

**[J-110-2019]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

**SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.**

MICHAEL RENNER,	:	No. 52 MAP 2019
	:	
Appellant	:	Appeal from the Order of
	:	Commonwealth Court dated October
	:	12, 2018 at No. 1479 CD 2017
v.	:	affirming the Order of the Court of
	:	Common Pleas of Lehigh County,
	:	Civil Division, dated October 5, 2017
COURT OF COMMON PLEAS OF LEHIGH	:	at No. 2016-CV-3195
COUNTY, COUNTY OF LEHIGH, JOHN J.	:	
SIKORA AND MARK SUROVY,	:	ARGUED: November 21, 2019
	:	
Appellees	:	

**OPINION**

**JUSTICE TODD**

**DECIDED: July 21, 2020**

In this appeal by allowance, we consider whether application of the Pennsylvania Human Relations Act (“PHRA”)<sup>1</sup> to the judicial branch of our tripartite form of government violates separation of powers principles. We conclude that application of the PHRA to the judiciary would violate such principles, and, thus, affirm the order of the Commonwealth Court.

On April 3, 1989, the Lehigh County Court of Common Pleas (“CCP”)<sup>2</sup> Office of Adult Probation hired Appellant Michael Renner as a Parole Officer.<sup>3</sup> In July 2011,

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<sup>1</sup> 43 P.S. §§ 951-63.

<sup>2</sup> As the CCP is both an Appellee and the trial court in this matter, we refer to the court as the CCP when discussing its role as Appellee, and “trial court” when discussing its role as the trial court.

Appellant informed Lehigh County Chief Probation Officer John J. Sikora that he had been diagnosed with a serious mental health condition and was hospitalized; he was subsequently absent from work for 4 to 6 weeks. During Appellant's absence, Sikora telephoned him numerous times to confirm the legitimacy of Appellant's condition.

Upon his return to work, Appellant alleges that Sikora and Lehigh County Benefits Manager Mark Surovy, both of whom supervised Appellant, told Appellant to resign or take a leave of absence; suggested that Appellant was no longer capable of performing his duties; assigned Appellant new cases in excess of a normal caseload; increased the number of Appellant's employment reviews; and required Appellant to work without a functional laptop, which was the primary means of communication in performing his work. Appellant also asserts that Sikora stopped working on outside charitable projects with Appellant, restricted his communication to purely business purposes, and suggested that Appellant was faking his medical condition. Appellant confronted Sikora about his hostilities towards him, but Sikora refused to discuss the matter. Appellant alleges that Surovy requested that Appellant be transferred out of Surovy's supervision, but Sikora denied that request. Appellant also requested a transfer; however, Court Administrator William Berndt refused his request. Thereafter, Sikora allegedly began insinuating that Appellant was homosexual and made inappropriate and hostile comments about homosexual people. In October 2013, Sikora allegedly requested Appellant resign because of his medical condition. Appellant, rather than terminate his employment, opted to enter the employer-sponsored employee assistance program. Subsequently, in March 2014, Sikora terminated Appellant for

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<sup>3</sup> Appellant avers that the staff of the Office of Adult Probation are under control of both the CCP and Lehigh County, and, thus, asserts that they are joint and/or co-employers of him.

failing to administer a urine test to an offender under his supervision. Appellant claims that the test was not required and that the reason for his termination was pretextual.

Appellant protested his termination to then-President Judge of the CCP Carol K. McGinley, the individual responsible for reviewing grievances under the Lehigh County's human resources dispute resolution process. Appellant alleges that Judge McGinley refused to take any action. As a result, Appellant claims that he could not obtain other employment in any other court system, and, on August 29, 2014, he filed a charge of unlawful discrimination with the Equal Employment Opportunity Commission, which was dual-filed with the Pennsylvania Human Relations Commission ("PHRC"), against Lehigh County Adult Probation, Sikora, and Surovy. He did not include the CCP as a party in that matter.

Thereafter, Appellant completed training as a municipal officer, and, subsequently, was offered a police officer position by Northampton and Fountain Hill Boroughs. As part of his duties as a municipal police officer, Appellant would be required to appear in courtrooms in both Lehigh and Northampton Counties. Appellant alleges that, through means unknown, the CCP and Lehigh County learned that Appellant was offered employment as a police officer, and caused an order to be issued on October 1, 2015, banning Appellant from possessing a firearm or taser in the Lehigh County Courthouse, Old Courthouse, and Government Center. As a result, Northampton and Fountain Hill Boroughs rescinded their employment offers to Appellant, as did Salisbury Township.<sup>4</sup> According to Appellant, he appealed Salisbury Township's rescission of his offer of employment and was given a hearing on the

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<sup>4</sup> Although Appellant, in his complaint, refers to Salisbury Township's rescission of its employment offer, he only avers that he received offers of employment from Northampton and Fountain Hill Boroughs.

matter. Appellant offers that, on February 2, 2016, his gun possession ban was lifted, but, as a condition, the CCP and Lehigh County required him to undergo a medical exam, which Appellant contends is in violation of the PHRA. On February 11, 2016, the Salisbury Police Civil Service Commission upheld the rescission of Appellant's job offer. According to Appellant, the CCP and Lehigh County continued to interfere with his employment opportunities in the form of, *inter alia*, providing false and misleading job references to municipal police agencies, including Fountain Hill Borough and Salisbury Township, which adversely impacted him.

On November 10, 2016, Appellant filed a complaint in the trial court against the CCP, Lehigh County, Sikora, and Surovy (collectively, "Appellees"). The complaint raised, *inter alia*, claims of unlawful discrimination and retaliation under the PHRA in connection with Appellant's March 6, 2014 termination from his employment as a Lehigh County Parole Officer. Appellant asserted that the proffered reasons for his termination were false and pretextual, and alleged that Appellees continued to retaliate against him by interfering with various employment opportunities he was pursuing, and that the CCP took no remedial action to prevent this discriminatory and retaliatory conduct. For this allegedly discriminatory conduct, Appellant sought, *inter alia*, declaratory and injunctive relief, compensatory damages for medical and psychological expenses, back pay and future earnings, and damages for mental, psychological, and emotional injuries, as well as reinstatement to his former position.

Relevant to the instant matter, the CCP filed preliminary objections to Appellant's complaint in the nature of a *demurrer*, asserting, *inter alia*, that the doctrines of sovereign immunity and separation of powers barred Appellant's claims against it. Following oral argument, the trial court sustained the preliminary objections and dismissed all claims against the CCP with prejudice.

Specifically, the trial court first found that the CCP was immune from suit because it is part of the Commonwealth government, it was acting within the scope of its duties at the time of the events giving rise to the litigation, and none of the statutory exceptions to sovereign immunity set forth in 42 Pa.C.S. § 8522 were applicable. The trial court also determined that Appellant’s claims were barred by the separation of powers doctrine, reasoning that our Court has the sole power and responsibility to supervise the practice, procedure, and conduct of the courts, which includes the authority to select, discharge, and supervise employees, and that neither the legislative nor the executive branch may infringe upon that prerogative.

Appellant appealed to the Commonwealth Court, arguing that the General Assembly waived sovereign immunity for the courts under the PHRA, as the Commonwealth Court has construed the definition of “employer” in Section 4(b) of the PHRA<sup>5</sup> to include courts, and application of the PHRA to the courts does not violate the separation of powers doctrine where, as here, the action is brought before the court, rather than before the PHRC.

In a *per curiam* decision, the Commonwealth Court affirmed. *Renner v. Court of Common Pleas of Lehigh County*, 195 A.3d 1070 (Pa. Cmwlth. 2018). First, the court rejected Appellant’s claim that the General Assembly waived sovereign immunity for the

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<sup>5</sup> Specifically, Section 4(b) of the PHRA defines “employer,” in relevant part, as:

any political subdivision or board, department, commission or school district thereof and any person employing four or more persons within the Commonwealth, but except as hereinafter provided, does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations.

43 P.S. § 954(b).

courts with respect to claims under the PHRA. While the Commonwealth Court recognized that another panel of that court previously found in *County of Allegheny v. Wilcox*, 465 A.2d 47 (Pa. Cmwlth. 1983), that the PHRA's definition of "employer" in Section 4(b) includes courts of common pleas, the court emphasized that the prior panel did not consider the issue of sovereign immunity in that case because it had not been sufficiently briefed, and, thus, found that *Allegheny County* was not dispositive of the issue. Similarly, the court rejected Appellant's reliance upon our decision in *Court of Common Pleas of Erie County v. Pennsylvania Human Relations Commission*, 682 A.2d 1246 (Pa. 1996), finding that the question of sovereign immunity was not before the Court. Accordingly, the Commonwealth Court concluded that, although the PHRA's definition of "employer" could be construed to include courts of common pleas, the definition did not constitute an express waiver of sovereign immunity, and this Court has not otherwise found that the General Assembly has expressly waived sovereign immunity under the PHRA. *Renner*, 195 A.3d at 1076.

The Commonwealth Court likewise rejected as meritless Appellant's argument with respect to the separation of powers doctrine. Preliminarily, the court explained that our Court has the authority under Article V, Section 10(c) of the Pennsylvania Constitution to "provide for . . . the administration of all courts and supervision of all officers of the judicial branch," *id.* at 1077 (quoting Pa. Const. art. V, § 10(c)), and that, under the separation of powers doctrine, "legislation infringing upon [the Pennsylvania Supreme] Court's authority over Pennsylvania courts is invalid," *id.* (internal quotation marks omitted). Noting that our Court held in *Erie County* that "the separation of powers doctrine prohibits the PHRC from hearing a case involving the common pleas courts' hiring or firing of personnel," *Renner*, 195 A.3d at 1077, the Commonwealth Court explained that, for those same reasons, the doctrine similarly prohibits the legislature

from “exercis[ing] any power specifically entrusted to the judiciary,” *id.* (quoting *Kremer v. State Ethics Commission*, 469 A.2d 593, 595 (Pa. 1983) (precluding application of the Ethics Act to the judiciary)). See also *First Judicial District v. Pennsylvania Human Relations Commission*, 727 A.2d 1110 (Pa. 1999). This prohibition, according to the Commonwealth Court, included interfering with the judiciary’s authority to provide for the administration of courts through the operation of the PHRA. Thus, the Commonwealth Court concluded that, because the CCP is part of the judiciary, it is not subject to the PHRA, and the trial court did not err in sustaining the CCP’s preliminary objections pursuant to the separation of powers doctrine.

We granted allocatur to consider two issues: first, whether the General Assembly intended for the Unified Judicial System to be within the definition of “employer” under the PHRA, and, thereby abrogate sovereign immunity; second, whether the application of the PHRA to the Unified Judicial System violates separation of powers principles. *Renner v. Court of Common Pleas of Lehigh County*, 216 A.3d 224 (Pa. 2019) (order). As these issues raise pure questions of law, our standard of review is *de novo*, and our scope of review is plenary. *Buffalo Township v. Jones*, 813 A.2d 659, 664 n.4 (Pa. 2002). While we granted allocatur on two issues, our resolution of the second issue regarding the separation of powers doctrine is dispositive, and, thus, we turn to consideration of only that issue.<sup>6</sup>

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<sup>6</sup> Typically, “when a case raises both constitutional and non-constitutional issues, a court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds.” *Ballou v. State Ethics Commission*, 436 A.2d 186, 187 (Pa. 1981). Here, we granted review of both the statutory definition of “employer” under the PHRA and the constitutional separation of powers question. However, as there has been a reoccurring uncertainty, as detailed below, regarding the breadth and contours of the application of the PHRA to the judiciary; as the parties have extensively briefed the overarching constitutional issue; as our resolution of the constitutional issue transcends the statutory “employer” question; and as such resolution renders the statutory construction issue moot, in this instance, we believe it prudent, if not (continued...)

Appellant asserts that applying the PHRA to the judiciary does not violate separation of powers principles if the action under the PHRA is brought in the courts and the PHRC neither investigates nor adjudicates the claim. Specifically, Appellant acknowledges that this Court held in *Erie County* and *First Judicial District* that the PHRC lacks jurisdiction, pursuant to the separation of powers doctrine, to adjudicate complaints against the judicial branch. However, Appellant emphasizes that, in both cases, the question before the Court was limited to whether the separation of powers doctrine prevented *the PHRC* from adjudicating claims against the judicial branch, but did not preclude the matter being resolved *in the courts*. Accordingly, Appellant argues that an aggrieved party may bring a claim under the PHRA against the judiciary in court, as he did here, and maintains that permitting courts to adjudicate such claims against the judicial branch is entirely consistent with the court's authority to supervise its operations. Indeed, Appellant maintains that our Court explicitly endorsed this approach in *Erie County* when we stated that court employees are not without recourse: "After the PHRC dismisses their claims for lack of jurisdiction, such employees may file actions in the court of common pleas based on the rights granted by the PHRA." Appellant's Brief at 24 (quoting *Erie County*, 682 A.2d at 1249). This approach is consistent with the separation of powers doctrine, according to Appellant, as the judiciary retains control of hiring, firing, and supervision of its employees. Finally, Appellant rejects analogies to decisions involving the Whistleblower Law, *Russo v. Allegheny County*, 125 A.3d 113 (Pa. Cmwlth. 2015), or the Ethics Act, *Kremer, supra*, wherein Pennsylvania courts found that application of those statutes to the judiciary

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necessary, to address the constitutional separation of powers issue. See *Jefferson County Court Appointed Employees Association v. Pennsylvania Labor Relations Board*, 985 A.2d 697, 705 n.13 (Pa. 2009).

violated separation of powers principles, as, by their terms, such statutes are distinguishable from the PHRA.

Additionally, in his reply brief, Appellant disagrees with the CCP's assertion, discussed more fully *infra*, that applying the PHRA to the judiciary would interfere with the courts' ability to handle court personnel matters. Appellant stresses, contrary to our discussion below, that the PHRA does not set rules of conduct, does not dictate the result of challenges to adverse actions or dictate remedies, and does not apply any procedure which would subject the Unified Judicial System to scrutiny by either of the other branches of government. Moreover, Appellant contends that the Pennsylvania Constitution prevents the Commonwealth from denying any person the enjoyment of any civil right or from discriminating against any person in exercise of such rights. See Pa. Const. art. I, § 26. Appellant offers that the PHRA merely sets forth a statutory protection against discrimination, and notes that its application is approved by the Code of Conduct for Employees of the Unified Judicial System ("*Code of Conduct*")<sup>7</sup> which clearly provides that the Unified Judicial System shall make "all hiring, employment, and supervisory decisions in compliance with the Unified Judicial System of Pennsylvania Policy on Non-Discrimination and Equal Employment Opportunity, the Rules of Judicial Administration, and all applicable state and federal laws." Appellant's Reply Brief at 11 (quoting *Code of Conduct*, § V(D)). Appellant asserts that through Section V(D) of the *Code of Conduct*, the judicial branch is subject to applicable laws pertaining to employment discrimination, which necessarily includes the PHRA.

Thus, Appellant concludes that the Pennsylvania Constitution and the PHRA prohibit discriminatory acts against judicial employees as a civil right, and the *Code of*

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<sup>7</sup> *Code of Conduct*, available at <http://www.pacourts.us/assets/files/setting-429/file-212.pdf>.

*Conduct* and Rules of Judicial Administration have implemented these prohibitions within the Unified Judicial System. According to Appellant, these protections are redressed through the procedure adopted in *Erie County* – that is, allowing a claim under the PHRA to be brought in the courts, thereby eliminating any separation of powers concerns. Finally, Appellant submits that any discomfort regarding a judge adjudicating such a claim involving other judges, and, ultimately sitting in judgment of another judge, does not implicate separation of power concerns, as it does not subject the judiciary to the scrutiny of the other branches of government, and, in any event, can be remedied by vesting jurisdiction over such claims in the Commonwealth Court’s original jurisdiction.

In response, the CCP argues that applying the PHRA to the courts would violate the doctrine of separation of powers, as such an action would directly implicate the judiciary’s oversight of court personnel. Specifically, citing to this Court’s decisions in *Erie County* and *First Judicial District*, the CCP explains that our Court has held that laws impacting the judiciary’s authority over its personnel violate separation of powers principles, and in doing so notes that this Court unequivocally stated in *First Judicial District* that “a non-judicial agency’s involvement in running the courts can never survive constitutional scrutiny.” *First Judicial District*, 727 A.2d at 1112. The CCP continues that, following *First Judicial District*, Pennsylvania courts have found any attempt to control the judiciary’s employee selection, supervision, or discharge practices to be unconstitutional, noting that courts have refused to apply the Ethics Act to employees of the judiciary, see *L.J.S. v. State Ethics Commission*, 744 A.2d 798 (Pa. Cmwlth. 2000) (determining that county probation officers are employees of the judiciary, and, thus, not “public employees” that are subject to the jurisdiction of the Ethics Act), and similarly have found that the Whistleblower Law cannot apply to judicial employees, see *Russo*

*v. Allegheny County*, 125 A.3d 113 (Pa. Cmwlth. 2015) (concluding that remedies under the Whistleblower Law would interfere with the exclusive right of the judiciary to supervise its employees, and, thus, applying the law to the judiciary was unconstitutional).

In light of these judicial pronouncements that the legislature may not exercise any power specifically entrusted to the judiciary, the CCP maintains that the PHRA may not be applied to it in this case, as doing so would directly interfere with the court's personnel decisions. In this regard, the CCP offers numerous negative consequences that would ensue if the courts were subjected to the PHRA, suggesting that fellow judges, in hearing such cases, would have extraordinary oversight over the personnel decisions of president judges and administrative judges; that the PHRA would undermine Unified Judicial System policies; and that the PHRA would directly interfere with the judiciary's duty to administer the courts under Article V, Section 10 of our Constitution.

Lastly, the CCP contends that Appellant has not offered a persuasive reason why this Court should subordinate its personnel management decisions to the policy choices of the General Assembly. The CCP urges that, as this Court has rejected interference with administration of its personnel by the executive branch through the PHRC, there is no logical reason why we should permit interference from the General Assembly through application of the PHRA. In doing so, the CCP dismisses as *dicta Erie County's* suggestion that an employee could file an action under the PHRA in the court of common pleas. Moreover, pointing to the *Code of Conduct* and the Unified Judicial System's Policy on Nondiscrimination and Equal Employment Opportunity, the CCP submits that any application of the PHRA to judiciary employees is unnecessary.

The separation of powers doctrine is essential to our tripartite governmental framework and is the cornerstone of judicial independence. It is inherent in the Pennsylvania Constitution and makes manifest that the three branches of government are co-equal and independent, and divides power accordingly. The governing structure of our Commonwealth, like the federal government, is divided into three equal branches, the legislative, see Pa. Const. art II, § 1 (“The legislative power of this Commonwealth shall be vested in a General Assembly . . . .”); the executive, see Pa. Const. art. IV, § 2 (“The supreme executive power shall be vested in the Governor . . . .”); and the judicial, see Pa. Const. art. V, § 1 (“The judicial power of the Commonwealth shall be vested in a unified judicial system . . . .”).

The rationale underlying this separation of powers is that it prevents one branch of government from exercising, infringing upon, or usurping the powers of the other two branches. Thus, to “avert the danger inherent in the concentration of power in any single branch or body,” no branch may exercise the functions delegated to another branch. *Jefferson County Court Appointed Employees Association v. Pennsylvania Labor Relations Board*, 985 A.2d 697, 706-07 (Pa. 2009); see generally *Markham v. Wolf*, 190 A.3d 1175, 1183 (Pa. 2018). The prohibition on one branch of government encroaching upon a sister branch’s powers is, in turn, related to the system of checks and balances, which prevents one branch from acting unchecked. *Jefferson County*, 985 A.2d at 706. For checks and balances to properly work, each branch must be kept from controlling or coercing the other. Insuring that each branch is co-equal and independent is the foundation of the separation of powers doctrine, and the avoidance of the concentration of governmental powers in one branch is essential to our freedom and liberty.

In our Commonwealth, the roots of the separation of powers doctrine run deep. The delineation of the three branches of government, each with distinct and independent powers, has been inherent in the structure of Pennsylvania's government since its genesis — the constitutional convention of 1776. Indeed for most of our Commonwealth's history, our Court has vigorously maintained separation of the powers of the branches, primarily relying on Article V, Section 1.<sup>8</sup> See, e.g., *Greenough v. Greenough*, 11 Pa. 489 (1849) (finding the separation of powers doctrine, and the inherent powers of the judicial branch, were distributed in the Constitution in such a way that the legislature could not exercise any judicial power).

Article V, Section 1's perhaps rudimentary expression of the separation of powers doctrine became concrete with the 1968 amendments to the Pennsylvania Constitution. While Article V, Section 1 remained virtually unchanged in the 1968 Constitution, Article V, Section 10(a) was added, granting to the Supreme Court general supervisory and administrative authority over the judicial branch.<sup>9</sup> Moreover, Article V,

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<sup>8</sup> Article V, Section 1 currently provides:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Pa. Const. art. V, § 1.

<sup>9</sup> Article V, Section 10(a) provides:

The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate.

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Section 10(c) was also added, granting to the Supreme Court the power to enact rules governing all aspects of the judiciary.<sup>10</sup> These newly-minted provisions expressly made the separation of powers between the branches of government explicit.

Our Court's decisions over the 50 years subsequent to the 1968 constitutional amendments have pointed to this constellation of provisions as the basis for our Commonwealth's separation of powers doctrine. Perhaps best exemplifying this approach is our decision in *Kremer*. Therein, our Court considered whether the financial disclosure requirement under the Ethics Act was constitutional when applied to

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Pa. Const. art. V, § 10(a).

<sup>10</sup> Article V, Section 10 (c) provides:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television.

Pa. Const. art. V, § 10(c).

judges. Citing sections 10(a) and 10(c), the Court emphasized that “the legislature may not exercise any power specifically entrusted to the judiciary.” *Kremer*, 469 A.2d at 595. The Court explained that Sections 10(a) and (c) of the Pennsylvania Constitution grant to the Supreme Court “general supervisory and administrative authority” and the “power to prescribe general rules governing practice, procedure, and the conduct of all courts” of the Unified Judicial System, and that legislation that encroached upon this grant of authority over the courts was invalid. *Id.* (citations omitted). Applying these grants of power, the Court found the disclosure requirements of the Ethics Act infringed upon the Supreme Court’s authority to supervise the judicial branch, stressing that it had established a judicial code that applied specifically to judges. *Id.* at 595-96. Thus, the long history of the separation of powers doctrine, made plain by the 1968 amendments to our Constitution, evinces a powerful check on legislative (and executive) action and an affirmation of a strong and independent judiciary, and our Court has consistently interpreted the doctrine as providing a bulwark to defend the judiciary against unintentional, or intentional, encroachments on its power by our sister branches.

Indeed, the necessity for the separation of powers among the branches, and the guarantee of each branch’s independence, is perhaps greatest for the judiciary. Of the three branches, the judicial branch is considered the most vulnerable:

It has no treasury. It possesses no power to impose or collect taxes. It commands no militia. To sustain itself financially and to implement its decisions, it is dependent on the legislative and executive branches.

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The vulnerability of the judicial branch is exacerbated because, unlike the executive and legislative branches, the judiciary has no true electoral constituency. Although judges in Illinois are elected, they do not represent the voters in the same way executive officers or legislators do. Citizens in a community typically refer to “their alderman,” “their

representative,” “their senator,” or “their mayor,” but no member of the public can rightly claim a particular member of the judiciary as “their judge.” Lacking an electoral constituency, judges command no popular allegiance. That, in turn, renders them easy targets for those who would condemn unpopular judicial rulings.

*Stilp v. Commonwealth*, 905 A.2d 918, 942 (Pa. 2006) (quoting *Jorgensen v. Blagojevich*, 811 N.E.2d 652, 660-61 (Ill. 2004) (citation omitted)).

In point of fact, in Federalist No. 78, titled, “The Judicial Department,” Alexander Hamilton spoke to these circumstances, concluding that the judiciary was undoubtedly the “weakest” branch:

The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

Federalist No. 78, 660-61, May 28, 1788 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citations omitted). Thus, vigilance in safeguarding its designated powers is especially crucial for the judiciary.

Finally, and significant for this appeal, while Sections 10(a) and (c) of Article V provide express supervisory authority and the exclusive right to enact rules governing the conduct of the judiciary, implicit in these powers is the necessary power of the judiciary to select, discharge, and supervise court employees — powers “essential to the maintenance of an independent judiciary.” *Jefferson County*, 985 A.2d at 707. For this reason, we have jealously guarded the Court’s exclusive supervisory and

administrative authority over the courts and court personnel. See, e.g., *id.* at 710 (holding the right to hire, fire, and supervise was impermissibly violated when county salary board eliminated five court employee positions). Having an exclusive constitutional grant of rule-making authority over court personnel, it is not subject to legislative regulation. *Kremer*, 469 A.2d at 595-96. While the judiciary and the legislature may both advance similar, and admirable, policies, our Court does so independently and exclusively for the judiciary and judicial employees through the promulgation of its own rules, policies, and procedures. *Id.*; see also *Thomas v. Grimm*, 155 A.3d 128, 139 (Pa. Cmwlth. 2017) (holding Whistleblower Law inapplicable to judicial employees).

With these general separation of powers tenets in mind, we next consider the relevant case law addressing the relationship between the judiciary and the PHRA, which we find reflects an evolution towards greater judicial independence with respect to application of the PHRA to the judiciary. Admittedly, the appellate case law in this area has not been a model of clarity, and we note that Appellant is correct that our Court has never expressly held that a court employee may not file a complaint under the PHRA against the judiciary *in court*, and, indeed, has at least suggested such a course was permissible.

Almost 40 years ago, the Commonwealth Court in *County of Allegheny v. Wilcox*, 465 A.2d 47 (Pa. Cmwlth. 1983), found that application of the PHRA to the court of common pleas did not violate the separation of powers doctrine, under the “*facts of the case before [it]*,” where the PHRC ordered the court to pay its female district justice secretaries the same amount as their male counterparts. *Id.* at 52 (emphasis original). The court reasoned that the court of common pleas had not met its burden in demonstrating that application of the PHRA to the court violated separation of powers

because the PHRC's order merely required the "upgrading or equalization of pay," and did not direct the court to hire or fire judicial employees. *Id.*

Over 10 years later, in *Erie County*, our Court considered whether the separation of powers doctrine prohibited the PHRC from adjudicating a discrimination claim under the PHRA. Juvenile Probation Officer Gary Ison was employed by the Erie County Court of Common Pleas, and was terminated after allegedly making sexual advances towards a probationer's mother. Ison filed a discrimination claim against the court, alleging that he was terminated because of his race, in violation of the PHRA. Our Court determined that the PHRC was precluded from adjudicating such a discrimination claim. We first noted that, under the separation of powers doctrine, the legislature may not exercise any power that has been constitutionally granted to the judiciary. *Erie County*, 682 A.2d at 1247. We also explained that, since this Court is granted supervisory and administrative authority over all courts under the Pennsylvania Constitution, which included the selection, discharge, and supervision of court employees, any legislative act that infringed upon this authority was invalid. *Id.* Ultimately, we reasoned that the judiciary must maintain the authority to make personnel decisions regarding those individuals needed to serve in judicial proceedings and assist judges in the performance of their judicial functions. Thus, we held that allowing the PHRC to review court personnel decisions through a claim of discrimination under the PHRA would encroach on the authority delegated to the judiciary by the state constitution. *Id.* at 1248.

While our Court acknowledged the Commonwealth Court's holding in *County of Allegheny* that the separation of powers doctrine did *not* preclude the PHRC from ordering the court to equalize pay for its employees, we found that decision to be distinguishable, as, in that case, the PHRC did not implicate the Court's power to hire or

discharge its personnel. *Id.* According to the Court, by reviewing personnel decisions, the PHRC would encroach upon the court's authority. *Id.* Our Court offered, however, that in cases in which the PHRC lacked jurisdiction over the court respondents, "court employees who are discriminated against are not without recourse. After the PHRC dismisses their claims for lack of jurisdiction, such employees may file actions in the court of common pleas based on the rights granted by the PHRA." *Id.* at 1249. Thus, in the wake of *County of Allegheny* and *Erie County*, the PHRC arguably had jurisdiction over certain court personnel matters, but not others, depending upon the nature of the claim and the degree of interference.

In response to the confusion created by *Erie County*, three years later, our Court attempted to clarify the PHRC's jurisdiction over matters involving the judiciary in *First Judicial District*. In that decision, a judicial employee filed a complaint with the PHRC against the First Judicial District Adult Probation Department, alleging sexual harassment by a co-worker. While the harasser was suspended for 30 days and reassigned to a different location, the victim asserted that she remained aggrieved as it was unclear whether the suspension and reassignment were linked to the sexual harassment, and the court failed to clearly condemn the actions against her.

Our Court granted allocatur to consider whether the PHRC had jurisdiction to investigate and adjudicate complaints filed against the judicial branch. We noted that the purpose of the PHRC's involvement was to investigate the alleged misconduct and to impose policy changes that would affect all court employees. 727 A.2d at 1112. Moreover, whether or not the PHRC would attempt to impose such a remedy, the Court explained that the PHRC's orders would necessarily direct, to some degree, the judiciary to act, or not act, in personnel matters. Further, it would require court officials to engage in discovery and appear before the PHRC. We concluded that such

interference in the courts was prohibited by the separation of powers doctrine. *Id.* Thus, the Court reiterated that it had the sole power and responsibility to supervise the “practice, procedure, and the conduct of all courts,” and that other branches of government acting through an administrative agency could not infringe upon this prerogative. *Id.*

In coming to this conclusion, we acknowledged that, under *County of Allegheny* and *Erie County*, the PHRC’s involvement in some aspects of the courts’ human resources policies and practices was sanctioned, but not others, depending upon the degree of invasiveness. *Id.* However, we definitively rejected as erroneous the rationale in *County of Allegheny* and held that the PHRC “has no jurisdiction, because of the separation of powers doctrine, to adjudicate any complaints against the judicial branch.” *Id.* This conclusion, according to the Court, was a “logical extension” of our prior holding in *Erie County* that separation of powers principles required that “judges retain the authority to select, discharge, and supervise court employees.” *Id.* We emphasized that the foundational error in *County of Allegheny* was that a “non-judicial agency's involvement in running the courts can never survive constitutional scrutiny, for no matter how innocuous the involvement may seem, the fact remains that if an agency of the executive branch instructs a court on its employment policies, of necessity, the courts themselves are not supervising their operations.” *Id.*

Thus, as the above-detailed cases illustrate, the approach of our Court and the Commonwealth Court has evolved over the last half century to clarify the degree to which the PHRC may become involved in personnel matters involving the judicial branch, ultimately declaring it may have no involvement under the separation of powers doctrine. That said, while this Court ultimately concluded in *First Judicial District* that *the PHRC* may not exercise jurisdiction over the courts with respect to claims under the

PHRA, we did not explicitly preclude aggrieved parties from filing such claims *in court* and, in fact, we seemingly approved just such a practice in *Erie County*. *Erie County*, 682 A.2d at 1249 (stating that “court employees who are discriminated against are not without recourse. After the PHRC dismisses their claims for lack of jurisdiction, such employees may file actions in the court of common pleas based on the rights granted by the PHRA.”).

With the contours of the separation of powers doctrine and the salient case law in hand, we turn to resolution of the question of first impression before us: whether the courts may adjudicate a matter involving the application of the PHRA to judiciary personnel. In doing so, we must first focus on whether application of the PHRA, as herein, violates the judiciary’s constitutional right to select, discharge, and supervise its employees.

The PHRA, enacted by the legislature in 1955, serves the laudable goal of prohibiting certain discriminatory practices, including those based upon “handicap or disability,” which result in the denial of equal employment, housing, and public accommodation opportunities. 43 P.S. § 952. The remedies available under the PHRA are substantial, and may include a cease and desist order, compensation for loss of work, hiring, reinstatement or upgrading of position, back pay, and reasonable accommodation. 43 P.S. § 959(f)(1).

As indicated above, however, the Pennsylvania Constitution grants independence to the judiciary in its administration of the Unified Judicial System. Pa. Const. art. V, § 10(a). Additionally, the Constitution grants exclusive policy and rule-making power to the judiciary regarding the courts. Pa. Const. art. V, § 10(c). The constitutional power to administer justice and to promulgate employment policies and rules includes the judiciary's power to select, discharge, and supervise its employees.

*Jefferson County, First Judicial District, Erie County.* This being the case, as a co-equal and independent branch of government, the judiciary has the independent and exclusive constitutional right to enact employment policies and rules regarding its employees, and to supervise the employment of such individuals.

Thus, drawing upon our Constitution and in accord with the direction of our case law, it becomes clear that application of the PHRA, no matter how admirable its goals, to judiciary personnel is in direct conflict with the judiciary's constitutionally-granted exclusive and independent right to administer the courts and to promulgate rules and policies regarding judicial employees, as well as its exclusive and independent authority to select, discharge, and supervise its employees. To apply the PHRA to the judiciary would manifestly interfere with these personnel decisions. We find this to be true whether the PHRA is applied by the executive branch through the PHRC, or by the courts themselves. Regardless, it is an incursion into our exclusive and independent domain to supervise judiciary personnel. Accordingly, we hold that application of the PHRA to the judiciary and its employees infringes upon this Court's ability to administer the courts, promulgate rules and policies, and supervise its employees, and, thus, violates separation of powers principles.<sup>11</sup>

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<sup>11</sup> Our decision in *Brady v. Pennsylvania Labor Relations Board*, 388 A.2d 736 (Pa. 1978), does not suggest a different conclusion. In *Brady*, we considered the issue of whether court reporters were covered by the Pennsylvania Employee Relations Act, 43 P.S. § 1101.101 *et seq.*, and, if so, whether application of the enactment violated the separation of powers doctrine in that regard. In resolving this question, our Court pointed to express language in the County Code, 16 P.S. § 1620, which provided that, with respect to collective bargaining involving employees paid from the county treasury, which included court reporters, the county commissioners had the sole power to represent for bargaining purposes judges of the county, the county, and county officers having employment powers over those employees. 388 A.2d at 739. However, the county commissioners were prohibited from affecting “the hiring, discharging and supervising rights and obligations with respect to such employees as may be vested in the judges or other county officers.” *Id.* (citation omitted). As the counties were financially responsible for employee compensation, and given the County Code's (continued...)

Furthermore, we acknowledge that our Court in *Erie County* endorsed the application of the PHRA to judicial employees in court proceedings. Yet, the issue before the Court was limited to the PHRC's ability to adjudicate an alleged claim of discrimination against the Court; we were not asked to inquire into alternative forums for bringing discrimination claims or whether application of the PHRA violated separation of powers principles. Our Court's one sentence response to the dissent's suggestion that there would be no forum to adjudicate a claim of discrimination was devoid of analysis and was not essential to the Court's holding, and, therefore, constituted *obiter dicta*. Regardless, in light of our explanation above for why such an approach is inconsistent with the separation of powers doctrine, *Erie County's* provision for such jurisdiction or suggestion that the PHRA was applicable to the judiciary is hereby rejected.

As the Pennsylvania Constitution vests in the judiciary the exclusive power over the administration of the courts, rulemaking, and the supervision of its personnel, it is the Court, and only the Court, that provides protection for employees subject to discrimination, independent of the executive and legislative branches, through its own rules, policies, and procedures. Indeed, the Court has done so through the

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(...continued)

express preservation of judicial authority regarding non-financial personnel matters, our Court reasoned that, as long as judges retained the authority to select, discharge, and supervise court employees, matters at issue in collective bargaining solely involving wages and other financial terms of employment did not infringe upon the independence of the judiciary. *Id.*

In the matter before us, and unlike that presented in *Brady*, the PHRA, by its terms, imposes obligations and provides for remedies that are in direct conflict with the judiciary's exclusive authority to select, discharge, and supervise its employees. Therefore, *Brady*, which purely involved employee compensation, is plainly distinguishable from the matter *sub judice*.

promulgation of its robust *Code of Conduct*. Contained therein is a requirement that “all hiring, employment, and supervisory decisions [be made] in compliance with the Unified Judicial System of Pennsylvania Policy on Non-Discrimination and Equal Employment Opportunity, the Rules of Judicial Administration, and all applicable state and federal laws.” *Code of Conduct*, § IV(D). Additionally, the *Code of Conduct* contains a prohibition against “any form of discrimination, harassment, or retaliation against any person as prohibited by law or court policy.” *Id.* § VII(B)(vi).<sup>12</sup> Moreover, pursuant to the Unified Judicial System’s Policy on Non-discrimination and Equal Employment Opportunity,<sup>13</sup> discrimination and harassment due to “race, color, sex, sexual orientation, gender identity or expression, national origin, age, disability or religion are prohibited.” *Policy on Non-discrimination and Equal Employment Opportunity*, under heading “Prohibition Against Discrimination and Harassment”. Indeed, these policies are more expansive than the PHRA by providing protection for sexual orientation and gender identity or expression. Finally, there is a meaningful avenue of reporting and processing claims of discrimination or harassment under the *Code of Conduct* with respect to county-level court employees, with the president judge of each judicial district responsible for disseminating and enforcing the *Code of Conduct*. *Code of Conduct*, § X.

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<sup>12</sup> Appellant contends that the *Code of Conduct*’s incorporation of “all applicable state and federal laws” prohibiting discrimination approves application of the PHRA to the judiciary. The mere reference to compliance with “applicable” state laws cannot be seriously read as an intention to subject the judiciary to any legislative enactment that may apply to personnel matters. Rather, it is simply a prohibition of conduct by example. See, e.g., *Kremer*, 469 A.2d 595-96; *Grimm*, 155 A.3d at 138-39.

<sup>13</sup> Available at <http://www.pacourts.us/assets/files/setting-2069/file-214.pdf>.

For the above reasons, we hold that application of the PHRA to the judiciary would violate separation of powers principles, and, thus, affirm the order of the Commonwealth Court.

Jurisdiction relinquished.

Justices Baer, Donohue, Dougherty, Wecht and Mundy join the opinion.

Chief Justice Saylor files a concurring opinion.