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COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2016-SC-220

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APPEAL FROM COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
NO. 2014-CA-000997-MR  
FRANKLIN CIRCUIT COURT NO. 13-CI-00202

UNIVERSITY OF LOUISVILLE

APPELLANT

v.

MARK ROTHSTEIN

APPELLEE

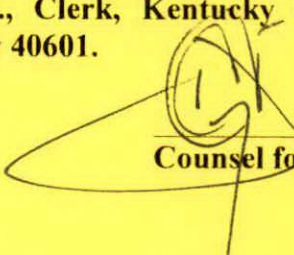
**REPLY BRIEF FOR APPELLANT UNIVERSITY OF LOUISVILLE**

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been served this 26th day of June, 2017 via hand delivery upon Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601; and via U.S. mail, postage-prepaid, upon Robert W. "Joe" Bishop, Esq., John S. Friend, Esq., and Tyler Korus, Esq., Bishop Korus Friend, P.S.C., 6520 Glenridge Park Place, Suite 6, Louisville, Kentucky, 40222; Hon. Thomas D. Wingate, Franklin Circuit Court Judge, Division 2, Franklin County Courthouse, 222 St. Clair Street, Post Office Box 678, Frankfort, Kentucky 40601; and, Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

  
Counsel for Appellant

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Appellant University of Louisville (the "University") submits this Reply brief in response to the Appellee brief filed on behalf of Mark Rothstein ("Rothstein").

### ARGUMENT

#### **I. THE UNAMBIGUOUS LANGUAGE OF THE KMPC DOES NOT WAIVE IMMUNITY FOR CLAIMS OF ALLEGED BREACH OF AN EMPLOYMENT CONTRACT WITH THE UNIVERSITY**

##### **A. Rothstein's Liberal Construction of the KMPC Ignores Kentucky Law.**

As the Kentucky Court of Appeals properly noted in its Opinion, sovereign immunity can be waived "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.'" Opinion, at 5 (citing *Withers v. University of Kentucky*, 939 S.W.2d 430, 436 (Ky. 1997) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974))). However, nowhere in his Brief to the Court does Rothstein grant this basic and well-founded principle. Rather, he wants the Court to "view the code in a liberal fashion" because it is "compelled by the legislature" to do so. Br. of Rothstein 10. But, as the University emphasized in its initial brief to the Court, the liberal construction section of the Kentucky Model Procurement Code's ("KMPC") is no different than the general order to liberally construe *all* Kentucky statutes. See KRS 446.080(1).

For all of his posturing about "person" and "procurement," Rothstein fails to answer a vital question: *Where in the KMPC did the General Assembly waive immunity for employment contracts?* The immunity waiver in the KMPC applies to "a lawfully authorized written contract," KRS 45A.245(1), and the KMPC defines "contract" to mean "all types of state agreements . . . for the purchase or disposal of *supplies, services, construction*, or any other *item*," KRS 45A.030(7) (emphasis added). A logical reading of the statute makes it clear that it is not intended to apply to employment relationships and employees. If the General Assembly

intended to include agreements for “employment,” why did it not state so? *See Revenue Cabinet, Commonwealth of Kentucky v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (stating that courts should “ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed”).

**B. The Court Should Not Conflate “Contractors” with “Employees.”**

Rothstein submits that “contractor” includes “an individual drawing a salary from a governmental body” or “a nonsalaried individual performing personal services for any governmental body.” Br. of Rothstein 13. The persons he describes are actually *employees*. *See* KRS 45A.030(15). As well, despite Rothstein’s suggestion, the KMPC’s failure to *exclude* an “individual drawing a salary” or “nonsalaried individual” from the term “contractor” does not mean such individuals should be *included*.

If the legislature intended employees to be contractors, it would not *separately* define them and assign *distinct* duties. *See Golightly v. Bailey*, 292 S.W. 320, 321 (Ky. 1927) (“[E]very word in a statute is to be given force and effect[.]”). “Employee” is distinct from “contractor” because the General Assembly intended it to be so. *O’Daniel*, 153 S.W.3d at 819 (courts “assume that the ‘[Legislature] meant exactly what it said, and said exactly what it meant.’” (quoting *Stone v. Pryor*, 45 S.W. 1136, 1142 (Ky. 1898) (Waddle, S.J., dissenting))).

**C. The Methods for Awarding Contracts Under the KMPC Are Inappropriate For Employment Contracts with the University.**

The method and process for awarding contracts under the KMPC reflect the legislature’s intent to exclude employment contracts with the University from the sovereign immunity waiver in KRS 45A.245.

Under the KMPC, “all state contracts” shall be awarded by:

- (1) Competitive sealed bidding, pursuant to KRS 45A.080; or
- (2) Competitive negotiation, pursuant to KRS 45A.085 and 45A.090 or 45A.180; or
- (3) Noncompetitive negotiation, pursuant to KRS 45A.095; or
- (4) Small purchase procedures, pursuant to KRS 45A.100.

KRS 45A.075. As previously stated, the term "contract" is expressly defined in the KMPC. Thus, if Rothstein's alleged employment contract with the University is encompassed by KRS 45A.245, then the awarding of that contract (and all other University employment contracts) must comply with KRS 45A.075 by being awarded by one of the methods set forth in that statute.

Applying the KMPC to employment contracts will require *all* state employees who have a contract but who are not "visiting speakers, professors, expert witnesses, and performing artists," KRS 45A.095(1)(f), to be hired through bids or requests for proposal under KRS 45A.080 or KRS 45A.085. It would be completely illogical for administrators, directors, and support staff of a higher education system to respond to RFPs or sealed bids when in search of a job and where the *price* of providing the services outlined in those documents drives hiring decisions. This is not the legislature's intent, nor should it be the decided view of the statute.

**D. Finding No Waiver of Immunity Would Not Nullify All Employment Contracts with the State.**

In his brief, Rothstein expresses concern that "if Kentucky's universities and colleges were held to be immune from enforcement of their written contracts with their employees, those same institutions would be foreclosed from bringing otherwise valid breach of contract actions against their employees." Br. of Rothstein 22. Contrary to Rothstein's omen, employee rights are enforceable under a host of laws. The Fourteenth Amendment shields a professor, like Rothstein, from a public entity stripping any tenure right he has without due process. *See Board*

of *Regents v. Roth*, 408 U.S. 564 (1972). The General Assembly also has the power to expressly waive immunity. Ky. Const. § 231. And the University, or other state actors, can take voluntary action that results in waiver. See *Lapides v. Board of Regents*, 535 U.S. 613, 620 (2002). Thus, an employee under a written contract with the state has remedies available and, in some limited, specific and vetted instances, could be permitted to sue for breach.

**E. The Kentucky Constitution Precludes Consideration of Extrinsic Authorities.**

“The *General Assembly* may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.” Ky. Const. § 231 (emphasis added). Consistent with that mandate, the *General Assembly* enacted the KMPC’s waiver provision. See 1978 Ky. Acts, ch. 110, § 49. And when construing statutes, the goal “is to give effect to the intent of the *General Assembly*.” *Maynes v. Commonwealth*, 361 S.W.3d 922, 924 (Ky. 2012) (emphasis added). Thus, Rothstein’s reliance on ABA model codes and decisions from other jurisdictions analyzing differing state statutes to discern an act of, and the intent of, the *Kentucky General Assembly* should be rejected.

**II. THE QUESTION PRESENTED BEFORE THIS COURT REMAINS RIPE FOR REVIEW**

Rothstein claims that the Kentucky Court of Appeals resolved the scope of the KMPC waiver of immunity in *Western Kentucky University v. Esters*, 2014 Ky. App. LEXIS 62 (Ky. App. Apr. 11, 2014). Br. of Rothstein 23. But, as Rothstein notes, this Court denied discretionary review of the Court of Appeals’ decision in *Esters* and ordered that the Court of Appeals’ opinion not be published. *W. Ky. Univ. v. Esters*, 2015 Ky. LEXIS 1660 (Ky., June 3, 2015). Thus, *Esters* cannot bind this case. See CR 76.28(4)(c). In addition, the Court of Appeals’ prior stance in *Ashley v. University of Louisville* preempts *Esters*. 723 S.W.2d 866, 867



(Ky. App. 1986) (“[W]e consider the language of KRS 45A.010 to limit the chapter’s application to the procurement of items of hardware and services subject to bidding procedures.”).

*Esters*’s lack of authority is further underscored by this Court’s opinion in *Furtula v. University of Kentucky*, 438 S.W.3d 303 (Ky. 2014). Writing on behalf of the *Furtula* majority, Justice Venters stated:

“*The Court of Appeals* has previously expressed doubt about the applicability of KRS 45A.245 and the Kentucky Model Procurement Code in the context of employment contracts. See *Ashley v. University of Louisville*, 723 S.W.2d 866, 867 (Ky. App. 1986).

438 S.W.3d at 306 n.3 (emphasis added) (quotation omitted). That this Court intended to bypass *Esters* as binding on this issue becomes clearer when one considers that the ultimate question in *Esters* turned on common-law contract principles. See 2014 Ky. App. LEXIS 62 at \*12-13 (“Here, the question before the circuit court was not whether WKU was immune from suit. Rather, it was whether *Esters* was working under a lawfully authorized written contract.”). If *Ashley* enjoys no weight, then Rothstein’s reliance on the later dicta in *Esters* is equally unpersuasive.

Finally, Rothstein relies on the Court of Appeals’ opinion in *Univ. of Louisville v. Lillard*, 2016 Ky. App. LEXIS 2 (Ky. App., Jan. 8, 2016), for its proposition that sovereign immunity is waived in the case of an employment contract. Br. of Rothstein 24. However, it is important to note that although this Court granted discretionary review of the Court of Appeals’ opinion in *Lillard*, it did not have an opportunity to decide the issue because the case was resolved by the parties prior to the conclusion of briefing deadlines.

### CONCLUSION

For all these reasons, as well as those stated in its initial brief to the Court, the University respectfully asks the Court to reverse the Kentucky Court of Appeals and the Franklin Circuit

Court and remand the case with instructions to dismiss Rothstein's breach of contract claim on the grounds that the University is immune from such actions.

Respectfully submitted,



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