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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-001092-MR

AMBERLY WHITE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE FRED A. STINE V, JUDGE  
ACTION NO. 10-CI-01449

SOUTHERN HEALTH  
PARTNERS, INC.

APPELLEE

AND

NO. 2012-CA-001106-MR

HEATHER STEPHENS

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE FRED A. STINE V, JUDGE  
ACTION NO. 11-CI-00299

SOUTHERN HEALTH  
PARTNERS, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

LAMBERT, JUDGE: These consolidated appeals are brought from two Campbell Circuit Court orders granting summary judgment to Southern Health Partners, Inc. (SHP). The appellants, Amberly White and Heather Stephens, were discharged from their employment with SHP, a private corporation which provides medical services to inmates at the Campbell County Detention Center, allegedly for reporting misconduct. The issue on appeal is whether SHP is an “employer” and the appellants “employees” for purposes of the Kentucky Whistleblower Act, Kentucky Revised Statutes (KRS) 61.101 et seq.

Under KRS 71.020, “[e]ach jailer shall have the custody, rule and charge of the jail in his county and of all persons in the jail[.]” KRS 441.045(3) requires that “the cost of providing necessary medical, dental, and psychological care for indigent prisoners in the jail shall be paid from the jail budget.” Under 501 Kentucky Administrative Regulations (KAR) 3:090 § 1(1), “[t]he jail’s medical services shall be provided by contracting with a health care provider licensed in Kentucky.”

SHP is a Delaware corporation that has contracts to provide medical care to inmates in detention centers in numerous states. In 2007, SHP and Campbell County entered into a contract under which SHP agreed to provide health services

to inmates at the Campbell County Detention Center (CCDC). Under the contract, SHP was responsible for employing the entire medical staff at the CCDC. The contract also contained the following provision describing the relationship between SHP and the county:

The parties acknowledge that SHP is an independent contractor engaged to provide medical care to inmates at the Detention Center under the direction of SHP management. Nothing in this agreement is intended nor shall be construed to create an agency relationship, an employer/employee relationship, or a joint venture relationship between the parties.

Appellant Amberly White was hired by SHP on January 8, 2009, as a part-time licensed practical nurse. She was terminated from her employment on December 4, 2009, ostensibly for breaching SHP telephone policy. White subsequently filed a complaint against SHP, Campbell County Fiscal Court and Campbell County, claiming that she was terminated in violation of the Whistleblower Act because she had complained about various forms of inmate abuse. White's complaint included the following allegations: medication was withheld from inmates based upon the severity of their crimes; the medical station was not kept fully stocked with supplies as a means of boosting SHP's profits; medication was withheld from inmates for a medically unreasonable amount of time; the house doctor signed numerous medical charts after only a cursory review or no review at all; the doctor would not take the time to examine all the patients identified by the nurses as needing treatment; an inmate was denied a mammogram by the doctor even though there was a lump in her breast; patients were given

medication to which they were allergic; and an inmate who was ultimately diagnosed with Hepatitis C had to beg for medical care. According to White, she reported these incidents to SHP's regional manager, her supervisors, and members of the jail staff.

Appellant Heather Stephens was hired by SHP in May 2009 as a medication aide. She was terminated on December 8, 2009, ostensibly for carelessness, violation of company policies and procedures, and unsatisfactory behavior towards others. Stephens filed a complaint against SHP and Campbell County on February 28, 2011, alleging that she was wrongfully terminated from her employment in violation of the Kentucky Whistleblower Act. She claimed that she witnessed medical care being withheld by SHP's employees; medical technicians filling out charts they were not authorized or trained to complete; saw the wrong medicine being administered to an inmate by a SHP employee; saw nurses refuse to treat inmates; and saw some inmates being overdosed and others with open sores being ignored. She also reported a doctor for signing off on patients without adequately reviewing their medical charts.

The Campbell Circuit Court subsequently entered agreed orders dismissing Campbell County and the Campbell County Fiscal Court as defendants. On May 10, 2012, the court granted summary judgment to the remaining defendant, SHP, in both cases on the grounds that White, Stephens and SHP did not meet the Whistleblower Act's definitions of "employer" and "employee." This appeal followed.

“The 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) (citing Kentucky Rules of Civil Procedure (CR) 56.03). “The record must be viewed in a light most favorable to the party opposing the motion[.]” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

“The Kentucky Whistleblower Act protects public employees who report perceived misconduct to certain state entities, or to ‘any other appropriate body or authority.’” *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 791 (Ky. 2008) (internal quotation marks omitted).

Under the Whistleblower Act, an “employee” is defined as  
a person in the service of the Commonwealth of  
Kentucky, or any of its political subdivisions, who is  
under contract of hire, express or implied, oral or written,  
where the Commonwealth, or any of its political  
subdivisions, has the power or right to control and direct  
the material details of work performance;

KRS 61.101(1).

There is no dispute that White and Stephens were employees of SHP, a private corporation, which is not a political subdivision of the Commonwealth. They argue that they were nonetheless “employees” for purposes of the Act because Campbell County, which is a political subdivision of the Commonwealth, had “the power or right to control and direct the material details of their work

performance.” Although 501 KAR § 1(3) provides that “[t]he health care staff shall not be restricted by the jailer in the performance of their duties except to adhere to the jail’s security requirements[,]” the appellants contend that this restriction did not mean that the county lacked actual power or control over the material details of their work. They argue that the evidence in the record shows the regulation was applied very broadly in practice and effectively grants CCDC a veto over which SHP employees may even gain access to the detention facility.

As further evidence of the county’s control over SHP employees, the appellants point to a clause in the contract between SHP and Campbell County which provides that the county may order an individual employed by SHP to be replaced. The pertinent provision is entitled “County’s Satisfaction with Health Care Personnel,” and states:

If County becomes dissatisfied with any health care personnel provided by SHP hereunder, or by any independent contractor, subcontractors or assignee, SHP, in recognition of the sensitive nature of correctional services, shall, following receipt of written notice from County of the grounds for such dissatisfaction and in consideration of the reasons therefore, exercise its best efforts to resolve the problem. If the problem is not resolved satisfactorily to County, SHP shall remove or shall cause any independent contractor, subcontractor or assignee to remove the individual about whom County has expressed dissatisfaction. Should removal of an individual become necessary, SHP will be allowed reasonable time, prior to removal, to find an acceptable replacement, without penalty or any prejudice to the interest of SHP. SHP shall be responsible for providing interim personnel so as to prevent any interruption of service to the County pursuant to the terms of this contract.

In *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425 (Ky. 2005), the Supreme Court of Kentucky found that a university professor was an employee of the Cabinet for Families and Children for purposes of the Whistleblower Act, even though there was no direct employment relationship or contract between the two. The facts of the case are instructive. Cummings was a University of Louisville professor and served as the Director of the University's Center for Policy Research and Evaluation for the Urban Studies Institute. He and a colleague submitted a proposal for a study of welfare reform to the Cabinet. The Institute and the Cabinet thereafter entered into a contract which allotted approximately \$500,000.00 annually to the Institute to create a database from which studies could be conducted in order to evaluate the impact of welfare reform in Kentucky. Cummings was not a signatory to the contract.

Cummings later claimed that he was removed from his position on the study because he planned to disclose to the Legislative Research Committee that welfare reform in Kentucky had a disparate impact upon African-American and Appalachian families. Cummings alleged that the university, at the direction of the Cabinet, removed him from the study. He filed a complaint, which included Whistleblower claims, against the Cabinet, the university, and employees of the Cabinet and the university. In ruling that Cummings was an employee of the Cabinet for purposes of the Whistleblower Act, the Supreme Court described the nature of his employment relationship with the Cabinet as follows:

The Contract [between the Institute and the Cabinet] itself states that the Cabinet would provide the database with which Cummings was to work. The Cabinet was permitted to add additional recipients to “supplement under-reported categories” in the panel if necessary; work in conjunction with the Institute to determine the appropriate indicators to study; provide consultation and technical assistance to the Institute; and monitor all activities pursuant to the Contract. Cummings was to report his findings to the Cabinet regularly. In addition, the Cabinet had control over what information was presented to other state agencies, the public, the media, and the Legislature. Cummings’s affidavit alleges that the Cabinet dictated the specific details of the manner in which he was to draw the samples, create certain questionnaires, and analyze and interpret the data. Cummings further contends that he was not permitted to use his professional expertise in any of the determinations made, and that this manner of control by the Cabinet was not usually seen in this type of situation. Cummings states that he met regularly with Cabinet officials in person and via e-mail, regarding the progress of the research, and that several of his reports were extensively re-written by the Cabinet. Cummings also states that the Cabinet used a detailed “Gantt chart,” which specified certain time lines and work product deadlines Cummings was required to meet, as a tool to monitor the Institute's work on the study. The record also revealed copies of e-mails between Cummings and Cabinet employees where Cummings was specifically asked to remove the word “disparate” from his findings.

Also telling is that the Cabinet had enough control over Cummings’s work that it was ultimately able to remove him from the study altogether. The Act’s prohibition on retaliatory firing necessarily implies that an employer must be in a position to retaliate with the threat of one’s job. This is a type of situation that we believe the General Assembly envisioned and sought to protect when it enacted the Act.

*Cummings*, 163 S.W.3d at 429-30.



By contrast, there is little evidence that Campbell County had any control over the specific, day-to-day aspects of White's and Stephens's work in providing medical services to inmates at the CCDC. The county did not have the power to direct the appellants to perform their tasks in a particular way, nor did it maintain the kind of substantive, detailed control and supervision over their duties that the Cabinet exercised over Cummings. Admittedly, the county did retain the right to ask SHP to remove employees with whom the county was dissatisfied, and the right to revoke the security clearance of SHP employees. But this power relates primarily to the vital security concerns associated with the jail setting, rather than to dissatisfaction with the professional performance of SHP employees. Again by contrast, in *Cummings*, there was evidence that the Cabinet was responsible for Cummings's termination from the study in direct retaliation for his plans to disclose negative findings about the effects of welfare reform. There is no evidence that the termination of White and Stephens was at the behest of the county at all, still less from any retaliatory motive on the part of the county for their work-related allegations. The county's power and control to direct the appellants' work performance was simply not sufficient to render the appellants "employees" under the Whistleblower Act.

The appellants further argue that the trial court erred in ruling that SHP is not an "employer" for purposes of the Whistleblower Act. "Employer" is defined in the Act as

the Commonwealth of Kentucky or any of its political subdivisions. Employer also includes any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions, with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees[.]

The appellants concede that SHP is not a political subdivision of the Commonwealth, but contend that it is nonetheless a corporate “person” authorized to act on behalf of the county in fulfilling its statutory duty to provide medical care to detention center inmates.

In *Cummings*, the Supreme Court explained that the “any person” language was included in the definition solely to ensure that the Commonwealth or one of its agencies could not avoid liability by arguing under a theory of respondeat superior that a policy maker or manager acted outside the scope of his or her employment. *Cummings*, 163 S.W.3d at 431-433. The appellants argue that this portion of the *Cummings* analysis should be narrowly construed to apply only to individual defendants, and that the trial court erred in extending the holding to include private contractors. We disagree. The *Cummings* court stressed that the purpose of the Act would be defeated if an aggrieved employee could maintain an action “without joining the Commonwealth or a political subdivision as a party defendant.” *Id.* at 431. As we have noted, White and Stephens both entered into agreed orders dismissing the county and the county fiscal court, leaving SHP, which is neither the Commonwealth nor one of its political subdivisions, as the sole defendant. It is well-established that in order to demonstrate a violation of the Act, a claimant must

establish that (1) the employer is an officer of the state; and (2) the employee is employed by the state. *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 251 (Ky. App. 2004). Adopting the appellants' interpretation would mean that SHP, by contracting to provide medical services to inmates of the county jail, was in effect transformed into a political subdivision of the state. Under the facts of this case, such a result would be an unwarranted expansion of the scope of the Act. The trial court did not err in ruling that SHP was not an "employer" for purposes of the Act.

Finally, the appellants dispute the trial court's conclusion that the wrongdoing they reported did not rise to the level of severity required to bring a successful claim under the Whistleblower Act. Since we have already determined that the trial court correctly ruled that the parties are not covered by the Act, this argument need not be addressed here.

The summary judgments granted by the Campbell Circuit Court are affirmed.

ALL CONCUR.

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