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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001855-MR
AND
NO. 2013-CA-001937-MR

GATEWAY AREA DEVELOPMENT DISTRICT, INC. — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 11-CI-90349

DAVID COPE — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

CLAYTON, JUDGE: Gateway Area Development District, Inc. (hereinafter "GADD") appeals from the October 2, 2013 judgment of the Rowan Circuit Court in a case involving the Kentucky Whistleblower Act. The issues appealed are whether the trial court erred when it denied GADD's motions for directed verdict

and judgment notwithstanding the verdict; and whether the trial court erred in taking judicial notice that GADD was an employer under Kentucky Revised Statutes (KRS) 61.101(2). GADD maintains that it is not an "employer" under the whistleblower statutes and that Cope's disclosure was not protected under the whistleblower statutes. GADD also appeals the trial court's grant of Cope's motion for attorney's fees. Additionally, Cope cross-appeals the trial court's denial of his motion to restore his request for punitive damages.

After careful consideration, we reverse.

BACKGROUND

Cope was an employee of GADD from 1989 until June 30, 1996. In 1996, GADD decided to contract out the services performed by Cope and issued a public request for proposals ("RFP"). Cope bid on the contract and was awarded it. His tenure as an independent contractor with GADD began on July 1, 1996. Thereafter, he re-bid on the contract multiple times, and each time was awarded it. Consequently, Cope acted as an independent contractor for GADD from July 1, 1996 until June 30, 2011.

However, in 2009, Cope filed a Form SS-8[1] with the Internal Revenue Service (hereinafter the "IRS") seeking a determination as to whether his position should be classified as "independent contractor" or "employee" for purposes of federal income taxes. In October 2010, the IRS released a preliminary

[1] "*Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding"*

determination that Cope should be classified as a full-time employee rather than an independent contractor.

In February 2011, GADD changed the status of the position held by Cope from "independent contractor" to "employee." In addition, GADD decided that upon the termination of Cope's contract, he would be hired as an employee rather than an independent contractor. But although Cope was offered his previous position, GADD only offered him the job as a part-time employee working twenty hours per week. GADD hired another part-time employee in the same position as Cope also at twenty hours per week.

GADD asserts that this decision was made because it was less expensive to hire two part-time employees than one full-time employee. According to GADD, the cost for the position, based on employee benefits, is fifty percent more for a full-time employee as opposed to two part-time employees. Cope, however, asserts that GADD hired him as a part-time employee to punish him for filing Form SS-8 with the IRS.

On September 30, 2011, Cope filed a complaint against GADD alleging two causes of action. Count One states that GADD violated Kentucky's Whistleblower Act, codified at KRS 61.101, by hiring him as a part-time employee rather than a full-time employee. He claimed that his submission of Form SS-8 to the IRS was a good faith disclosure of an actual or suspected violation of federal or state law, and GADD hired him as a part-time employee to punish him for making this disclosure. Under this count, Cope sought "back pay, full reinstatement of all

fringe benefits, exemplary or punitive damages, and his reasonable attorney's fees and costs."

In Count Two of the Complaint, Cope contended that GADD violated Kentucky's wage and hour laws under KRS 337.010 by classifying him as an independent contractor rather than a full-time employee. Thereafter, GADD made a motion for summary judgment on the wage and hour claim, which the trial court granted. This summary judgment has not been appealed. Next, GADD moved for summary judgment on the whistleblower action, which the trial court denied.

A jury trial was held August 5 and 6, 2013. At the close of Cope's evidence, GADD made a motion for a directed verdict arguing that Cope had failed to demonstrate that GADD was an employer subject to liability under the Kentucky Whistleblower Act and, further, that Cope's report about his employee status was not a "protected disclosure" under the Act. The trial court denied this motion.

At the close of GADD's case, Cope made a motion for the trial court to take judicial notice that GADD was an "employer" under the Kentucky Whistleblower Act. The trial court granted this motion. Next, GADD renewed its directed verdict motion, which was again denied. It also made a *Fratzke*[2] motion to prohibit Cope from recovering punitive damages because he failed to identify an amount of punitive damages in his responses to GADD's interrogatories. After GADD's motion, Cope attempted to amend the responses to the interrogatories and

[2] *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999).

include an amount for punitive damages. Ultimately, the trial court denied Cope's motion to amend his responses and, as such, the jury was not instructed on punitive damages.

The jury found for Cope and awarded him the full amount for damages and benefits permitted under the instructions. After the trial concluded, Cope made a motion, among other things, for reinstatement, punitive damages, and attorney's fees and costs. In addition, GADD filed a motion for judgment notwithstanding the verdict renewing its arguments regarding the public agency and disclosure issues. A hearing about the motions was held on August 30, 2013.

On October 2, 2013, the trial court partially granted Cope's motion by awarding him a portion of his submitted attorney's fees, $65,685.19, and all of his costs, $2,957.18. The trial court, however, denied Cope's motion for reinstatement and punitive damages. And the trial court denied GADD's motion for judgment notwithstanding the verdict in its entirety. Thereafter, the trial court entered its judgment in accordance with the aforementioned rulings.

GADD now appeals the denial of its motions and the amount of the award of attorney's fees to Cope. Cope cross-appeals the trial court's decision denying his motion for reinstatement of a motion for punitive damages.

ISSUES

On appeal, GADD proffers the following arguments: The trial court erred when it denied GADD's motions for directed verdict and judgment notwithstanding the verdict since Cope failed to present any evidence that GADD

was an "employer" under KRS 61.101(2) and because his request to the IRS for clarification regarding his employment status was not a "good faith report" as set forth in KRS 61.102(1). GADD also maintains that the trial court erred when it took judicial notice that GADD was a political subdivision of the state. Finally, GADD contends that the trial court erred in granting Cope's motion for attorney's fees without analyzing or making findings about his submitted attorney's fees.

Cope responds that the trial court properly denied GADD's motion for directed verdict since GADD is an "employer" subject to the Whistleblower Act and Cope's disclosure to the IRS was a "protected disclosure" under the Whistleblower Act; the trial court properly took judicial notice that GADD was a political subdivision of the Commonwealth; and finally, the trial court's award of attorney's fees was not an abuse of discretion. Cope cross-appeals and suggests that the trial court erroneously failed to consider an award of punitive damages.

ANALYSIS

Kentucky Whistleblower Act

The underlying purpose of the Kentucky Whistleblower Act "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." *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004) (citation omitted). The pertinent statute prohibits an employer from discriminating against or otherwise retaliating against an employee

who makes public certain instances of wrongdoing at the hands of the employer. KRS 61.102.

For Cope to prevail on his claim under the Whistleblower Act, he must establish all four of the following elements:

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

Id. at 251. In addition, the plaintiff must demonstrate that "the disclosure was a contributing factor in the personnel action." *Id*. If the plaintiff meets this burden, the burden then shifts to the employer "to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." *Id*.

In the case at bar, GADD contests the applicability of the whistleblower statutes. It contends that the trial court erred when it failed to grant GADD a directed verdict or judgment notwithstanding the verdict. According to GADD, Cope must establish pursuant to the whistleblower statutes that GADD was an employer and/or his disclosure was the type of good faith report or disclosure protected by the statutes.

Initially, we address the issue of whether GADD is a state employer as contemplated under the whistleblower statutes. In the complaint, Cope describes GADD as a "Kentucky non-profit corporation . . . an agency of the

Department of Aging and Independent Living which [sic] operates under the Cabinet for Health and Family Services." This depiction of GADD in the complaint underlines the first issue – was GADD a non-profit corporation or an employer for the Commonwealth?

GADD believes the court erred because it did not undertake an analysis of its status as an "employer" under *Comair*[3] (discussed below) and relied on evidence that it suggests was grossly insufficient to determine that GADD was a political subdivision of the Commonwealth. In reply, Cope maintains that the trial court properly denied the motion for directed verdict since it was not required to undertake a *Comair* analysis and even if it had, the analysis would support that GADD was a political subdivision covered by the Whistleblower Act.

GADD – An Employer

GADD is one of fifteen area development districts in the state of Kentucky. Area development districts are inter-county bodies, created by statute, which work with local governments in their respective regions on a broad range of various projects and issues within their respective regions. *See* KRS 147A.050. GADD asserts that, notwithstanding its legislative origin and governmental functions, it was not an "employer" subject to liability under the Kentucky Whistleblower Act.

Nevertheless, our Court confirmed in *Davis v. Powell's Valley Water Dist*., 920 S.W.2d 75, 78 (Ky. App. 1995), that a water district is a type of special

[3] *Comair, Inc. v. Lexington-Fayette Urban Cnty. Airport Corp*., 295 S.W.3d 91 (Ky. 2009).

district which constitutes a political subdivision of the Commonwealth and is afforded the protections of the Kentucky Whistleblower Act. Furthermore, with regards to a similarly created entity, a planning commission, we decided it was a political subdivision subject to the Whistleblower Act. *Northern Kentucky Area Planning Com'n v. Cloyd,* 332 S.W.3d 91, 94 (Ky. App. 2010).

Before dealing directly with the issue, we note that our task as a reviewing court is to ascertain whether the trial court erred in failing to grant a directed verdict. This Court reviews a trial court's refusal to direct a verdict under a clear error standard. *See Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256 (Ky. App. 2007). In performing our review, we are cognizant that "[a]ll evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact." *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461 (Ky. 1990). Moreover, a trial court's ruling will be overturned only where the jury's verdict is so flagrantly against the weight of the evidence as to indicate passion or prejudice. *Denzik v. Denzik*, 197 S.W.3d 108, 110 (Ky. 2006).

Returning to the question whether GADD, and other area development districts, may be characterized as "political subdivisions" of the Commonwealth for purposes of the Whistleblower Act, Cope must establish in order to make a claim under the Act that GADD is a public subdivision of the state.

Under the Act, "'[e]mployer' means the Commonwealth of Kentucky or any of its political subdivisions." KRS 61.101(2).

Although no Kentucky appellate case has addressed with particularity whether GADD is a political subdivision of the Commonwealth, it was observed in *Uninsured Employers' Fund v. Stanford*, 399 S.W.3d 26, 32 (Ky. 2013), that Bluegrass Area Development District (hereinafter "BADD") was a governmental entity created by the legislature in KRS 147A.050. Hence, it appears that development districts are governmental entities. But the question remains as to whether they are political subdivisions of the Commonwealth as anticipated under the Whistleblower Act.

In *Wilson v. City of Central City*, 372 S.W.3d 863 (Ky. 2012), the Supreme Court observed that the whistleblower statutes do not define political subdivisions. In order to make such a determination, the *Wilson* Court reaffirmed its holding in *Comair, Inc. v. Lexington–Fayette Urban Cnty. Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). The Court recognized that:

> [n]umerous ... entities ... fall outside [the] taxonomy of city versus state and county, and it is not immediately clear whether they are agencies of the state, and therefore possibly entitled to immunity, or more akin to municipal corporations, and are therefore liable in tort. These in-between entities have given courts the most trouble in recent years.

Wilson, 372 S.W.3d at 869 (quoting *Comair*, 295 S.W.3d at 95).

The Court then noted that resolving the immunity status (and in our case the application of the whistleblower statutes) falls into a "gray" area. *Id*.

GADD, relying on a footnote in *Wilson*, suggests that the Supreme Court mandated that to ascertain whether immunity or the Whistleblower Act is applicable, a court must analyze whether an entity is an employer pursuant to *Comair*. Although the court did not use mandatory language, the Court did state "[w]e cite *Comair* with approval in how to resolve whether one of these entities is subject to the Whistleblower Act." *Id.*

In *Comair*, the Court stated that the test to determine immunity status focuses on "whether the entity exercises a governmental function, which [*Berns*] explains means a 'function integral to state government.'" *Comair*, 295 S.W.3d at 99 (citing *Kentucky Center for the Arts v. Berns,* 801 S.W.2d 327, 332 (Ky. 1990)). Further, "[t]he focus," *Comair* directs, "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 ...." *Id.* In sum, the *Comair* test for immunity, and whistleblower status, is done on a case-by-case basis and focuses on whether the entity exercises a governmental function that is integral to state government. *Wilson*, 372 S.W.3d at 869.

In the case at bar, GADD relies heavily on a federal district court case to support its position that the trial court erred in determining that GADD was an "employer" under the Whistleblower Act. Initially, before reviewing this federal decision, we point out that state courts are not bound to follow a decision of a federal court, including the United States Supreme Court, when dealing with state law. *Johnson v. Fankell*, 520 U.S. 911, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997).

Rather, the approach taken by a federal court may be viewed as persuasive but not binding. *U.S., ex rel. U.S. Attorneys ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 147 (Ky. 2014).

The case relied on by GADD is *Stanford v. U.S.*, 948 F.Supp.2d 729 (E.D.Ky. 2013). Therein, BADD moved for summary judgment on the basis of sovereign immunity, maintaining that it was a political subdivision of the state under the *Comair* analysis. As an aside, we observe that the federal court reviewed this case under a summary judgment analysis rather than directed verdict review.

To ascertain whether BADD was entitled to sovereign immunity, the federal district court began its analysis by explaining that whether BADD was entitled to sovereign immunity rested on whether the agency met the *Comair* elements. It then characterized the elements as follows:

> To show that it performs "a function integral to state government," BADD must establish two elements. *Comair*, 295 S.W.3d at 99 (internal quotation marks omitted). First, BADD must show that it addresses "state level government concerns that are common to all citizens of th[e] state." *Id*. Serving "purely local" concerns does not count. *Id*. Examples of state-level government concerns include "police, public education, corrections, tax collection, and public highways." *Id*. Second, BADD must demonstrate that it serves a function that is itself "integral" to addressing that state-level government concern. *Id*. at 101 (examining whether the airport board's function was itself "integral to state government"). To be "integral" BADD's actions must be necessary, an "essential" part of carrying out that state-level government function. *Commonwealth v. Ky. Retirement Sys.*, 396 S.W.3d 833, 837–38 (Ky. Apr. 25, 2013); *see also Comair*, 295 S.W.3d at 99 (explaining that the test extends sovereign immunity "to departments,

> boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure" (quoting *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 331 (Ky.1990)).

Id. at 736-737.

Yet, we view the two referenced elements in *Comair* somewhat differently than the federal district court in *Stanford*. As discussed in *Comair,* the basic concept behind the two prongs is whether the entity is an agency of a clearly immune entity (like the state or a county) or one that is for purely local, proprietary functions. This distinction is helpful in determining whether an agency meets prong one. *Comair*, 295 S.W.3d at 99. The Court explained that this factor is merely a guiding principle that focuses on the origins of the entity. *Id*.

Here, the origin of special districts is found in KRS 65.005(2)(a), which states that "'[s]pecial district' means any agency, authority, or political subdivision of the state which exercises less than statewide jurisdiction and which is organized for the purpose of performing governmental or other prescribed functions within limited boundaries. It includes all political subdivisions of the state except a city, a county, or a school district." Thus, the very statutory origin of special districts defines them as "political subdivisions of the state."

Indeed, with regards to the first prong, *Stanford* agrees that GADD meets the prong's requirement:

> BADD was created by the Kentucky legislature and is designated as a "public agency" under state law. *See* Ky.Rev.Stat. §§ 147A.050(15), 147A.080(10). Thus,

> BADD is a political subdivision of the state. *See id.* § 65.230. And since the state enjoys total immunity, BADD satisfies the first step. *See Comair*, 295 S.W.3d at 99.

Stanford, 948 F.Supp.2d at 736.

Having determined that GADD is a governmental entity, we now consider the second prong, that is, whether its function is an integral governmental function. *Comair*, 295 S.W.3d at 99. According to *Stanford*, which used the *Comair* analysis, for an agency to show that it addresses state level government concerns, it must demonstrate that it serves a function that is itself "integral" to addressing that state level government concern. *Stanford*, 948 F.Supp.2d at 737 (citations omitted). To do so, the federal district court then opines that BADD's actions must be shown as an "essential" part of carrying out that state level government function. *Id*. Ultimately, the federal district court decided that BADD failed to establish that the balance of its activities addressed state concerns.

Returning to *Comair*, the Court therein explained that state level governmental concerns are those 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). Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways. *Comair,* 295 S.W.3d at 99.

To assess if the entity performs a "function integral to state government," the trial court must consider the balance of the entity's functions, not

just the particular action at issue in the case. *N. Ky. Area Planning Comm'n v. Cloyd*, 332 S.W.3d 91, 95–96 (Ky. App. 2010).

Cope pursued his claim in the trial court as though, to quote his brief, "GADD is clearly a political subdivision of the Commonwealth that does not fall within this 'gray area' [and, therefore,] the trial court was not required to engage in a *Comair* analysis." (Appellee's brief, page 6). His rationale is that a county is not in this gray area and "GADD is even broader than a county . . . ." (*Id.* at page 5). Apparently, this is why he presented no proof at trial descriptive of the state functions GADD performs.

Cope's rationale is flawed because GADD unquestionably falls in this gray area. However, the *Comair* Court reasoned that each situation requires a case-by-case analysis to ascertain whether sovereign immunity and, in this case, whistleblower statutes, apply. The Court states that sovereign immunity should:

> "extend ... to departments, boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure." 801 S.W.2d at 332 (internal quotation marks omitted). The focus, however, 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). Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways.

Comair, 295 S.W.3d at 99.

We resolve the immunity question – and hence the "political subdivision" question under the Whistleblower Act – by analyzing "what an

agency actually does[.]" *Comair,* 295 S.W.3d at 102 (Ky. 2009) (internal quotation marks and citation omitted). How can that analysis occur without the plaintiff's offer of proof as to what GADD actually does? Cope failed to present sufficient evidence to overcome GADD's directed verdict. Under these circumstances, the trial court erred in denying the directed verdict motion.

Judicial Notice

GADD also declares that the trial court erred when it granted Cope's motion for judicial notice that GADD was a political subdivision of the state. Cope based his motion for judicial notice on a manual, titled "Special Districts Manual," which was published by the Kentucky Office of Finance and Administration Special District Branch. The manual classified "area development districts" as special districts and, thus, Cope claims this allows the trial court to take judicial notice that agencies like GADD are "employers" of the state for the purposes of the Kentucky Whistleblower Act.

GADD objects to the trial court's grant of judicial notice because it claimed that the manual was not a substitute for the factual and legal analysis required under *Comair.* In addition, GADD discusses the necessary elements for judicial notice.

In disputing the trial court's action in taking judicial notice of GADD's status as a state agency, GADD argues that the trial court is taking notice of an adjudicative fact, which is not permissible under the evidentiary rule about judicial notice. Kentucky Rules of Evidence (KRE) 201. It contends that the only

fact for which judicial notice could be taken was that GADD is a special district under Kentucky law. Primarily, GADD argues that its classification as a special district is only the beginning of the evaluation and, accordingly, judicial notice cannot appropriately be given under KRE 201.

We agree with GADD that the trial court improperly granted judicial notice that GADD was a state employer. According to KRE 201, a trial court may only take judicial notice of an adjudicative fact when it is a fact "not subject to reasonable dispute" because it is either:

> (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

KRE 201(b). Here, the extensive evaluation by this Court and the evidence placed on the record during the trial demonstrate that GADD's status as an employer under the Kentucky Whistleblower Act was neither generally known nor referenced explicitly in a source with unquestionable authority. Therefore, judicial notice of this adjudicative fact was improper.

Good Faith Report under Kentucky Whistleblower Act

We now turn to the third element under KRS 61.102 for a whistleblower claim – a good faith report or disclosure of actual or suspected violation of state law to an appropriate authority. In particular, the whistleblower statute protects an employee "who in good faith reports, discloses, divulges or

otherwise brings to the attention of . . . [an] appropriate body or authority, any facts or information relative to an actual or suspected violation of any law . . . of the United States . . . or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety." KRS 61.102(1).

Here, GADD contends that the trial court erred when it denied GADD's motions for directed verdict and judgment notwithstanding the verdict because Cope's filing of a Form SS-8 with the IRS was not a good faith disclosure as contemplated by the statute. GADD asserts that submission of Form SS-8 was not a "good faith" disclosure because it was based on public information, which is not covered under the Kentucky whistleblower statutes. We agree.

In *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792 (Ky. 2008), the Supreme Court enunciated that the rationale behind the Whistleblower Act "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." *Davidson*, 152 S.W.3d at 255 (citations omitted).

Relying on the similarity between our statute and the federal whistleblower statute, the Court in *Davidson* observed that the report of publicly known information was not afforded protection under KRS 61.102. *Id.* However, since the *Davidson* decision was made, the federal government updated the federal whistleblower statutes in 2013. Still, the Kentucky whistleblower statutes

remained the same, and our review of the statute continues under the holdings of previously decided Kentucky cases.

After the decision in the *Davidson* case, our court decided *Helbig v. City of Bowling Green*, 371 S.W.3d 740 (Ky. App. 2011). Therein, our Court explained in *Helbig* that "[i]f '[t]he purpose of [KRS 61.102] is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known,' it does not logically follow that [Helbig] is protected under this act for reporting that a publicly known policy violates a publicly known law." *Id*. at 742 (quoting *Davidson*, 152 S.W.3d at 255.)

In that case, Helbig, a police officer, filed a complaint under the whistleblower statutes because he had been demoted after he filed a grievance regarding a new overtime policy. The City of Bowling Green filed a motion to dismiss his complaint on the grounds that the overtime policy had been adopted in a public forum and, therefore, was publicly known prior to the filing of his grievance. We affirmed the trial court's dismissal of the complaint. Relying on *Davidson*, we held that publicly known information is not afforded protection under KRS 61.102.

GADD argues that the facts in *Helbig* are similar since Cope's status as an "independent contractor" was publicly known. When Cope filed the Form SS-8 with the IRS, he did not disclose any information or unlawful conduct that was not already known, that is, public. In fact, Cope's status as an independent contractor was published numerous times to the general public through GADD's

request for proposals. Evidence was presented that these RFP's were published in newspapers in five counties.

Cope argues that GADD's contention that the Kentucky Whistleblower Act does not protect public information relies on cases that have been overturned. He begins with *Meuwissen v. Department of Interior*, 234 F.3d 9, 17 IER Cases 10 (Fed. Cir. 2000). As previously noted, *Davidson* recognized the similarity between the federal and state whistleblower statutes when it made its decision that the Kentucky Whistleblower Act does not protect publicly known information. Nonetheless, although the federal whistleblower statute has been amended, the Kentucky Whistleblower Act has not. Further, both *Davidson* and *Helbig* are still legally sound cases and precedential. Thus, we are not persuaded by this line of reasoning.

Therefore, the question becomes whether Cope's report to the IRS of his status as an "independent contractor" rather than an "employee" for clarification under current tax law was public knowledge and, therefore, not subject to protection under the Kentucky Whistleblower Act. Clearly, under the facts of the case, the information was public and the tax laws were known. Consequently, under both *Davidson* and *Helbig*, Cope's disclosure does not meet the criteria for protection under the Kentucky Whistleblower Act.

After review of the evidence supporting the judgment resulting from a jury verdict, an appellate court's role is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. *Lewis*, 798 S.W.2d at

461. Because Cope has not met all the required elements under KRS 61.102(1) and precedential Kentucky cases, we must reverse the judgment. The information disclosed was publicly known and, accordingly, not subject to protection under the Kentucky Whistleblower Act.

Referencing the standard of law applicable to this case, we observe that "there is a complete absence of proof on a material issue in the action," that is, no good faith report or disclosure of was made by Cope. *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)). Thus, we are compelled to reverse and remand for the failure to grant a directed verdict on this issue as well as to whether GADD was an employer subject to liability under the Kentucky Whistleblower Act.

Remaining Issues

Since we have ascertained that Cope was not entitled to protection under the Kentucky Whistleblower Act, we deem it unnecessary to address the two remaining issues. A trial court may only award attorney's fees under KRS 61.990(4) when rendering a judgment in an action filed under KRS 61.102 or 61.103. Since we have reversed the judgment, Cope is not entitled to attorney's fees. Moreover, with regard to Cope's cross-appeal seeking punitive damages, once again, because the judgment has been reversed, he is not entitled to punitive damages under any legal theory.

CONCLUSION

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

ALL CONCUR.

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