

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002440-MR

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MICHAEL O. MCDONALD, SPECIAL JUDGE
ACTION NO. 03-CI-008296

CHRISTIE RICHARDSON

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: This is an appeal of a judgment of the Jefferson Circuit Court resolving a declaratory judgment action by holding that Louisville/Jefferson County Metro Government (hereinafter "Metro Government") is obligated to provide a legal defense to Christie Richardson, a former police officer, in a number of civil rights actions filed against her. After having carefully reviewed the relevant statutory provisions and the persuasive and insightful arguments of counsel, we reverse.

In 1997, Richardson became a member of the Metro Narcotics Unit, a joint unit of the Louisville and Jefferson

County Police Departments. In March 2002, she was indicted on hundreds of felony counts based on her activities while serving as an officer of the narcotics unit. It was alleged that Richardson fabricated information in order to obtain search warrants, tampered with drug evidence, forged judges' signatures on search warrants, and appropriated cash intended for payment for drug buys to paid informants. At a jury trial held in early 2003, Richardson was convicted of numerous counts of official misconduct, criminal possession of forged instruments, and tampering with public records. The Fraternal Order of Police provided for Richardson's defense at the criminal trial.

Shortly after her indictment, Richardson resigned her position with the police department. Several weeks later, she was named as a defendant in a class action filed by numerous citizens against the City of Louisville; the Jefferson County Chief of Police; and Mark Watson, Richardson's partner in the narcotics unit. The complaint alleged that Richardson had: unlawfully entered the plaintiffs' residences, unlawfully searched their persons and property, offered perjured testimony against them, and otherwise engaged in acts of official misconduct. The complaint also claimed that Richardson had acted "under color and authority of state law and within the scope of [her] employment" as a police officer. Finally, the complaint charged that city and county government officials --

through various acts and omissions -- had violated the plaintiffs' constitutional rights by failing properly to train, to supervise, and to discipline its police officers. A number of similar actions, both state and federal, were soon filed naming Richardson (in her official capacity) as a party-defendant.

On September 22, 2003, Richardson filed a declaratory judgment action against Metro Government and two insurance companies providing coverage to Jefferson County's Fraternal Order of Police. According to Richardson's complaint, both Metro Government and the insurance providers had failed and improperly refused to provide her with a defense in the civil actions filed against her. She alleged that Metro Government's refusal to provide her with a defense was a violation of Kentucky's Claims Against Local Governments Act ("CALGA"), KRS¹ 65.2005. Richardson asked the trial court for an order clarifying which of the defendants was responsible for her individual legal defense in the underlying actions.

The defendant insurance companies contended that Richardson's complaint constituted a claim for benefits under a plan governed by the Employee Retirement Income Security Act, a federal statute. A notice of removal to the federal district court was filed, and on November 14, 2003, the action was

¹ Kentucky Revised Statutes.

removed to the United States District Court for the Western District of Kentucky. On March 15, 2004, however, Richardson's state law claim against Metro Government was remanded to Jefferson Circuit Court. In an order entered October 27, 2004, the Jefferson Circuit Court ordered Metro Government to provide Richardson with a legal defense in the several civil actions filed against her. This appeal followed.

The issue presented for our review is whether Metro Government wrongfully refused to provide Richardson with a defense against the claims brought against her in the civil rights actions. Specifically, we must decide whether Richardson was entitled to benefit from the Metro Government's duty to defend its employees pursuant to the relevant provisions of CALGA.

KRS 65.2005 provides, in its entirety, as follows:

- (1) A local government shall provide for the defense of any employee by an attorney chosen by the local government in any action in tort arising out of an act or omission occurring within the scope of his employment of which it has been given notice pursuant to subsection (2) of this section. The local government shall pay any judgment based thereon or any compromise or settlement of the action except as provided in subsection (3) of this section and except that a local government's responsibility under this section to indemnify an employee shall be subject to the limitations contained in KRS 65.2002.

- (2) Upon receiving service of a summons and complaint in any action in tort brought against him, an employee shall, within ten (10) days of receipt of service, give written notice of such action in tort to the executive authority of the local government.
- (3) A local government may refuse to pay a judgment or settlement in any action against an employee, or if a local government pays any claim or judgment against any employee pursuant to subsection (1) of this section, it may recover from such employee the amount of such payment and the costs to defend if:
 - (a) The employee acted or failed to act because of fraud, malice, or corruption;
 - (b) The action was outside the actual or apparent scope of his employment;
 - (c) The employee willfully failed or refused to assist the defense of the cause of action, including the failure to give notice to the executive authority of the local government pursuant to subsection (2) of this section;
 - (d) The employee compromised or settled the claim without the approval of the governing body of the local government; or
 - (e) The employee obtained private counsel without the consent of the local government, in which case, the local government may also refuse to pay any legal fees incurred by the employee.

Metro Government argues that the circuit court erred in determining that it was required to provide for Richardson's individual defense for several reasons. First, it contends that

the newly constituted Metro Government (the merger of Louisville and Jefferson County governments into Metro Government occurred after the incidents at issue) is not subject to CALGA's provisions. Next, it contends that Richardson is not an employee entitled to CALGA's benefits and that to provide her an individual defense under these circumstances would violate constitutional principles. Finally, Metro Government argues that Richardson was not acting within the scope of her employment when she allegedly committed the wrongful acts. We agree that Metro Government is not required by the terms of the statute to provide Richardson with a defense in the cases filed against her because she was not employed in the public sector at the time the actions were filed.

To determine whether Richardson is entitled to a defense provided by the local government in this case, a court must first examine the plain language of the statute's provisions. See Revenue Cabinet v. O'Daniel, 153 S.W.3d 815 (Ky. 2005)("[W]e assume that the '[Legislature] meant exactly what it said, and said exactly what it meant.'") citing Stone v. Pryor, 103 Ky. 645, 45 S.W. 1136, 1142 (1898). With certain exceptions and limitations, KRS 65.2005 requires a local political subdivision to provide a legal defense for and to pay any judgment obtained against an employee for damages arising out of the tortious performance of a ministerial act. See

Schwindel v. Meade County, 113 S.W.3d 159 (Ky. 2003). However, the government may recover from the employee any amount of a judgment paid and the costs of providing the defense if it is found that the employee acted or failed to act because of fraud, malice, or corruption or that he or she acted outside the actual or apparent scope of his or her employment.² KRS 65.200(2)

defines "employee" as follows:

"Employee" means any elected or appointed officer of a local government, or any paid or unpaid employee or agent of a local government, provided that no independent contractor nor employee nor agent of an independent contractor shall be deemed to be an employee of a local government.

"[A]ny language used by the legislature must be given its clear and commonly accepted meaning." SmithKline Beecham Corp. v. Revenue Cabinet, 40 S.W.3d 883, 887 (Ky.App. 2001). The statute is not ambiguous on its face. Nothing in either KRS 65.2005 (granting the substantive protections to local government employees) or KRS 65.200 (defining *employee*), appears to pertain to **former** employees of a local government.

Nevertheless, a provision seemingly clear on its face may become ambiguous where the consequences or results of a literal application of the language would be absurd or unreasonable. Light v. City of Louisville, ____ S.W.3d ____

² Our research indicates that in deciding whether political subdivisions must provide a defense to an employee, courts are most often required to determine whether the employee's conduct giving rise to the action fell within the "scope of his employment."

(Ky.App. 2005)(rendered July 1, 2005; pending on motion for discretionary review). We must consider whether it is unreasonable or contrary to legislative intent to exclude Richardson, a **former** local government employee, from the benefits of the statute. We conclude that a proper interpretation of the statute does not entitle her to its protection.

Like our sister states, Kentucky enacted local tort claims legislation in part to protect public employees from judgments against them arising from their government service. These provisions encourage employees to perform their duties in good faith and without fear of having to bear financial and other adverse consequences of a legal action that might be instituted against them. An employee is thus enabled to perform more efficiently without the necessity of second-guessing possible personal consequences or liabilities flowing from performance of their public duties.

Despite their overlapping purposes, the provisions from other jurisdictions vary in the protection afforded and its applicability to classes of employees. For example, the provisions of both New Jersey's Tort Claims Act and California's Government Code expressly require the public entity to provide a defense to an "employee or **former employee**" in any action instituted against him on account of an act or omission

occurring in the scope of his employment. (Emphasis added.) New Jersey Statutes Annotated 59:10A-1; California Government Code § 995. Illinois's Local Governmental and Governmental Employees Tort Immunity Act empowers a local public entity to appear and to defend against any claim or action instituted against an employee arising out of an act or omission occurring within the scope of employment and defines *employee* specifically to include a present or **former** employee. 745 Illinois Compiled Statutes 10/1-202.

A distinction is thus highlighted between statutes broadly providing for the protection of both employees and former employees *versus* those providing a more limited benefit to employees only. While requiring Metro Government to provide Richardson a defense under these circumstances is not inconsistent with the objectives of the statute, it is not unreasonable to exclude her from its benefits since she was not still serving as a public employee when the civil rights actions were filed against her. Where a statute is unambiguous, there is no need to refer to extrinsic evidence of legislative intent or some public policy that the statute is intended to effect. Lewis v. Jackson Energy Co-op Corp., ____ S.W.3d ____ (Ky. 2005) (rendered November 23, 2005; pending on petition for rehearing). We are not at liberty to amend the statute by inserting language of our own at variance with its plain language. Id. Citing

City of Louisville v. Fidelity & Columbia Trust Co., 54 S.W.2d
40 (Ky. 1932).

The statute is not ambiguous. By virtue of these provisions, the legislature requires local governments to provide a defense to its employees and does **not** include language covering **former employees**. Since CALGA does not apply to former employees, Metro Government is not required to provide Richardson with a defense in the actions filed against her.

The judgment of the Jefferson Circuit Court is reversed.

HENRY, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

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