

**Commonwealth Of Kentucky**

**Court of Appeals**

NOS. 2001-CA-002696-MR  
AND  
2001-CA-002736-MR

JESSE BAKER

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 96-CI-00064

BOONE COUNTY POLICE MERIT BOARD

APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING ON DIRECT APPEAL, AND AFFIRMING IN PART AND REVERSING  
IN PART ON CROSS-APPEAL

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BEFORE: COMBS, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal and cross-appeal from a judgment entered by the Boone Circuit Court in an action relating to the back pay due to appellant/cross-appellee Jesse Baker upon his reinstatement to employment as a police officer. For the reasons stated hereafter we affirm on direct appeal, and we affirm in part and reverse in part on cross-appeal.

This court rendered an unpublished opinion on October 23, 1998, reversing the Boone Circuit Court's judgment upholding the termination of Baker's employment as a police officer and directing that he should be "reinstated with back pay from the date of his wrongful termination." Discretionary review was denied by the Kentucky Supreme Court.

Baker thereafter requested an award of back pay from the date of his wrongful termination. Baker and appellee/cross-appellant Boone County Police Merit Board (appellee) eventually agreed that the matter would be heard before a Special Master Commissioner, consistent with the discovery and evidentiary limitations established in the trial court's prior order. After a hearing, the commissioner recommended that Baker be awarded damages in the amount of \$67,657. The court overruled appellee's objections and adopted the commissioner's report in its entirety, awarding Baker \$67,657 with interest from the judgment's date of entry. This appeal and cross-appeal followed.

First, Baker contends on direct appeal that the trial court erred when calculating what portion of the income which he earned during the termination period should be set off against the amount awarded to him as back pay. We disagree.

CR 53.06(2) provides in pertinent part that "[w]ithin 10 days after being served with notice of the filing of" a

commissioner's report of recommendations to a trial court, "any party may serve written objections thereto upon the other parties." The Kentucky Supreme Court specifically considered this provision in Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997), where it held:

In general, a party who desires to object to a report must do so as provided in CR 53.06(2) or be precluded from questioning on appeal the action of the circuit court in confirming the commissioner's report. United States v. Central Bank & Trust Co., Ky., 511 S.W.2d 212 (1974). Such a rule does not create in the commissioner an additional level of the Court of Justice or elevate the status of the office, but merely recognizes that enforcement of such a rule is necessary as the means of informing the trial court of the parties' disagreement with or complaint about the report. . . . If we should merely apply the provisions of CR 52.03, as appellant urges, and authorize review of questions of sufficiency of evidence without requiring objections to the commissioner's report, appeals would be taken from trial court judgments adopting commissioner's reports without the trial court ever having been apprised of any disagreement with the report. Not only would this amount to the blindsiding of trial courts, it would also result in unnecessary appeals, confusion in appellate courts, needless reversals, and in general, would invite all the mischief associated with appellate review of unpreserved error.

As noted by appellee, Baker filed no objections to the commissioner's recommendations, including those regarding the setoff of his earnings from the termination period. However, Baker asserts that although Eiland requires parties to object to

the reports of domestic relations commissioners (DRC's), the same requirement does not apply to the reports of other commissioners such as the one involved herein. While this argument at first glance may appear to have some merit based on Eiland's frequent references to DRC's, a closer review of Eiland and CR 53.06 shows otherwise. Eiland particularly addressed a situation which involved a DRC, but at no point did the opinion distinguish between DRC situations and those which involve other types of circuit court commissioners. Moreover, a review of CR 53 as a whole dispels any notion that portions of CR 53.01 through CR 53.09 apply exclusively to DRC's rather than to all circuit court commissioners, with the exception of CR 53.03 which by its very title specifically pertains to DRC's. In fact, it would be illogical to hold that the reporting and response requirements of CR 53.06 are limited to DRC's since that interpretation would eliminate reporting requirements for other commissioners and thereby would render their work useless to circuit courts. For that reason, we cannot agree with Baker that pursuant to Eiland, CR 53.06 applies only to the reports of DRC's. Further, despite Baker's citation thereto, we are not persuaded that a different result is compelled by Barker v. Hill, Ky. App., 949 S.W.2d 896 (1997), which merely noted in a footnote that its circumstances merited review under CR 61.02 rather than under Eiland. It follows, therefore, that Baker's

objections to the commissioner's recommendations regarding the setoff of income were waived and will not be addressed on appeal.

Next, Baker contends that the trial court erred by prohibiting the introduction of any evidence regarding the overtime pay which he allegedly would have earned if the termination had not occurred. We disagree.

A panel of this court addressed the issue of whether an illegally-discharged employee is entitled to recover overtime pay as part of back pay compensation in Maggard v. Commonwealth, Cabinet for Families and Children, Ky. App., 991 S.W.2d 659 (1998). There, a state employee who was reinstated to his former position asserted that he should be compensated for certain overtime work which he claimed was an expected part of his employment. He relied on 200 KAR 12:030, Section 3(2)(d), which provides that gross pay shall include "[a]ny other changes which would affect the amount of compensation which the employee would otherwise have received" except for the termination. However, after considering the opposing conclusions reached by Pennsylvania and New Jersey courts in similar circumstances, this court held that

[b]ecause the common law rule recognizing the right of an illegally discharged employee to recover back pay has never been construed in Kentucky as encompassing more than the employee's base salary, because Maggard was not vested with

any legally enforceable right to earn overtime pay during the period of his suspension, and because any award of overtime pay for that period would necessarily be based in part upon speculation and conjecture, we hold, as would at least one other appellate court, that there is no legal justification for an award to Maggard of lost overtime compensation. We find no authority for appellant's position that the cited statute and regulations support his contention.

991 S.W.2d at 661.

Baker attempts to distinguish his situation from Maggard by arguing that unlike his own situation, Maggard had only an expectation and not a right to work overtime hours, with the result that such overtime hours were "wholly speculative." However, our review of Maggard shows that as here, "overtime was an expected part of his job." 991 S.W.2d at 660. Despite Baker's assertions that he had an "enforceable" right to claim overtime pay based on seniority and that he would have worked all available overtime in order to increase his retirement pay, we cannot say that his overtime figures were any less speculative than those proposed by Maggard. That being so, we must conclude that the trial court did not err by excluding testimony regarding overtime pay. Further, the court did not err by excluding testimony regarding gun and dry cleaning allowances, as including these amounts in the award of back pay would have amounted to nothing more than a windfall.

Finally, Baker contends that the trial court erred by failing to award prejudgment interest, while appellee contends on cross-appeal that the court erred by awarding postjudgment interest. It is well established in Kentucky that "the interest statute, KRS 360.040, has no application to judgments against state government or any of its subdivisions." Kenton County Fiscal Court v. Elfers, Ky. App., 981 S.W.2d 553, 560 (1998). See also Commonwealth, Department of Transportation, Bureau of Highways v. Lamb, Ky., 549 S.W.2d 504 (1976); Powell v. Board of Education of Harrodsburg, Ky. App., 829 S.W.2d 940 (1991). Thus, it is clear that the court did not err by declining to award prejudgment interest, but it did err by awarding postjudgment interest against appellee.

The court's judgment is affirmed except to the extent that on cross-appeal, it is reversed insofar as it awards postjudgment interest against appellee.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
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