Blowing the Whistle in the Commonwealth

By Stephen A. Simon

On a basketball court, the referee blows the whistle when a player commits a foul. The fairness and the outcome of the game would be jeopardized if the referee feared that blowing the whistle might cost him his job. The same is true for government employees who blow the whistle on their employers: without adequate legal protection for these employees, whistleblowers will not come forward and the proper functioning of our government will suffer.

In Kentucky, government employees who blow the whistle on their employers are protected from reprisal under the Kentucky Whistleblower Act.[1] Kentucky is in the overwhelming majority of states that provide statutory protection for whistleblowers, as only three states do not have such laws on the books.[2] Like most whistleblowing laws, the Act was designed 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."[3]

Specifically, the Act protects employees who report any "facts or information" related to an "actual or suspected" violation by a public employer of any federal, state or local law. The Act also protects employees who expose "mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety."[4] No employer can use its "official authority," or threaten to use its authority, that would in any way "discourage" or "interfere" with the making of a report.[5]

Although the Act was enacted over two decades ago in 1986, Kentucky courts in the last several years have issued numerous opinions that have, in some ways, expanded the reach of the Act and, in other ways, limited the protection it affords employees. For attorneys who represent employers or employees in the public sector, it is critical to understand the scope of this statute.

Who is an "Employer" Under the Act?

As the statutory language makes plain, the Act does *not* protect private-sector employees. This statutory protection only extends to employees who work for the Commonwealth of Kentucky "or any of its political subdivisions."[6]

The question then is what constitutes a "political subdivision." The term clearly applies to county government, and Kentucky courts have ruled that an area planning commission and water districts fit the definition too.[7]

The Act is silent on whether municipalities are considered a "political subdivision."[8] This year, in *Wilson vs. Central City*, [9] the Kentucky Court of Appeals ruled that the absence of "municipalities" in the Act reflected the legislature's intent that municipal employers should not be covered. Relying on two prior federal district court decisions, the court of appeals reasoned that the absence of "municipalities" was significant since the legislature in several other Kentucky statutes specifically referenced municipalities, separately from "political subdivisions" or the Commonwealth itself. The court also noted that municipalities are different in character to the Commonwealth and its political subdivisions in that municipalities are not entitled to sovereign immunity.[10]

However, in *Kindle v. City of Jeffersontown*, No. 09-5119 (6th Cir. March 15, 2010), the United States Court of Appeals for the Sixth Circuit found that municipalities *are* covered by the Act. Reversing the district court's contrary ruling, which the Kentucky of Court of Appeals in *Wilson* had cited, the Sixth Circuit held that the Kentucky Supreme Court had already addressed this issue, albeit in an indirect way. In *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852 (Ky. 2008), a whistleblowing employee sued his former employer, which was a public entity that administered the water and sewer services for two cities, Russellville and Auburn. After the plaintiff won a jury award at trial, the entity dissolved and was "absorbed" by Russellville and Auburn. In denying plaintiff's cross-appeal, which concerned whether the defendant had to post a supersedeas bond after it dissolved, the court held that the "judgment continues to be enforceable against" the two cities. Thus, the Sixth Circuit read *Allen* to mean that the Supreme Court had "approved of applying the Whistleblower Act to a municipality upholding the jury award."[11]

The Act also is silent on whether individual supervisors or managers can be held liable for reprisals against their subordinate employees. Unlike the issue regarding municipalities, the Kentucky Supreme Court has squarely resolved this issue and found that individuals cannot be sued under the Act, despite the Act's

definition of "employer" that expressly includes "any person authorized to act on behalf of the [government] with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees."[12] The Kentucky Supreme Court ruled in *Cabinet for Families and Children v. Cummings*[13] that this language was intended only to incorporate the doctrine of respondeat superior liability – *i.e.*, to ensure that government entities can be held liable for retaliatory acts committed by their individual supervisors or managers. In so finding, the Kentucky Supreme Court followed the lead of numerous federal circuit courts of appeal, which have likewise interpreted Title VII of the 1964 Civil Rights Act and other federal anti-discrimination statutes that similarly define "employer."[14]

In *Cummings*, the Kentucky Supreme Court distinguished the Whistleblower Act from Kentucky's Civil Rights Act, which the Court previously has held *does* permit individual liability, as the latter statute defines "employer" as "one (1) or more individuals" and prohibits retaliation by "two (2) or more persons."[15] Given the Kentucky Supreme Court's rulings on these two statutes, whether an individual supervisor can be held liable for retaliation in Kentucky depends on the nature of the employee's complaint that preceded the retaliatory act. For example, a supervisor who fires an employee for complaining about sexual harassment can be held individually liable, but that same supervisor would not be held liable if the employee had complained, for example, that her employer was wasting tax dollars.

Nonetheless, supervisors or managers who retaliate against whistleblowers should beware. As the Court noted in *Cummings*, the Act does provide *criminal* penalties against individuals. Any person who "willfully violates any of the provisions" of the Act can be convicted of a "Class A misdemeanor."[16]

The Act Provides Ample Remedies and Shifts the Burden of Proof to the Employer

The Act provides a full array of remedies. Under K.R.S. § 61.990(4), the employee may seek injunctive relief, back pay, reinstatement (including reinstatement of "fringe benefits and seniority rights"), and exemplary or punitive damages. In addition, the court may award the costs of litigation, including "reasonable attorney fees" and witness fees.[17]

Regarding the tolling period for filing a lawsuit, the Act has a wrinkle. In a separate provision, the Act provides the employee must "bring a civil action for appropriate injunctive relief or punitive damages . . . ." within ninety days of the violation. KRS § 61.103(2). This provision makes no reference to the other remedies spelled out above, and the Act contains no other provision referencing a tolling period. Thus, in *Allen*,[18] the Kentucky Supreme Court held that the ninety-day statute of limitations in K.R.S. § 61.103(2) applies *only* to the whistleblower's claim for injunctive relief or punitive damages.[19] (Legislation was introduced in January of this year that would extend the tolling period from ninety to 180 days, among other expansions of the law, but the bill died before the end of the legislative session.)[20] Although not spelled out by the Court, the applicable tolling period for the remaining relief set forth in the Act is presumably governed by Kentucky's general five-year statute of limitations.[21]

To obtain any of the remedies set forth in the Act, the whistleblower must, of course, first prove her case. Under the Act, a *prima facie* case of retaliation has 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.[22]

In addition, the plaintiff must demonstrate, by a preponderance of the evidence, that the disclosure or report was a "contributing factor" in the employer's personnel action.[23] Per amendments to the Act in 1993, upon

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the plaintiff's establishing a *prima facie* case of retaliation, the burden of proof shifts to the employer, who to avoid liability must prove by *clear and convincing* evidence that the disclosure was not a material fact in the personnel action.[24]

An employee need not make an actual report or disclosure of information to enjoy the protections of the Act. A *threat* to make such a report or disclosure is sufficient.[25] Also, the employee enjoys the protection of the Act if he makes a report or disclosure as part of a lawsuit against the government.

But an employee must tread carefully here. Allegations in a lawsuit may not constitute protected whistleblowing under the Act unless the lawsuit raises facts that are not publicly known. In *Davidson v. Kentucky Department of Military Affairs*, an employee, Davidson, initiated a lawsuit against his employer, the Kentucky Department of Military Affairs, for allegedly retaliating against him for a prior lawsuit his former company had brought against the Kentucky Cabinet for Natural Resources and Environmental Protection (NREPC).[26] In protesting fines that NREPC had levied against his company, Davidson had alleged that the agency's procedures were an "abuse of authority" and violated state law. The court held that this was not whistleblowing activity because Davidson "did not report anything about these procedures which was not already known, such as secretive agency procedures."[27] Likewise, the Kentucky Supreme Court found in an earlier case, *Boykins v. Housing Authority of Louisville*,[28] that the plaintiff was not a whistleblower under the Act because her lawsuit against her employer, resulting from an accident her daughter suffered on the employer's property, was a "simple negligence action" and did not constitute a "report of information regarding any alleged mismanagement or endangerment of public health and safety."[29]

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To Enjoy the Act's Protection, the Whistleblower's Complaint Must Be Made in "Good Faith"

From the perspective of a well-meaning employee who is considering blowing the whistle on her employer, the real peril in the Act lies in its requirement that the report or disclosure must be in "good faith." The would-be whistleblower may not have all the pertinent facts at her disposal before making a complaint – and ultimately her allegations may be proven wrong. Will she still enjoy the protections of the Act? Fortunately for employees Kentucky courts typically have answered in the affirmative.

In a decision issued earlier this year, the Court of Appeals in *Jones v. Oldham County Sheriff's Department*[30] reversed a circuit court's grant of summary judgment against a plaintiff for purportedly not satisfying the good faith requirement. The whistleblower, a deputy sheriff, had passed along to his superior a written list, which he did not read first, that his colleagues had authored and which identified examples of inappropriate acts by their chief deputy sheriff.[31] The court noted that while the plaintiff had not actually authored the list, he had seen earlier drafts and even had provided his colleagues with his own examples of misconduct by the chief deputy sheriff. Characterizing the issue of good faith as a "close one," the court of appeals reversed the circuit court's ruling and held that "as a general rule, a determination of whether a party acted in good faith is a question of fact that does not lend itself well to summary judgment."[32]

Likewise, the Court of Appeals ruled last year in *Thornton v. Office of the Fayette County Attorney*[33] that even a whistleblower's complaint based solely on second-hand, hearsay information *could* be considered to be in good faith. However, on the facts of this case the employee failed to satisfy this requirement. The whistleblower was a part-time employee of the Fayette County Attorney's office who complained to elected officials and several state agencies about her supervisor regarding questionable billing practices. Because the plaintiff performed almost all of her work physically outside of the office, it was plain that she learned of these alleged misdeeds on a hearsay basis – specifically, from the supervisor's administrative assistant, who also complained to certain public officials. The court rejected a categorical rule that would not permit hearsay evidence to satisfy the good faith requirement, but the court added that the complaint must be based on a "reasonable belief of accuracy."[34] Focusing on the fact that the plaintiff "made no attempt to corroborate or discover firsthand information about the suspected activities" – and given that the plaintiff knew these allegations already were being reported to the authorities by another employee – the court affirmed the grant of summary judgment against the plaintiff, finding her complaint was not made in good faith.[35]

Interestingly, whether the employee's motive in making the complaint is relevant to the issue of good faith has not

been squarely resolved by the courts. In *Davidson v. Kentucky Department of Military Affairs*,[36] the Court of Appeals declined to decide whether "an employee's motivation for making a report" – *i.e.,* motivated "purely by a sincere desire to expose the illegality" or driven by "self-serving interest" – is relevant to the good faith requirement under the Act.

The *Gaines* Decision and the Future of the Whistleblower Act

Finally, in a significant expansion of the Act, the Kentucky Supreme Court ruled in *Workforce Development Cabinet v. Gaines*[37] that an employee who makes a complaint (otherwise covered by the Act) *to his own employer* is protected under the Act. The Act lists specific governmental entities – that do *not* specifically include one's own employer – to whom an employee must complain to be protected from reprisal, as follows:

> [T]he Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority . . . .[38]

Holding that the Act "must be liberally construed to serve [its] purpose" of protecting whistleblowers, the Court, in a 4-3 decision, interpreted the phrase, "any other appropriate body or authority," to include the whistleblower's own employer.[39]

The majority in *Gaines* did not accept the defendant's argument that the agencies listed in the Act were only ones with "investigatory authority for wrongdoing by public agencies" and, therefore, that "any other appropriate body or authority" must necessarily only include agencies of that character.[40] The majority noted that "an employee" of these agencies, who could receive such a complaint, did not have the authority to investigate. The majority reasoned that the list encompassed those who had the authority to "remedy or report" the complaint of misconduct, which meant, in turn, that the phrase "any other appropriate body or authority" should encompass any public body or authority who carries this "remedy or report" authority. Accordingly, the majority held that this statutory phrase included the whistleblower's own employer because "[g]enerally, the most obvious public body with the power to remedy perceived misconduct is the employee's own agency . . . ."[41] The majority also reasoned that a contrary reading of the statute would "reward an employee who makes a report to an 'appropriate' outside entity, but punish the employee who reports internally."[42] The dissenting justices accused the majority of essentially rewriting the Act to add "the individual's employer" as an eighth entity in K.R.S. § 61.102.[43]

From a public employer's perspective, the implication of *Gaines* is that any complaint by a public employee to his or her employer could now constitute a "report" or "disclosure" under the Act. The *Gaines* majority discounted the scenario where a public employee nefariously seeks the protection of the Act by complaining to his employer about, for example, "inefficient paper recycling" or "excessive use of paper clips."[44] The majority contended that the employee would not be covered under the Act because such a complaint would not satisfy the "good faith" requirement.[45] As the preceding discussion demonstrates, however, the courts' interpretation of "good faith" is a work-in-progress. The caselaw to date suggests that an employee's complaint about a trifling matter, like "excessive use of paper clips," will not be deemed bad faith as a matter of law. So long as the employee reasonably believes his complaint about paper clips is accurate, that may be suf-

ficient to show good faith.[46]

On the other hand, if the *Gaines* holding leads to a substantial number of cases where public employees seek protection under the Act in connection with their filing internal complaints about paper clip usage and the like, it may trigger Kentucky courts to take a more restrictive approach to the "good faith" requirement. In particular, courts may ultimately decide that *motive* is relevant when considering the employee's good faith under the Act. This would be an unfortunate development because if the good faith requirement is unduly restricted, then public employees may be wary of reporting government waste or violations of the law they observe in their workplaces.

In sum, it is critical that the Act continue to protect public employees who – like referees in basketball – blow the whistle when they see a foul.

ENDNOTES

1. K.R.S. § 61.101, *et seq*. This article does not address whistleblowing by private-sector employees, who generally enjoy far less protection under the common law. *See, e.g., Boykins v. Housing Auth. of Louisville*, 842 S.W.2d 527 (Ky. 1992).
2. *Thornton v. Office of Fayette County Attorney*, 292 S.W.2d 324, 330 (Ky. App. 2009) (*citing* 96 Cal. L. Rev. 1633, 1641 (2008)).
3. *Workforce Dev. Cab. v. Gaines*, 276 S.W.3d 789, 792 (Ky. 2008).
4. K.R.S. § 61.102(1).
5. *Id*.
6. *Id*. § 61.101(2).
7. *Northern Ky. Area Planning Comm'n v. Gordon*, No. 2008-CA-001104-MR (Ky. Ct. App. Jan. 15, 2010); *Davis v. Powell's Valley Water Dist*., 920 S.W.2d 75 (Ky. Ct. App. 1995).
8. K.R.S. § 61.101(2).
9. No. 2008-CA-001547-MR (Ky. Ct. App. Jan. 15, 2010).
10. *Id*.
11. *Kindle v. City of Jeffersontown, Ky*., 2010 WL 891305, at *3-4 (6th Cir. Mar. 15, 2010) (petition for rehearing *en banc* denied June 16, 2010).
12. K.R.S. § 61.101(3).
13. 163 S.W.3d 425, 431-33 (Ky. 2005).
14. *Id*. at 431-32; *see, e.g., Wathen v. Gen'l Elec. Co*., 115 F.3d 400, 406 (6th Cir. 1997).
15. K.R.S. §§ 344.010(1), 344.280; *Cabinet for Families and Children v. Cummings*, 163 S.W.3d at 432; *Brooks v. Lexington-Fayette Urban County Hous. Auth*., 132 S.W.3d 790 (Ky. 2004).
16. K.R.S. § 61.990(3).
17. *Id*. § 61.990(4).
18. 269 S.W.3d at 855-56
19. *Id*.
20. HB 185.
21. K.R.S. § 413.120(2) (governs actions "created by statute, when no other time is fixed by the statute").
22. *Id*. § 61.103(3).
23. *Id*; *Davidson v. Ky. Dep't of Military Affairs*, 152 S.W.3d 247, 251 (Ky. Ct. App. 2004).
24. K.R.S. § 61.103(3); *Ky. Dep't of Agric. v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000).
25. *Allen*, 269 S.W. 3d at 857.
26. *Davidson*, 152 S.W.3d at 250.
27. *Id*. at 255-56.
28. 842 S.W.2d 527 (Ky. 1992).
29. *Id*. at 529.
30. No. 2009-CA-000350-MR (Ky. Ct. App., Apr. 16, 2010).
31. *Id*.
32. *Id*.
33. 292 S.W.3d 324, 331 (Ky. Ct. App. 2009).
34. *Id*. at 330-32.
35. *Id*.
36. 152 S.W.3d at 254-55.
37. *Gaines*, 276 S.W.3d at 792-94.
38. K.R.S. § 61.102(1).
39. 276 S.W.3d at 793-94.
40. *Id*. at 793.
41. *Id*.
42. *Id*. at 793-94.
43. *Id*. at 797-98.
44. *Id*. at 794.
45. *Id*.
46. *See Thornton*, 292 S.W. 3d at 331.

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