

Case survey: State Department of Career Education, Division of Rehabilitative Services v. Means
2013 Ark. 173, 426 S.W. 3d 922

THE ARKANSAS SUPREME COURT HELD THAT A CONTRACTOR WAS A PUBLIC EMPLOYEE AS A MATTER OF LAW AND PROTECTED UNDER THE WHISTLEBLOWER ACT AND REPORTING TO HIS IMMEDIATE SUPERVISOR WAS AN APPROPRIATE AUTHORITY AND THERE WAS NO EVIDENCE TO SUPPORT A JURY INSTRUCTION ON DAMAGE MITIGATION.

The State of Arkansas Department of Career Education, Division of Rehabilitation Services (“ARS”) appealed an order of the Garland County Circuit Court in favor of the appellee Bob Means.¹ In its appeal ARS asserted that the circuit court erred in (1) finding that Means was a public employee as a matter of law; (2) denying ARS motion for a directed verdict; (3) failing to give a jury instruction for mitigation of damages; and (4) denying ARS’s motion for a new trial.²

ARS is the state agency responsible for providing opportunities for Arkansans with disabilities to lead independent and productive lives.³ Means is a psychotherapist that contracted with ARS to provide services on a part-time basis which included providing services at the Hot Springs Rehabilitation Center.⁴ In 2008, Means contacted the United States Office of the Inspector General to report suspected abuse surrounding keeping residents in the facility, receiving expensive services past normal rehabilitative training.⁵ Shortly after calling the OCR, Means received a call from a commissioner at ARS advising Means that he was being terminated immediately because ARS was implementing a new counseling model.⁶

Means filed suit under the Arkansas Whistle-Blower Act alleging that he was terminated as a result of his report to the OIG.⁷ ARS moved for summary judgment arguing that Means could not establish he was a public employee under the statute, that he had not communicated the alleged waste to an appropriate authority, or that ARS had taken an adverse action because of his report.⁸ The circuit court denied the motion for summary judgment and the jury returned a verdict in favor of Means for \$110,452.⁹ At the conclusion of the trial, ARS moved for a new trial or remittitur arguing that the jury’s verdict was excessive and erroneously awarded.¹⁰ The circuit court entered judgment in favor of Means and ARS appealed to the Arkansas Supreme Court.¹¹

¹ State Department of Career Education, Division of Rehabilitative Services v. Means, 2013 Ark. 173, at 1, 426 S.W.3d 922, 924.

² *Id.* at 1, 426 S.W.3d at 924.

³ *Id.* at 1, 426 S.W.3d at 924.

⁴ *Id.* at 1–2, 426 S.W.3d at 924.

⁵ *Id.* at 2–3, 426 S.W.3d at 924–925.

⁶ *Id.* at 2, 426 S.W.3d at 924.

⁷ State Dept. of Career Edu., 2013 Ark 173, 2, 426 S.W.3d at 925.

⁸ *Id.* at 2, 426 S.W.3d at 925.

⁹ *Id.* at 4–5, 426 S.W.3d at 925–926.

¹⁰ *Id.* at 5, 426 S.W.3d at 926.

¹¹ *Id.*, 426 S.W.3d at 926.

ARS's first point of appeal argues that the circuit court erred in finding as a matter of law that Means was a "public employee" and could not establish a claim under the Whistle-Blower Act.¹² While Means was only a contractor, "public employee" is defined as "a person who performs a full or part-time service for wages, salary, or other remuneration for a public employer."¹³ ARS argued that he was merely a contractor, but the Court held that the circuit court did not error by instructing that Means was a public employee as a matter of law based on the plain meaning of the statute.¹⁴

ARS next argued that the circuit court erred in denying its motion for a directed verdict because Means did not present any evidence that he reported the allegations of waste to an "appropriate authority, which is one of the prerequisites for bringing a claim under the Whistle-Blower Act."¹⁵ ARS argued that a "supervising employee" referenced in the statute does not encompass Means' direct supervisor, whom he reported the issue.¹⁶ ARS argued for a very narrow interpretation that would have restricted "supervisory employee" to government official that has jurisdiction over law enforcement, regulatory violations, or waste.¹⁷ The Court once again turned to the statute and applied the plain meaning of the text. The Court held that the plain meaning of the text was unambiguous and to "hold as ARS urges, that a public employee cannot report allegations of waste to an immediate supervisor would lead to an absurd result."¹⁸

The third point that ARS appealed was that the circuit court erred in failing to instruct the jury on mitigation of damages, specifically ARS not seeking any additional employment after his termination and whether he acted reasonable in mitigating damages.¹⁹ A party is entitled to a jury instruction when it is a correct statement of the law and there is a basis in the evidence to support giving the instruction.²⁰ The Arkansas Supreme Court will not reverse a circuit court's refusal to give an instruction unless there was a clear abuse of discretion.²¹ In the instant case, the circuit court correctly acknowledged that it was ARS's burden to prove mitigation matters.²² ARS failed to provide any evidence showing Means had the opportunity to mitigate damages and for this reason, the Arkansas Supreme Court found not reason that the circuit court abused their discretion in denying the proffered jury instruction.²³

ARS's last point of appeal is that the circuit court erred in not granting a new trial, or alternatively, a remittitur.²⁴ ARS argued that a new trial was warranted because Means failed to establish a prima facie claim under the Whistle-Blower Act and because the court failed to give

¹² *Id.*, 426 S.W.3d at 926.

¹³ State Dept. of Career Edu., 2013 Ark 173, 7, 426 S.W.3d at 927 (*quoting* ARK. CODE ANN. § 21-1-602(4)).

¹⁴ *Id.* at 7, 426 S.W.3d at 927.

¹⁵ *Id.* at 7–8, 426 S.W.3d at 927 (*citing* ARK CODE ANN. § 21-1-602(2)(A)).

¹⁶ *Id.* at 8–9, 426 S.W.3d at 928.

¹⁷ *Id.* at 8, 426 S.W.3d at 928.

¹⁸ *Id.* at 10–11, 426 S.W.3d at 928–29.

¹⁹ State Dept. of Career Edu., 2013 Ark 173, at 11, 426 S.W.3d at 929.

²⁰ *Id.* at 11, 426 S.W.3d at 929.

²¹ *Id.* at 11, 426 S.W.3d at 929.

²² *Id.* at 12, 426 S.W.3d at 930.

²³ *Id.* at 11–12, 426 S.W.3d at 930.

²⁴ *Id.* at 13, 426 S.W.3d at 930.

the jury instructions on mitigation of damages.²⁵ Alternatively, ARS asserted that the damages that were awarded were excessive and not supported by substantial evidence.²⁶ However, the Court refused to address the merits of the argument because ARS gave the impression in its appeal that there was no formal ruling on the post-trial motion for a new trial but that conflicted with the other evidence in front of the court.²⁷ It is the Appellant's burden to show a record sufficient to demonstrate error by the trial court and the Court does not consider matters outside of the record.²⁸ Here, ARS was aware that an order had been omitted from the record, failed to move to supplement the record, and tried to appeal from a deemed-denied ruling that never occurred and for that reason the Court refused to address the merits of the argument.²⁹

²⁵ State Dept. of Career Edu., 2013 Ark 173, 1, 426 S.W.3d at 930.

²⁶ *Id.* at 13, 426 S.W.3d at 930.

²⁷ *Id.* at 13–14, 426 S.W.3d at 930–31.

²⁸ *Id.* at 13–14, 426 S.W.3d at 930–31.

²⁹ *Id.* at 14, 426 S.W.3d at 931.