IN THE

COURT OF APPEALS OF VIRGINIA

RECORD NO. 1552-09-03

MICHAEL WARE MOORE,

Appellant.

v.

VIRGINIA MUSEUM OF NATURAL HISTORY, *et al.*,

Appellees.

BRIEF OF APPELLEES

WILLIAM C. MIMS
Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

PETER R. MESSITT
Senior Assistant Attorney General

GUY W. HORSLEY, JR.
Special Assistant Attorney General

JAKE A. BELUE
Assistant Attorney General

RONALD N. REGNERY*
Senior Assistant Attorney General
VSB No. 37453
900 East Main Street
Richmond, Virginia 23219
(804) 786-5632
(804) 371-2087 (facsimile)

*Lead Counsel for Appellees

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I. INTRODUCTION

The circuit court properly ruled that neither Virginia Code § 2.2-3004 – 2.2-3006(B) nor Virginia Code § 2.2-4026 provided it with subject matter jurisdiction over Moore's claim that his employment with the Commonwealth was terminated based on his sexual orientation. In addition, the court correctly held that the Governor's Executive Order Number 1 and the Virginia Human Rights Act (Virginia Code § 2.2-3900 *et seq*.) do not create causes of action nor waive the Commonwealth's sovereign immunity herein. Moreover, neither that Executive Order nor the Act was cited as potential bases for jurisdiction in the Petition for Appeal initially filed by Moore in the circuit court. Similarly, the federal laws referenced by Moore in the various memoranda he filed with the circuit court (as well as in his opening brief herein) were not previously plead in his Petition for Appeal. As a result, the circuit court's dismissal of Moore's Petition for Appeal should be affirmed and his appeal dismissed.[1]

II. STATEMENT OF THE CASE

This appeal has been taken by Appellant Michael Ware Moore ("Appellant" or "Moore") from the final order of the Circuit Court of the City of Martinsville ("the Circuit Court") dated June 15, 2009, appearing at pages 121-122 of the Joint Appendix ("J.A. ____"). It involves the Circuit Court's dismissal of Moore's "Petition for Appeal" for lack of subject matter jurisdiction and on sovereign immunity grounds. Appellees are: (1) the Virginia Museum of Natural History ("VMNH") (the state agency for which

[1] On September 2, 2009, the Appellees, by counsel, filed a Motion to Transfer Due to Lack of Original Jurisdiction. In that Motion, the Appellees asserted that this Court lacked jurisdiction over the instant appeal as it did not fall within the purview of Virginia Code § 17.1-405. As a result, Moore does not have an appeal "of right" herein and thus must Petition for Appeal to the Supreme Court of Virginia pursuant to Virginia Code § 8.01-670 and Rule 5:17 of the Rules of the Supreme Court of Virginia. To date, no ruling has yet been made on this Motion.

Moore formerly worked as a probationary employee) and the Virginia Department of Human Resource Management ("DHRM" or "Department") (which investigated the Appellant's allegations of discrimination based upon his sexual orientation against the VMNH).

III. STATEMENT OF FACTS

This matter was brought before the Circuit Court on a pleading captioned "Petition for Appeal" filed against VMNH and DHRM. According to that Petition, Moore formerly was employed by the VMNH as a Development Associate. During his probationary period of employment, he resigned (in lieu of termination). Thereafter, Moore sought reinstatement, alleging that he was forced to resign and that he was fired because of his sexual orientation in violation of the Governor of Virginia's Executive Order Number 1 (2006) (J.A. 12-13). Moore further alleged in his Petition that the Department conducted an investigation of his claim of purported discrimination and concluded that there were legitimate reasons for his termination. Moore also contested that finding by DHRM.

Per the Petition, Moore claimed that the Circuit Court "has jurisdiction over the parties pursuant to Sections 2.2-3004 and 3006.B and/or Section 2.2-4026"[2] of the Code of Virginia." J.A. 1. In response to the Petition, VMNH and DHRM filed a Motion to Dismiss, Plea of Sovereign Immunity and Demurrer. By letter opinion dated May 27, 2009, Judge David V. Williams granted the Appellees' Plea of Sovereign Immunity. A Final Order dismissing the Petition with prejudice was entered on June 15, 2009. It is from this ruling of the Circuit Court that Moore now appeals to this Court.

[2] As discussed in more detail below, Moore apparently has abandoned his assertion that the Circuit Court had jurisdiction over his claims pursuant to Section 2.2-4026 of the Code of Virginia (which is part of the Administrative Process Act).

IV. QUESTIONS PRESENTED

The issues before this Court relate to: (1) whether the Circuit Court had subject matter jurisdiction over Moore's claims pursuant to Virginia Code §§ 2.2-3004 – 2.2-3006(B) and/or 2.2-4026; (2) whether any of the other federal and/or state laws and/or constitutional provisions referenced in the Appellant's opening brief were properly plead before the Circuit Court; (3) whether the Governor's Executive Order Number 1 or the Virginia Human Rights Act (Virginia Code § 2.2-3900 *et seq*.) provided the Circuit Court with subject matter jurisdiction and/or otherwise created a cause of action allowing the Appellant to bring a claim of employment discrimination based on his sexual orientation; and (4) whether the above-mentioned state laws and Executive Order properly waived the Commonwealth's sovereign immunity herein

The Appellees respectfully submit that the answer to all four (4) of these questions is in the negative and thus request affirmance on each of these grounds.

V. STANDARD OF APPELLATE REVIEW

This appeal presents four (4) questions – all of which are subject to *de novo* review as a matter of law. *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 357-58; 626 S.E.2d 369, 372 (2006).

VI. ARGUMENT

A. The Circuit Court Lacked Subject Matter Jurisdiction Over Moore's Claims

In his Petition for Appeal, Moore cites only two (2) sources of jurisdiction available to the Circuit Court – "Sections 2.2-3004 – 3006.B and/or Section 2.2-4026" of the Code of Virginia. J.A. 1. As no mention of "Section 2.2-4026" is made in the Appellant's opening brief, he apparently is not challenging on appeal the Circuit Court's

finding that it lacked jurisdiction pursuant to that particular statute. Regarding Virginia Code §§ 2.2-3004 – 3006.B, those statutes are likewise not legitimate sources of subject matter jurisdiction. Rather, they are part of the statutory grievance procedure available to non-probationary state employees ("Grievance Procedure"). Section 2.2-3001 limits the class of persons covered by the Grievance Procedure to "non-probationary employees" (unless exempted by law). It is undisputed here that Moore was a probationary employee of the Commonwealth at the time of his resignation (*see*, *e.g.*, J.A. 26). As a result, the Appellant is not covered by the Grievance Procedure and cannot rely upon its terms for any "appeal" or other claim.[3]

Although the Appellees deny that Moore's alleged discharge was based upon his sexual orientation, discrimination in employment based upon sexual preference is not illegal under either Virginia law or federal law. Perhaps realizing such, Moore made several attempts to add to the two (2) sources of jurisdiction initially cited in his Petition for Appeal in the various legal memoranda he subsequently filed with the Circuit Court (as discussed in more detail below, the Circuit Court did not acquire jurisdiction over these additional federal and state claims since the Appellant failed to amend his Petition pursuant to Rule 1.8 of the Rules of the Supreme Court of Virginia to include them). Though not cited as a possible jurisdictional basis in his Petition for Appeal, Moore asserts that the Governor's Executive Order Number 1 provides a source of protection giving rise to a cause of action. That Executive Order creates no such cause of action and

[3] In his opening brief, Moore states that the Circuit Court "applied the incorrect burden of proof" and referenced *Virginia Polytechnic (sic) v. Quesenberry* in support of that assertion (Appellant's brief, p. 9). *Quesenberry* is not on point, as Moore did not have access to the Grievance Procedure and thus did not present his case to an administrative hearing officer. Moreover, the Court of Appeals case cited by the Appellant in support of his assertion regarding the "incorrect burden" applied by the Circuit Court was later overruled by the Supreme Court of Virginia in *Virginia Polytechnic Inst. & State Univ. v. Quesenberry*, 277 Va. 420, 674 S.E.2d 854 (2009).

it is not an expression of state legislative policy. Instead, it is simply an executive directive to state agencies not to discriminate in their hiring practices based upon sexual orientation. Moore's only recourse under that Executive Order was to file a complaint with the Office of Equal Employment Services ("OEES") within DHRM - which investigates such complaints. Here, Moore did file such a complaint and the matter was investigated. Once the OEES investigation is completed, the Executive Order does not provide for judicial appeal of the results of such an investigation – and it would be impossible for it to do so. Only the General Assembly can create a cause of action as a matter of legislative authority. *See* Va. Const. Art. III, § 1 (2009) and Art. IV, § 1 (2009).

Also absent from Moore's Petition for Appeal (but instead raised afterwards in the subsequent legal memoranda he filed with the Circuit Court) is the Virginia Human Rights Act (Virginia Code § 2.2-3900 *et seq*.). Appellant cites that Act, generally, as a source of legislative authority for his claim of illegal discrimination based upon sexual preference. However, Moore points to no provision of that Act for the proposition that sexual preference is a protected category. He cites no provision because there is none. To the contrary, the Virginia General Assembly has consistently rejected attempts to amend the Human Rights Act (and other state laws) to add sexual preference as a protected category.

Finally, Moore cites various federal laws (such as Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000 *et seq*.) and the Equal Protection Clause of the Fourteenth Amendment) as potential sources of legislative authority for his claims of illegal discrimination based upon sexual preference. As noted above, Moore cited no federal law in his Petition for Appeal. Although he later mentions such laws in the

various legal memoranda he filed with the Circuit Court and in his opening brief here, Moore never sought to amend his Petition for Appeal to include such claims – as required by Rule 1.8 of the Rules of the Supreme Court of Virginia. By failing to amend his Petition pursuant to Rule 1.8, the Circuit Court did not acquire jurisdiction over any purported cause of action not previously cited in that Petition. *See Mechtensimer v. Wilson*, 246 Va. 121, 122-23, 431 S.E.2d 301, 302 (1993) (circuit court failed to acquire jurisdiction over plaintiff's additional claims due to his failure to obtain leave of court to amend original motion for judgment to include such claims). As a result, the federal causes of action alleged by Moore (as well as his claims made pursuant to the Governor's Executive Order Number 1 and the Virginia Human Rights Act) were not properly raised by the Appellant to the Circuit Court below and this Court thus lacks jurisdiction over them here.

Even had these federal claims been properly plead by Moore, the federal laws at issue do not give rise to a cause of action based upon one's sexual preference. For example, Title VII does not list sexual orientation as a protected category. *See* 42 U.S.C. 2000e-2(a); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996) (citations omitted). Further, the category of sexual preference (which, as noted above, is not otherwise protected by either federal or state law) is not viable under the Equal Protection Clause in situations like the one here – as the Supreme Court of the United States recently rejected the "class of one theory" in the context of public employment. *Enquist v. Oregon Dep't of Agric.*, 128 S.Ct. 2146 (2008). The Court in *Enquist* held that in public employment cases (as distinguished from regulations affecting the general public), a plaintiff cannot use the Equal Protection Clause to pursue a claim of wrongful

termination because she was treated "differently from others for a bad reason, or for no reason at all" (unless another independent constitutional right was implicated). *Enquist*, 128 S.Ct. at 2156. The Court rejected the Equal Protection argument made by Enquist, because allowing it to proceed would be to "constitutionalize the employee grievance." *Id*. at 2157 (citation omitted). Recognizing the need to defer to the government in its personnel administration, the Court in *Enquist* refused to accept an Equal Protection claim of recovery to challenge discharges of state employees based on a "class of one theory." *Id*.

In the various legal memoranda he filed with the Circuit Court, as well as in his opening brief here, Moore references case after case in an attempt to possibly stumble upon a basis for the Circuit Court to have jurisdiction over his claim of discrimination based upon sexual orientation. This effort fails for several reasons. First, and as discussed above, Moore failed to amend his Petition for Appeal to include such alleged causes of action. Second, Appellant has cited no case decided by a Virginia court, or the Court of Appeals for the Fourth Circuit, in support of his assertions that sexual orientation is a protected class in the context of employment discrimination and/or that alleged discrimination based on one's sexual orientation is the equivalent of religious discrimination under Title VII. Finally, the United States Supreme Court cases cited by the Appellant are distinguishable from the instant case and thus are not controlling here – as none of those cases specifically dealt with an individual's claim of alleged

employment discrimination based upon his sexual orientation.[4] Put simply, Moore is asking this Court to tread into new and uncharted territory in order to address novel claims that were not even mentioned in his Petition for Appeal. This Court should decline to do so.

B. Moore's Claims Are Barred By Sovereign Immunity

Reduced to its core, Moore's Petition for Appeal is nothing more than a challenge to the investigative findings made by OEES (and a request to be reinstated with damages). As noted above, the authority for that investigation came from the Governor's Executive Order Number 1, which, among other things, prohibited employment discrimination based on "sexual orientation" and delegated "investigative authority" of complaints of such discrimination to OEES. However, that Executive Order did not authorize any appeal of OEES's investigative findings (whether to the Circuit Court or otherwise). Moreover, that Executive Order did not - and could not – create a cause of action for employees who allegedly were discharged based upon their sexual orientation. First, the Executive Order says nothing about creating such a cause of action. Second, and more significantly, the sovereign immunity of the Commonwealth cannot be waived by Executive Order. The immunity of the Commonwealth can be waived only by constitutional amendment or by laws enacted by the General Assembly. *Rector and Visitors of the Univ. of Virginia v. Carter*, 267 Va. 242, 244-45, 591 S.E.2d 76, 78-79 (2004). Executive Orders fall within neither category and thus cannot waive the sovereign immunity of the Commonwealth.

[4] For example, on pages 19-20 of his opening brief, Moore states: "[a]dditional court decisions that have held that discrimination based on sexual orientation violate constitutional equal protection rights include *Davis v. Passman*, 442 U.S. 228, 234-35 (1979)…" There is no such holding in *Passman*. In fact, the *Passman* case did not involve the issue of discrimination based on sexual orientation at all; rather, the plaintiff in that case alleged that she was terminated from employment based on her sex (female). As a result, *Passman* is distinguishable from the instant case.

As the doctrine of sovereign immunity is "alive and well in Virginia", the Commonwealth thus is immune from actions for damages except to the extent it has waived such immunity. *Bates v. Commonwealth*, 267 Va. 387, 391-92, 593 S.E.2d 250, 253 (2004) (citation omitted); *Melanson v. Commonwealth*, 261 Va. 178, 181, 539 S.E.2d 433, 434 (2001). Since Moore has not, and cannot, cite to any authority waiving the Commonwealth's immunity herein, his claims fail as a matter of law and were properly dismissed by the Circuit Court.

VII. CONCLUSION: RELIEF SOUGHT

The Circuit Court properly held that it lacked subject matter jurisdiction over Moore's claims pursuant to Virginia Code §§ 2.2-3004 – 2.2-3006(B) and/or 2.2-4026 – the only two (2) bases for jurisdiction actually cited in the Appellant's Petition for Appeal. The Circuit Court also correctly ruled that neither the Governor's Executive Order Number 1 nor the Virginia Human Rights Act (Virginia Code § 2.2-3900 *et seq*.) provided it with subject matter jurisdiction and/or otherwise created a cause of action allowing the Appellant to bring a claim of employment discrimination based on his sexual orientation. Finally, the Circuit Court properly found that neither the above-mentioned state laws nor the Executive Order waived the Commonwealth's sovereign immunity herein.

The Appellees, by counsel, thus respectfully request that this Court affirm the Circuit Court, thereby sustaining its dismissal of Moore's "Petition for Appeal" with prejudice.

Respectfully Submitted,

VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

VIRGINIA MUSEUM OF NATURAL HISTORY

By: _____
Counsel

WILLIAM C. MIMS
Attorney General

MAUREEN RILEY MATSEN
Deputy Attorney General

PETER R. MESSITT
Senior Assistant Attorney General

GUY W. HORSLEY, JR.
Special Assistant Attorney General

JAKE A. BELUE
Assistant Attorney General

RONALD N. REGNERY*
Senior Assistant Attorney General
VSB No. 37453
900 East Main Street
Richmond, Virginia 23219
(804) 786-5632
(804) 371-2087 (facsimile)

***Lead Counsel for Appellees**

CERTIFICATE OF COMPLIANCE

I hereby certify that on this the 20th day of October, 2009 that I have complied with Supreme Court of Virginia Rule 5A:19(f) by filing with the Clerk of Court seven (7) copies of the Brief of Appellees and by mailing via first-class mail, postage prepaid, one (1) copy of the Brief to Michael B. Hamar, Esquire, Michael B. Hamar, P.C., 520 W. 21st St., Suite J, Norfolk, Virginia 23517.

Counsel for Appellees further states that he does not waive oral argument.

_____

Ronald N. Regnery