pursuant to Court order

SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000012-D

PENNYRILE ALLIED
COMMUNITY SERVICES, INC.
APPELLANT

REPLY BRIEF

v.

KATRICIA ROGERS
APPELLEE

* * * *

Submitted by:

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was sent by U.S. Mail on the 10th of January 2014 to: Ms. Susan Stokley Clark, Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Mr. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable William Engle, III, Perry Circuit Court, Hall of Justice, 545 Main Street, Hazard, KY 41701-1702; and Mr. Anthony J. Bucher, B. Dahlenburg Bonar, P.S.C., 3611 Decoursey Avenue, Covington, KY 41015. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Perry Circuit Court by the appellant.

COUNSEL FOR APPELLANT

I. STATEMENT CONCERNING ORAL ARGUMENT

Pennyrile Allied Community Services, Inc. welcomes oral argument but believes it's unnecessary.

II. STATEMENT OF POINTS AND AUTHORITIES

III. ARGUMENT 1-7

A. THE CARDINAL RULE OF STATUTORY CONSTRUCTION IS THAT THE INTENTION OF THE LEGISLATURE SHOULD BE ASCERTAINED AND GIVEN EFFECT. TO SATISFY THIS CARDINAL RULE, COURTS OFTEN HAVE TO READ STATUTES IN CONTEXT AND IN LIGHT OF THEIR ESSENTIAL PURPOSE. KRS 61.102(1) IS KENTUCKY'S WHISTLEBLOWER STATUTE. THE STATUTE'S PURPOSE IS TO REDUCE ILLEGAL ACTIVITY, FRAUD, WASTE, AND ABUSE IN STATE GOVERNMENT. KRS 61.102(1) DOES THIS BY PROTECTING STATE EMPLOYEES FROM REPRISAL WHEN THEY DISCLOSE ILLEGAL ACTIVITY, FRAUD, WASTE, OR ABUSE IN STATE GOVERNMENT. IN THIS CASE, THE COURT OF APPEALS HELD THAT KATRICIA ROGERS'S "DISCLOSURE" ABOUT DENNIS GIBBS PULLING INTO HER DRIVEWAY WAS PROTECTED UNDER KRS 61.102(1). BUT ROGERS'S "DISCLOSURE" WAS A PERSONAL GRIEVANCE AND NOT A DISCLOSURE OF GOVERNMENT ILLEGALITY, FRAUD, WASTE, OR ABUSE. DID THE COURT OF APPEALS ERR BY HOLDING THAT ROGERS'S "DISCLOSURE" DIDN'T HAVE TO TOUCH ON A MATTER OF GOVERNMENT (PUBLIC) CONCERN TO BE PROTECTED UNDER KRS 61.102(1)? 1-5

KRS 61.102(1) 1, 5

Fiorillo v. Department of Justice, 795 F.2d 1544, 1555-57 (Fed. Cir. 1986) 2, 3

B. THE CIRCUIT COURT WAS RIGHT TO HOLD THAT ROGERS'S QUESTION TO THE SHERIFF WASN'T A DISCLOSURE THAT TOUCHED ON A MATTER OF PUBLIC CONCERN. THEREFORE, THE COURT WAS RIGHT TO HOLD THAT ROGERS'S WHISTLEBLOWER CLAIM FAILS AS A MATTER OF LAW. 5

C. KENTUCKY'S WHISTLEBLOWER STATUTE PROTECTS AT-WILL GOVERNMENT EMPLOYEES FROM REPRISAL WHEN THEY DISCLOSE A VIOLATION OF LAW, FRAUD, WASTE, OR ABUSE. IN THIS CASE, KATRICIA ROGERS DIDN'T DISCLOSE ANYTHING. SHE ASKED A QUESTION. SHE ASKED A DEPUTY SHERIFF WHETHER HER SUPERVISOR WAS ENTITLED TO DRIVE INTO HER DRIVEWAY TO CHECK ON HER DURING WORK HOURS. THE DISSENT IN THE COURT OF APPEALS CONCLUDED THAT ROGERS'S QUESTION WASN'T A "DISCLOSURE" AND SO WASN'T PROTECTED UNDER THE WHISTLEBLOWER ACT. WAS THE DISSENT CORRECT? 5-7

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III. ARGUMENT

A. THE CARDINAL RULE OF STATUTORY CONSTRUCTION IS THAT THE INTENTION OF THE LEGISLATURE SHOULD BE ASCERTAINED AND GIVEN EFFECT. TO SATISFY THIS CARDINAL RULE, COURTS OFTEN HAVE TO READ STATUTES IN CONTEXT AND IN LIGHT OF THEIR ESSENTIAL PURPOSE. KRS 61.102(1) IS KENTUCKY'S WHISTLEBLOWER STATUTE. THE STATUTE'S PURPOSE IS TO REDUCE ILLEGAL ACTIVITY, FRAUD, WASTE, AND ABUSE IN STATE GOVERNMENT. KRS 61.102(1) DOES THIS BY PROTECTING STATE EMPLOYEES FROM REPRISAL WHEN THEY DISCLOSE ILLEGAL ACTIVITY, FRAUD, WASTE, OR ABUSE IN STATE GOVERNMENT. IN THIS CASE, THE COURT OF APPEALS HELD THAT KATRICIA ROGERS'S "DISCLOSURE" ABOUT DENNIS GIBBS PULLING INTO HER DRIVEWAY WAS PROTECTED UNDER KRS 61.102(1). BUT ROGERS'S "DISCLOSURE" WAS A PERSONAL GRIEVANCE AND NOT A DISCLOSURE OF GOVERNMENT ILLEGALITY, FRAUD, WASTE, OR ABUSE. DID THE COURT OF APPEALS ERR BY HOLDING THAT ROGERS'S "DISCLOSURE" DIDN'T HAVE TO TOUCH ON A MATTER OF GOVERNMENT (PUBLIC) CONCERN TO BE PROTECTED UNDER KRS 61.102(1)?

In response to PACS's original argument under this heading, Ms. Rogers offers two counterarguments. The first is a plain-language argument. Rogers asserts that, in interpreting KRS 61.102(1), the Court should ignore the statute's essential purpose—which is to reduce illegal activity, fraud, waste, and abuse *in state government*—and hold that the statute protects any state employee who discloses any wrongdoing by any government official regardless of whether the wrongdoing touches on a matter of public concern.[1]

We said all that we needed to say about this plain-language argument in our original brief. The argument ignores common sense. KRS 61.102(1) is designed to reduce fraud, waste, and abuse *in state government*. Rogers's plain-language argument uncouples the statute from that purpose. Thus, the Court should reject it.

Rogers's second counterargument supports her plain-language argument but is distinct. Rogers argues that the Federal Whistleblower Act's legislative history

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1 Appellee's Brief, p. 6.

bolsters her contention that her Kentucky whistleblower claim doesn't include a touch-on-a-matter-of-public-concern element. Although Rogers didn't make this argument below and so arguably didn't preserve it, we'll reply.

The first piece of legislative history that Rogers relies on is Senate Report 100-413.[2] The Report openly criticizes the Federal Circuit Court of Appeals for its decision in *Fiorillo v. Dept. of Justice*. Specifically, Senate Report 100-413 criticizes the *Fiorillo* court's holding that Francis Fiorillo's disclosure of government wrongdoing wasn't entitled to whistleblower protection because his "primary motivation" was revenge.[3] Rogers argues that the Senate's criticism of *Fiorillo* is proof that an employee's disclosure doesn't have to touch on a matter of public concern to be protected under the Federal Whistleblower Act. Rogers misreads Senate Report 100-413.

The Senate's beef with the *Fiorillo* opinion had nothing to do with the touch-on-a-matter-of-public-concern element in Mr. Fiorillo's federal whistleblower claim. What the Senate was upset about was the fact that the *Fiorillo* court held that Fiorillo's disclosure wasn't entitled to whistleblower protection because his motivation was personal—revenge. According to the Senate, Fiorillo's motivation was irrelevant to whether his disclosure was protected. To correct the *Fiorillo* court's error, the Senate amended the Federal Whistleblower Act to protect "any disclosure." By using "any disclosure" in the Act, the Senate's intent was to prevent courts from considering an employee's motivation in making a disclosure. The following quote from Senate Report 100-413 shows this.

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2 *Id.* at 8 (the Report is attached to Rogers's brief as Appendix Item 3).

3 Senate Report 100-413, p. 13.

> In *Fiorillo v. Department of Justice* . . . an employee's disclosures were not considered protected because the employee's "primary motivation" was not for the public good, but rather for the personal motives of the employee. The court reached this conclusion despite the lack of any indication in [the statute] that the employee's motives are supposed to be considered in determining whether a disclosure is protected.[4]

Although it's clear that the Senate's beef with *Fiorillo* had to do with the fact that the court considered Mr. Fiorillo's motivation, Senate Report 100-413 doesn't expressly endorse the touch-on-a-matter-of-public-concern element in Mr. Fiorillo's federal whistleblower claim. But the dissenting opinion in *Fiorillo* does. The *Fiorillo* dissent, while siding with Senate Report 100-413 in rejecting the *Fiorillo* majority's consideration of Fiorillo's motivation, explained that Fiorillo's disclosure had to touch on a matter of public concern to be entitled to whistleblower protection.[5] The dissent's position on this point is proof positive that Ms. Rogers is misreading Senate Report 100-413 when she claims that the Report eliminates the touch-on-a-matter-of-public-concern element in a federal whistleblower claim.

The second piece of legislative history that Rogers relies is House Report 103-769.[6] Rogers argues that the Report supports her contention that "any disclosure" as used in the Federal Whistleblower Act includes disclosures that don't touch on matters of public concern. Rogers is mistaken. House Report 103-769 says the same thing that Senate Report 100-413 says—a court can't consider an employee's motivation

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4 *Id.*

5 *Fiorillo v. Department of Justice*, 795 F.2d 1544, 1555-57 (Fed. Cir. 1986) (Newman, J. dissenting).

6 Appellee's Brief, p. 9 (the Report is attached to Rogers's brief as Appendix Item 5).

for making a disclosure in deciding whether the disclosure is protected under the Federal Whistleblower Act.[7] Here's the relevant language from House Report 103-769:

> Perhaps the most troubling precedents involve the Board's inability to understand that "any" means "any." The [Whistleblower Protection Act] protects "any" disclosure evidencing a reasonable belief of specified conduct . . . .[8]

Rogers wants the Court to focus on the House of Representatives' use of the word "any" in this quote. That would be a mistake. The key words in the quote are "specified conduct." What the House is saying is that the Whistleblower Protection Act protects "any" disclosure (regardless of the employee's motivation) so long as the disclosure is a disclosure of "specified conduct." Critical here, for conduct to be "specified conduct," it has to touch on a matter of public concern. The House Report clarifies this on page 11 where it explains that the Whistleblower Protection Act only protects disclosures that are significant to taxpayers. "Significant to taxpayers" is another way to say "touches on a matter of public concern." In the Report's words:

> The [Whistleblower Protection Act] could be called the Taxpayer Protection Act, because whistleblowers "put the customer first." By definition, their disclosures only qualify for legal protection when the information is significant for accountability to . . . the taxpaying public.[9]

In the end, the two pieces of legislative history that Rogers relies on both fail her. Neither supports her argument that there's not a touch-on-a-matter-of-public-concern element in a federal whistleblower claim. What the two legislative reports reflect is that an employee's motivation for disclosing government wrongdoing is

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7 House Report 103-769, p. 15.

8 Appellee's Brief, p. 9 (quoting House Report 103-769).

9 House Report 103-769, p. 11.

irrelevant to whether her disclosure is protected under the Federal Whistleblower Act. The Federal Whistleblower Act protects "any disclosure" that touches upon a matter of public concern regardless of the disclosing employee's motivation. And, as we've shown, the same is true of KRS 61.102(1). The Court should, therefore, reverse the court of appeals and reinstate the circuit court's summary judgment in favor of PACS.

B. THE CIRCUIT COURT WAS RIGHT TO HOLD THAT ROGERS'S QUESTION TO THE SHERIFF WASN'T A DISCLOSURE THAT TOUCHED ON A MATTER OF PUBLIC CONCERN. THEREFORE, THE COURT WAS RIGHT TO HOLD THAT ROGERS'S WHISTLEBLOWER CLAIM FAILS AS A MATTER OF LAW.

Our argument under this heading in our initial brief was that Rogers's "disclosure" was a personal grievance with Dennis Gibbs and didn't touch on a matter of public concern. Rogers didn't respond to the argument. Thus, we have no reply.

C. KENTUCKY'S WHISTLEBLOWER STATUTE PROTECTS AT-WILL GOVERNMENT EMPLOYEES FROM REPRISAL WHEN THEY DISCLOSE A VIOLATION OF LAW, FRAUD, WASTE, OR ABUSE. IN THIS CASE, KATRICIA ROGERS DIDN'T DISCLOSE ANYTHING. SHE ASKED A QUESTION. SHE ASKED A DEPUTY SHERIFF WHETHER HER SUPERVISOR WAS ENTITLED TO DRIVE INTO HER DRIVEWAY TO CHECK ON HER DURING WORK HOURS. THE DISSENT IN THE COURT OF APPEALS CONCLUDED THAT ROGERS'S QUESTION WASN'T A "DISCLOSURE" AND SO WASN'T PROTECTED UNDER THE WHISTLEBLOWER ACT. WAS THE DISSENT CORRECT?

In response to our argument under this heading, Rogers implicitly concedes that asking her local sheriff whether it was legal for Dennis Gibbs to pull into her driveway wasn't a "disclosure" under KRS 61.102(1).[10] Thus, we have no reply.

That said, Rogers argues that she "internally disclosed" Dennis Gibbs's alleged trespassing when she brought up the incident at a PACS staff meeting in May

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10 Appellee's Brief, p. 10.

2011.[11] Rogers contends that this "internal disclosure" satisfies KRS 61.102(1)'s disclosure requirement.

Our initial reply to Rogers's internal-disclosure argument is that she doesn't explain how or where she preserved it, and we don't believe that she did. Substantively, PACS's position on the internal-disclosure issue is two-part. First, Rogers didn't "disclose" anything at the May 2011 staff meeting because there was nothing to disclose. Gibbs never hid the fact that he drove to Rogers's house and pulled into her driveway in February 2011. In fact, it's undisputed that Gibbs told Rogers what he did on the day he did it.[12] Gibbs also told Rogers that he knew where all of his team members lived and that that was why he drove to her house—to see where she lived.[13] Rogers didn't complain to Gibbs when he told her this in February, and she didn't complain during the next two months.[14] Instead, Rogers waited until May and confronted Gibbs at a staff meeting.[15] Notably, even after Rogers raised the issue at the staff meeting, she still didn't ask PACS to reprimand Gibbs or to take any other action against him. Instead, she threatened to report Gibbs if he did it again, which leads us to the second part of our argument on this point.

The second part of our internal-disclosure argument addresses Rogers's assertion that she "disclosed" something when she threatened to report Gibbs to law

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11 *Id.*

12 Deposition of Katricia Rogers, pp. 52-53.

13 *Id.* at 53.

14 *Id.* at 52.

15 *Id.*

enforcement.[16] For argument's sake, we'll assume that a threat to disclose illegal activity such as trespassing could possibly amount to a "disclosure" under KRS 61.102(1). But this assumption doesn't help Rogers. Despite the assumption, Rogers's threat wasn't a "disclosure" under KRS 61.102(1) because the threat was "to take action if the unlawful act continued."[17] This threat was purely hypothetical. Rogers didn't threaten to report what Gibbs had done. She threatened to report Gibbs if he did it again. That threat wasn't a threat to "disclose" anything that had happened. It wasn't a threat to disclose extant illegality, fraud, waste, or abuse. It was a threat to disclose something that might happen in the future. Thus, it doesn't help Rogers prove that she made a "disclosure" under KRS 61.102(1).

IV. CONCLUSION

In the end, we return to the relevant language in KRS 61.102(1): "No employer shall subject to reprisal . . . **any** employee who in good faith . . . discloses . . . **any** facts . . . relative to an actual or suspected violation of **any** law."[18] We agree, as we must, that "any" means "any." But we strongly disagree with Ms. Rogers's argument that the General Assembly intended KRS 61.102(1) to protect "any government employee who discloses any violation of any law." That's an absurd interpretation of a statute whose essential purpose is to reduce illegality, fraud, waste, or abuse *in state government*. To avoid this absurd result, we ask the Court to consider KRS 61.102(1) in

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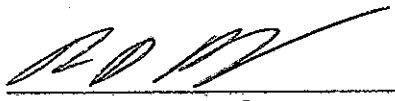
16 Appellee's Brief, p. 12.

17 *Id.*

18 KRS 61.102(1) (bold added).

light of its essential purpose and in light of Justice Palmore's proclamation that common sense should not be a stranger in the house of the law. Common sense says that a statute intended to reduce illegality, fraud, waste, or abuse *in state government* would only protect disclosures that touch on matters of public concern. Common sense says that Katricia Rogers's beef with Dennis Gibbs was a personal grievance over Gibbs's management style and not something that touched on a matter of public concern. The taxpaying public simply doesn't care about Gibbs's management style. It would, therefore, defy common sense for the Court to hold that Katricia Rogers is a government whistleblower under KRS 61.102(1).

BOEHL STOPHER & GRAVES, LLP



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