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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2014-CA-000997-MR

UNIVERSITY OF LOUISVILLE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 13-CI-00202

MARK ROTHSTEIN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: The University of Louisville (“U of L”) has appealed from the May 21, 2014, order of the Franklin Circuit Court which partially granted its motion for summary judgment on contractually based claims advanced by one of its professors, Mark Rothstein. U of L contends the trial court improperly denied its request for protection from suit on the basis of sovereign immunity. We disagree and affirm the trial court.

The sole issue to be decided in this appeal is whether U of L enjoys sovereign immunity shielding it from suits related to employment contracts or if the waiver of immunity contained in the Kentucky Model Procurement Code (KMPC)<sup>1</sup> for actions brought on written contracts is applicable to employment contracts. Because the issue is purely one of law, a detailed recitation of the factual history predating the dispute is unwarranted. Thus, we provide only a truncated account of the facts.

In 2000, Rothstein was recruited as a professor of medicine at U of L. He was hired with tenure as an endowed chair—the Herbert F. Boehl Chair of Law and Medicine—and also appointed a Distinguished University Scholar (“DUS”) under a five-year renewable contract. The DUS contract is at the center of the instant dispute.

Rothstein’s first DUS contract began on June 19, 2001, and provided for payment of 40% of Rothstein’s base salary. U of L was to evaluate Rothstein’s performance in the penultimate year of the contract term. Following this review, Rothstein’s DUS contract was renewed for an additional five-year period in September 2004. The renewed contract term ran from April 1, 2006, to March 31, 2011, and the provisions of the renewal again called for a review of Rothstein’s performance in the penultimate year of the contract term. This review, which should have been completed in 2010, was not undertaken in a timely manner.

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<sup>1</sup> Kentucky Revised Statutes (KRS) 45A.005 *et seq.*

U of L ultimately completed the required review on April 13, 2011. Despite receiving high evaluations and numerous letters recommending renewal from his peers, the Dean of the Department of Medicine recommended non-renewal of Rothstein's DUS contract. Effective May 31, 2011, Rothstein's DUS contract was terminated, although he remained a tenured professor pursuant to his position as an endowed chair. Termination of the contract eliminated approximately \$67,000.00 of his annual salary.

After unsuccessfully attempting to navigate U of L's lengthy grievance process to resolve the contract dispute—and allegedly being thwarted by “a series of Orwellian procedural disputes” advanced by U of L—Rothstein filed a multi-count suit against U of L for, *inter alia*, breach of his employment contract. The case was transferred to the Franklin Circuit Court pursuant to the mandates of KRS 45A.245 and KRS 452.105. Following a period of motion practice, the parties filed competing motions for summary judgment. Pertinent to this appeal, U of L argued as a state agency it was immune from suit for breach of contract and immunity had not been waived by enactment of KRS 45A.245. More specifically, U of L contended the waiver of immunity under the KMPC did not contemplate or encompass employment contracts.

The Franklin Circuit Court denied U of L's motion for summary judgment on the breach of contract claim after rejecting its assertion of sovereign immunity. The trial court concluded written employment contracts were included within the purview of KRS 45A.245. This appeal followed.

As an initial matter, we note it is well-established that an immediate appeal lies from a trial court’s denial of governmental immunity, even in the absence of a final order. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). The cloak of immunity entitles its possessor to be free “from the burdens of defending the action, not merely . . . from liability.” *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (citations omitted). Further, in 1970, U of L “became a state institution of higher education . . . with all the attendant powers and protections, including immunity from suit except where the Kentucky General Assembly specifically waives it. . . . The doctrine extends to both actions in tort and contract.” *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978). Thus, we have jurisdiction to adjudicate the issue raised in this appeal, to wit: whether the General Assembly’s waiver of immunity under the KMPC applies to employment contract disputes.

Sovereign immunity is founded on the notion that the resources of the Commonwealth, its income and property, cannot be used as recompense for state action that harms a plaintiff through the ordinary suit-at-law process. As previously noted, the Commonwealth is immune from suit unless there has been an express waiver allowing suit. A waiver 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.’” *Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662, 678 (1974)) (internal citations

omitted). When interpreting a statute, “[o]ur main objective is to construe the statute in accordance with its plain language and in order to effectuate the legislative intent.” *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 430 (Ky. 2005).

In the KMPC, the General Assembly waived sovereign immunity on written contracts made with the Commonwealth. The pertinent provision of the Code states as follows:

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. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

KRS 45A.245(1).

Chapter 45A also provides the following definitions of “contract” and “writing” or “written”:

“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(8).

“Writing” or “written” means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

KRS 45A.030(30).

There can be no doubt a written employment contract between U of L and Rothstein exists and Rothstein’s claims stem from an alleged breach thereof. The uncertainty lies in the applicability of the KMPC to employment contracts. Various panels of this Court have “expressed doubt about the applicability of KRS 45A.245 and the Kentucky Model Procurement Code in the context of employment contracts.” *Furtula v. University of Kentucky*, 438 S.W.3d 303, 306 at n.3 (Ky. 2014) (citing *Ashley v. University of Louisville*, 723 S.W.2d 866, 867 (Ky. App. 1986)). Nevertheless, in reliance on the language contained in *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013), wherein our Supreme Court noted the express language of KRS 45A.245 implied an “overwhelming” intent by the Legislature to waive immunity, this Court undertook a detailed examination of the scope of KRS 45A.245 in *Commonwealth v. Samaritan Alliance, LLC*, 439 S.W.3d 757 (Ky. App. 2014).

After careful consideration, we concluded “the Supreme Court applied the statute as a waiver of sovereign immunity in *all* contract actions against the Commonwealth and not only those subject to the Model Procurement Code.” *Id.* at 762 (emphasis added). Contrary to U of L’s vehement protestations and its lengthy semantic and public policy arguments, our holding in *Samaritan Alliance* would

clearly extend to employment contracts. The Legislature's enactment of KRS 45A.245 plainly constitutes an unqualified waiver of sovereign immunity on all written contracts with the Commonwealth—including employment contracts.

Further bolstering our decision, we note the model code upon which the KMPC is based contains an express exclusion for employment contracts. Yet, when adopted by our Legislature, the language providing for such an exception was removed. This affirmative step by the General Assembly plainly evinced an intent to specifically include employment contracts under the umbrella of the KMPC and, consequently, its express waiver of sovereign immunity. While we agree with U of L that customary hiring practices are inconsistent with the bidding and negotiation requirements of the KMPC, execution of contracts in compliance with these mandates is simply not the issue under consideration. As we have made abundantly clear, the sole issue of import is a determination of the legislative intent to waive immunity for disputes on written contracts entered into by the Commonwealth. U of L's arguments on collateral matters to this central issue are no more than red herrings and need not be addressed further.

Finally, while this matter was under consideration, another panel of our Court was presented with nearly an identical challenge to the applicability of KRS 45A.245 in the realm of employment contracts and has independently reached the same conclusion we reach today. In *University of Louisville v. Lillard*, --- S.W.3d ---, 2016 WL 93834, at \*3 (Ky. App. Jan. 8, 2016), the panel unanimously concluded:

the waiver of immunity for all actions based on written contracts brought against the Commonwealth or its agencies is consistent with the purpose of the Model Procurement Code to hold “the government to the same standard of good faith and fair dealing as private parties.” *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 585 (Ky. 2003). . . . A private citizen who contracts with the Commonwealth or its agencies should be entitled to the same remedies for the breach of that contract as he or she would have against another private citizen. As a part of the legislature’s effort to bring fairness to the contractual relationships between the Commonwealth and its citizens, the legislature enacted KRS 45A.245.

. . . KRS 45A.245, by its express terms, resolves any dispute concerning the application and scope of immunity to written contracts. The Commonwealth and its agencies no longer enjoy immunity for the breach of a written contract entered into with a private citizen.

We agree wholly.

For the foregoing reasons, we conclude Rothstein’s argument—with which the circuit court agreed—that the waiver of sovereign immunity contained in the KMPC governs employment contracts is correct, and U of L is not entitled to brandish the shield of immunity in response to Rothstein’s allegations. Thus, we affirm.

ALL CONCUR.

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