 S.W.3d at 793. The panel majority correctly followed these principles in concluding that appellants "are the type of employees that the statute was designed to protect." Slip op. at 7.

The panel majority's ruling that the City of Jeffersontown is an "employer" under the Act is also supported by numerous other

principles of Kentucky law. First, Kentucky law has long recognized a municipality as a "political subdivision" of the state. *Mansbach Scrap Iron Co. v. City of Ashland*, 30 S.W.2d 968, 969 (Ky. 1930)("a city is a political subdivision of the state"); *City of Pineville v. Meeks*, 71 S.W.2d 33, 35 (Ky. 1934)("[m]unicipalities are … political subdivisions of the state"). Indeed, this Court concluded in *Smith v. Board of Education of Ludlow, Ky.* 111 F.2d 573 (6th Cir. 1940), as follows: "the law appears to be well-settled in Kentucky that a municipality is a political subdivision of the State." These pronouncements of Kentucky law align with those of the Supreme Court. *See City of Trenton v. State of New Jersey,* 262 U.S. 182, 185-86 (1923)("[t]he city is a political subdivision of the state"); *see also United Bldg. and Const. Trades Council v. Mayor and Council of City of Camden,* 465 U.S. 208, 215 (1984)("a municipality is merely a political subdivision of the State").

Second, under Kentucky law its legislature is presumed cognizant of judicial constructions of terms and incorporates those into its statutes. *See T.M. Crutcher Dental Depot v. Miller* 64 S.W.2d 466, 467 (Ky. 1933)("It is to be presumed the Legislature enacted this amendment with a full knowledge of the existing conditions of the

common law and of statutes with respect to the subject-matter."). Accordingly, it is presumed that the Kentucky legislature was aware that municipal corporations were considered political subdivisions of the state under Kentucky law when drafting and enacting the Kentucky Whistleblower Act.

Third, the language of the Act also indicates an intent to include cities within its scope. Ky.Rev.Stat. § 61.102 protects an employee that discloses violation of an "ordinance." "In its most common meaning, the term [ordinance] is used to designate the enactments of the legislative body of a municipal corporation." *Black's Law Dictionary* at 989 (5th Ed.). Terms in Kentucky statutes are to be given their common legal meaning. Ky.Rev.Stat. § 446.080(4). It is nonsensical and would evade the Act's purpose to conclude that the Act forbids an employer from retaliating against an employee that discloses a violation of a municipal "ordinance" while not including the municipality as such an employer.

The unpublished, non-precedential decision of the Kentucky Court of Appeals, *Wilson v. City of Central City,* 2010 WL 135105 (Ky.App.) relied upon by appellees does not warrant even little weight in this context. First, the decision in *Wilson* was designated not be published

and as such "shall not be cited or used as binding precedent in any other case in any court of this state[.]" CR 76.28(4)(c).

Second, *Wilson*'s assertion that municipalities were excluded intentionally from the Whistleblower Act, as a matter of statutory interpretation, is directly contrary to *Allen* and *Gaines*. The judgment at issue in *Allen* could not be enforceable against the two cities if they were each not a suable "employer" under the Act. Furthermore, *Gaines* held that the Act is a remedial statute that should be construed broadly to achieve its purpose of protecting public employees that disclose wrongdoing in government. 276 S.W.3d at 793, 796. As this Court has noted, "remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly." *Cobb v. Contract Transport, Inc.,* 452 F.3d 543, 559 (6th Cir. 2006). However, the *Wilson* court instead construes narrowly the Act's coverage and construes broadly the Act's exclusions or exceptions.

Third, the error by the *Wilson* court, as well as the similar errors by the court in *Baker v. McDaniel*, 2008 WL 215241 (E.D. Ky.), and by the court below here, rests on the incorrect supposition that included as an "employer" under the Whistleblower Act are only those entities

entitled to sovereign immunity from tort liability. Neither cities nor special districts, which are both municipal corporations, are entitled to sovereign immunity from tort liability. *See Calvert Investments, Inc. v. Louisville & Jefferson Co. Met. Sewer. Dist.,* 805 S.W.2d 133, 136-37 (Ky. 1991)(special district); *Haney v. City of Lexington,* 386 S.W.2d 738, 742 (Ky. 1964)(city). Yet the Kentucky Court of Appeals held in *Davis v. Powell's Valley Water Dist.,* 920 S.W.2d 75 (Ky.App. 1995), that a special district was a "political subdivision" of the state under the Act and therefore a suable "employer" under it. Accordingly, the panel majority correctly analyzed Kentucky law and concluded that "whether an entity receives sovereign immunity in Kentucky does not appear dispositive of whether that entity is a political subdivision for purposes of the Kentucky Whistleblower Act." Slip op. at 8.

Wilson, like *Baker* and the decision by the court below here, also fails to consider or discuss long-standing recognition in Kentucky law that cities are deemed subdivisions of the state, which the legislature is presumed cognizant of and to have incorporated into the Act. The Kentucky legislature continues to regard a municipal corporation as a political subdivision of the state but one example being the statute,

Ky.Rev.Stat. § 154A.020(1), creating the Kentucky Lottery Corporation as "an independent, de jure municipal corporation and political subdivision of the Commonwealth of Kentucky[.]"

2. The Panel Majority Followed a Number of This Court's Precedents and Correctly Ruled that Appellants' Speech Addressed a Matter of Public Concern and that Foreman Is Not Entitled to Qualified Immunity.

As the panel majority observed, "[t]his Court has consistently held that speech on the same topics as [appellants' speech] at issue -- the efficacy and operations of public agencies and allegations of misconduct by public officials -- address as a matter of public concern." Slip op. at 10-11 (collecting cases). Appellees simply disagree with the panel majority regarding which of this Court's precedents apply and control, and appellees' assertion that the panel majority has deviated from the precedents of the Supreme Court, this Court and others is without merit.

The record indicates that appellants' speech addressed substantial matters affecting the entirety of the Jeffersontown police department. First, Jeffersontown's city attorney, Fred Fisher, observed that appellants' speech encompassed the entirety of the police department, and not simply personal and petty grievances. (RE 31-9, Fischer depo.

at 35). Second, Jeffersontown's police chief, Fred Roemele, regarded appellants' speech as raising such substantial issues that he resolved to launch an investigation by his department's criminal investigation or narcotics and intelligence divisions of the issues raised in appellants' report. (RE 45, Roemele depo. at 41; RE 45-4, Roemele depo. ex. 9).

Appellees' contention that defendant Foreman is entitled to qualified immunity rests on their arguments that appellants' speech did not address a matter of public concern. Because the panel majority correctly ruled that appellants' speech addressed a matter of public concern, it likewise ruled correctly that Foreman was not entitled to qualified immunity.

3. The Panel Majority Correctly Ruled that the Jeffersontown Civil Service Commission Is A Necessary Party for Purposes of Relief

Appellants were terminated from civil service positions and seek reinstatement, which can only be achieved through action by the Jeffersontown Civil Service Commission (JCSC) in accordance with this Court's decision in *Christophel v. Kukulinsky*, 61 F.3d 479 (6th Cir. 1995), which held that civil service status is attained only through formal action of the civil service authority. The panel majority correctly ruled that JCSC is a necessary party under Fed.R.Civ.Pro. 19.

Appellees' do not dispute in their petition that action by JCSC is necessary for appellants to attain full relief.

Conclusion

For the foregoing reasons, appellees' petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Sixth Circuit's electronic filing system this 20 day of May 2010, that notice will be sent electronically by that system to All Counsel of Record. I further certify that 25 copies of the foregoing were mailed, postage prepaid this 20 day of May 2010 to Office of the Clerk, U.S. Court of Appeals for the Sixth Circuit, 100 E. Fifth Street, Room 540, Cincinnati, OH 45202-3988.

/s/ Robert L. Abell
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