IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED
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Tennessee Claims Commission
CLERK'S OFFICE

WILLIAM CENTER,	)	
	)	
Claimant,	)	
	)	
vs.	)	Claim No. T20050746
	)	Regular Docket
STATE OF TENNESSEE,	)	
	)	
Defendant.	)	

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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The complaint in this matter arises from claimant William Center's employment as a Director of Juvenile Court Information Systems with the Tennessee Council of Family Court Judges from August 2003 until February 27, 2004, at which time he alleges that he was terminated. Subsequent to his termination, Mr. Center sought relief both in the Claims Commission and in the Davidson County Chancery Court for negligent retention, retaliatory discharge, and outrageous conduct.

By Order of June 12, 2009, the Commission dismissed the claims for outrageous conduct and negligent retention for lack of subject matter jurisdiction. The State has now moved for dismissal of the remaining

claims for violation of Tenn. Code Ann. § 50-1-304 and Tenn. Code Ann. § 8-50-116 on the same basis. Mr. Center opposes the motion. Because Mr. Center's claims for retaliatory discharge under Tenn. Code Ann. § 50-1-304 and for violation of Tenn. Code Ann. § 8-50-116 are not within the Commission's subject matter jurisdiction, the motion is granted.

CLAIMS COMMISSION JURISDICTION

Subject matter jurisdiction concerns the authority of a court to hear a controversy. *Meighan v. U.S. Sprint Commc'ns*, 924 S.W.2d 632, 639 (Tenn. 1996). Subject matter jurisdiction involves the nature of the cause of action and the relief sought, and can only be conferred on a court by constitutional or legislative act. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000).

When subject matter jurisdiction is at issue, the court must ascertain the nature or gravamen of the pending action. *Brandy Hills Estates, LLC v. Reeves*, 237 S.W.3d 307, 315 (Tenn.Ct.App. 2006). Once that is determined, the court must determine whether the Constitution of Tennessee, the General Assembly, or the common law have conferred the power to adjudicate cases of that sort on the court. *Id.* Neither the actions nor

inactions of the parties can confer subject matter jurisdiction on a court. *State ex rel. Dep't of Social Servs. v. Wright*, 736 S.W.2d 84, 85 n. 2 (Tenn.1987); *Caton v. Pic-Walsh Freight Co.*, 211 Tenn. 334, 338, 364 S.W.2d 931, 933 (1963).

The State of Tennessee, as a sovereign, is immune from suit except as it consents to be sued. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000). The Claims Commission is a forum of limited jurisdiction and its authority to render damages against the State is limited to claims based on the acts or omissions of state employees, as defined in Tenn. Code Ann. § 8-42-101(3), which fall within certain categories. The categories of claims over which the Claims Commission has jurisdiction are outlined in Tenn. Code Ann. § 9-8-307(a). If a claim falls outside of the categories specified in § 9-8-307(a), then the state retains its immunity from suit, and a claimant may not seek relief from the State. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000). When deciding whether the Commission has jurisdiction to hear a claim under the statute, a liberal construction in favor of jurisdiction must be given, "but only so long as (1) the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the 'most

favorable view in support of the petitioner's claim' is not clearly contrary to the statutory language used by the General Assembly. *Stewart v. State,* 33 S.W.3d 785, 791.

CLAIMS FOR VIOLATION OF TENN. CODE ANN. §§ 50-1-304 AND 8-50-116.

Mr. Center alleges that his termination was retaliatory and violated the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304, and Tenn. Code Ann. § 8-50-116. Tenn. Code Ann. § 50-1-304, also known as the Whistleblowing Act, provides that "[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities." Tenn.Code Ann. § 50-1-304(b)(2009). Included within the Act's definition of "employee" are employees of the State. Tenn. Code Ann. § 50-1-304(a)(1)(A). Subsection (d) of the Act creates a cause of action for retaliatory discharge for employees terminated in violation of the statute. *See* Tenn. Code Ann. § 50-1-304(d).

The other statute upon which Mr. Center relies, Tenn. Code Ann. § 8-50-116, states in relevant part:

> (b)(1) No head of any state department, agency or institution, state employee exercising supervisory authority, other state employee or state contractor shall recommend or act to discharge, demote, suspend, reassign, transfer, discipline,

threaten or otherwise discriminate against a state employee regarding the state employee's evaluation, promotion, compensation, terms, conditions, location or privileges of employment, nor may any state employee or state contractor retaliate against another state employee because the employee, or a person acting on behalf of the employee, reports or attempts to report, verbally or in writing:

(A) The willful efforts of such person or agency or contractor to violate a state or federal law, rule or regulation which had or would have had a material and adverse effect upon program operations or program integrity, or the willful efforts to conceal such a violation;

(B) Acts which constituted fraud against the state, the federal government, the public or any fellow employee;

(C) The willful misappropriation of state or federal resources;

(D) Acts which posed an unreasonable and specific danger to the health or safety of the public or employees; or

(E) Acts constituting gross mismanagement of a program, gross waste of state or federal funds, or gross abuse of authority;

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(3) No head of any state department, agency, or institution, state employee exercising supervisory authority, other state employee or state contractor shall recommend or act to discharge, demote, suspend, reassign, transfer, discipline, threaten or otherwise retaliate or discriminate against a state employee regarding the state employee's evaluation, promotion, compensation, terms, conditions, location, or privileges of employment because the employee refused to carry out a directive if the directive constitutes a violation of

> state or federal law, rule or regulation, written policy or procedure which materially and adversely affects the operations or integrity of a program or if the directive poses an unreasonable and specific danger to the health or safety of the employee, the employees or the public.

Tenn. Code Ann. § 8-50-116. A violation of this statute may be prosecuted by state employees in an action in circuit or chancery court. *See* Tenn. Code Ann. § 8-50-116(c).

The State contends that Mr. Center's claims based upon the violations of these two statutes are outside the Commission's subject jurisdiction as delineated in Tenn. Code Ann. § 9-8-307(a)(1) and must be dismissed. Mr. Center's response does not directly address the merits of the State's argument that his claims do not fall within the categories of claims described § 9-8-307(a)(1). Rather, he maintains that the State has "agreed" to the Claims Commission's jurisdiction by asserting the waiver provision contained in Tenn. Code Ann. § 9-8-307(b) as a bar to the action filed in Davidson County Chancery Court.[1] Because the State, apparently successfully, argued that the waiver warranted the dismissal of the

[1] Tenn. Code Ann. § 9-8-307(b) provides that claims filed against the State in the Claims Commission "shall operate as a waiver of any cause of action, based on the same act or omission, which the claimant has against any state officer or employee. The waiver is void if the commission determines that the act or omission was not within the scope of the officer's or employee's office or employment."

Chancery Court action, Mr. Center contends that the motion to dismiss should be denied. This reasoning, however, misapprehends the nature of subject matter jurisdiction.

As reflected above, subject matter jurisdiction does not depend on the conduct or agreement of the parties, *see Shelby County v. City of Memphis*, 211 Tenn. 410, 413, 365 S.W.2d 291, 292 (1963); *James v. Kenne*dy, 174 Tenn. 591, 595, 129 S.W.2d 215, 216 (1939), and the parties cannot confer subject matter jurisdiction on a trial or an appellate court by appearance, plea, consent, silence, or waiver. *See Caton v. Pic-Walsh Freight Co.*, 211 Tenn. 334, 338, 364 S.W.2d 931, 933 (1963); *Dishmon v. Shelby State Cmty. Coll.*, 15 S.W.3d 477, 480 (Tenn.Ct.App. 1999).

As set forth in Tenn. Code Ann. § 8-50-116(c), subject matter jurisdiction over claims for violation of Tenn. Code Ann. § 8-50-116 is vested in circuit or chancery court. Although Tenn. Code Ann. § 50-1-304 does not designate a specific forum in which whistle blowing claims must be filed, there is no indication in either that statute or in Tenn. Code Ann. § 9-8-307(a), that such suits may be brought in the Claims Commission, which unlike the Chancery Court has no general jurisdiction.

Although Mr. Center argues that the timing of the State's motion, some four years after the filing of the claim, would deprive him of a remedy to which he is entitled, the Commission notes that although the claim transferred to the Commission in May of 2005, no complaint was filed in this matter until October 9, 2008, after the Commission ordered claimant to file a complaint setting forth the factual and jurisdictional bases of his claims against the State.[2] *See* Order of September 9, 2008. More important, however, subject matter jurisdiction may be raised at any time by the parties or by the appellate court *sua sponte* on appeal. *County of Shelby v. City of Memphis*, 211 Tenn. 410, 365 S.W.2d 291 (Tenn. 1963).

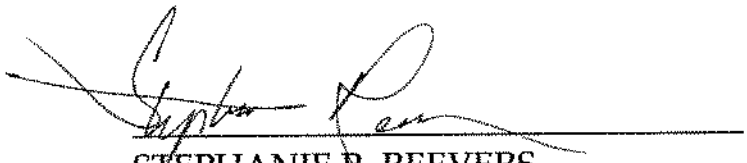
Mr. Center's response indicates that the Chancery Court dismissed the case in order that it might proceed in the Claims Commission. The Chancery Court's Order has not been filed and the Commission has only the representations of the parties as to the Chancery Court proceedings. However, even if claimant's assertions are true, the fact that the Chancery Court dismissed the complaint before it, even if that dismissal was based upon an erroneous conclusion that jurisdiction was proper in the Claims

[2] The claim was filed with a copy of the Chancery Court complaint.

Commission, does not confer upon the Claims Commission the authority to adjudicate this claim where none exists.[3]

Because the Commission concludes that it lacks subject matter jurisdiction over Mr. Center's complaint, including his claims for violation of Tenn. Code Ann. §§ 50-1-304 and 8-50-116, this matter is dismissed.

It is so **ORDERED** this the 6th day of January 2010.



STEPHANIE R. REEVERS
Claims Commissioner

[3] Although the waiver set forth in Tenn. Code Ann. § 9-8-307(b) is void if the Commission determines that the act or omission complained of was not within the scope of the officer's or employee's office or employment, the statute creates no exception for cases in which the Commission determines that it lacks subject matter jurisdiction. In *Haley v. University of Tennessee-Knoxville, 188 S.W.3d 518* (Tenn. 2006), which claimant relies upon, the Tennessee Supreme Court held that Tenn. Code Ann. § 9-8-307(b) imposes a strict election of remedies requirement, which waives all other cognate causes of action "[t]he moment the plaintiff's claim is 'filed' with the Claims Commission" regardless of whether the action is later withdrawn or nonsuited. *Id.* at 524

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 6 day of January, 2010.

Marsha Richeson

Marsha Richeson, Administrative Clerk
Tennessee Claims Commission