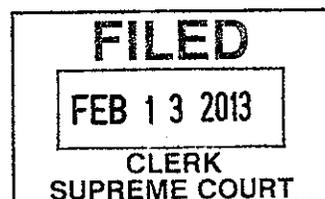


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000139



KNOTT COUNTY BOARD OF EDUCATION,
ROBERT POLLARD, HAROLD COMBS,
KIMBERLY KING, LANTRE COMBS,
REX SLONE, DENNIS JACOBS, RANDY COMBS,
ANNA DIXON, PATRICIA SLONE HACKWORTH,
CHARLES JONES, SHARON SMITH AND DIANE HALL

APPELLANTS

V.

APPEAL FROM KNOTT CIRCUIT COURT
CIVIL ACTION NO. 08-CI-000152
HON. JOHNNY RAY HARRIS, SPECIAL JUDGE
AND COURT OF APPEALS CASE NUMBER 10-CA-001404-MR

GRACE PATTON

APPELLEE

BRIEF OF APPELLEE

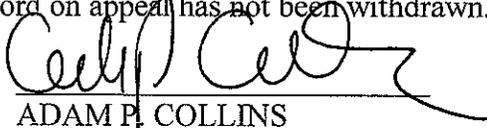
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served by mail or hand-delivery to Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Clerk of the Knott Circuit Court, 1st Floor, Knott County Justice Center, Post Office Box 1317, Hindman, Kentucky 41822; Hon. Johnny Ray Harris, Special Judge, Knott Circuit Court, Floyd County Justice Center, 127 South Lake Drive, Prestonsburg, Kentucky 41653; Jonathan C. Shaw, Esq., 327 Main Street, Post Office Drawer 1767, Paintsville, Kentucky 41240-1767, Counsel for Appellants, and that the original and ten copies were sent via U.S. registered mail to the Clerk of the Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601-3415, on this the 12th day of February, 2012. I further certify that the record on appeal has not been withdrawn.



ADAM P. COLLINS

INTRODUCTION

This is an action for wrongful termination. In the proceedings below, the Trial Court entered summary judgment in favor of the Appellants on all claims, finding that they did not owe or breach any legal duties to Appellee. By published Opinion entered on December 2, 2011, the Kentucky Court of Appeals unanimously reversed the grant of summary judgment regarding Appellee's retaliation claims against the Knott County Board of Education under the Whistleblower Act, KRS 61.102, and her statutory claims against the individually named Appellants under KRS 160.345 and 160.290, but affirmed the dismissal of Appellee's other claims. After unsuccessfully petitioning for re-hearing, Appellants sought discretionary review, which was granted by Order entered October 17, 2012.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee and her counsel would be happy to participate in oral argument, if desired by the Court, although they believe that the Court may safely affirm without argument.

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COUNTERSTATEMENT OF THE CASE

As the Appellants' Statement of the Case contains multiple misrepresentations about the record below, and is otherwise inconsistent with the facts of the case, as is explained herein, the Appellee hereby submits the following counterstatement. The Appellee, Grace Patton ("Patton"), served as a certified French teacher at the Knott County Central High School for six (6) years (ROA, Depo. of Grace Patton, pp. 9-10). During the 2006-2007 academic year, she also served on the Knott County Central High School's Site-Based Decision-Making Council ("SBDMC")(ROA, Depo. of Patton, p. 133). On or around January 18, 2007, the Principal of Knott County Central High School, the Appellant, Robert Pollard ("Pollard"), wrote a letter to Patton, reprimanding her for making a comment critical of Pollard (ROA, Depo. of Patton, Exhibit 18, pp. 1-2). Pollard placed a copy of this letter in Patton's personnel file (ROA, Depo. of Patton, Exhibit 18, p. 2). On or around March 23, 2007, Patton responded to Pollard's letter of reprimand by alleging that the reprimand was "null and void" because it had been issued and placed in her personnel file in violation of a 2006 agreement between the Knott County Education Association and the Knott County Board of Education ("Board"), as well as KRS § 161.155 (ROA, Depo. of Patton, Exhibit 19).

Exactly one week after Patton formally protested Pollard's letter of reprimand, on March 30, 2007, Pollard called Patton into his office and informed her that he would be asking the SBDMC to change the school's foreign language offering from French to Spanish (ROA, Depo. of Patton, p. 28), thereby eliminating Patton's employment. Later that same day, Patton received notice from Pollard's secretary that there would be a special meeting of the SBDMC on the following school day, April 2, 2007 (ROA, Depo. of Patton, p. 30).

During the subsequent meeting, Pollard did indeed recommend that the SBDMC change the high school's foreign language offering from French to Spanish (ROA, Depo. of Patton, Exhibit 4, pg. 2). Patton countered by advocating that French be retained in the curriculum (ROA, Depo. of Patton, Exhibit 4, p. 2). Patton's attorney then asked to address the subject, but Pollard told him that this first meeting was "special" and that the "public comments would have to wait for the regular meeting." (ROA, Depo. of Patton, Exhibit 4, p. 2).

Thereafter, the SBDMC elected to table the matter until the following week (ROA, Depo. of Patton, Exhibit 4, p. 2).

The following week, on April 9, 2007, the SBDMC held a second meeting regarding the curriculum change advocated by Pollard (ROA, Depo. of Patton, Exhibit 4, pp. 3-5).

During this meeting, several persons expressed their support for retaining French, and possibly supplementing, but not supplanting, it with Spanish. Only Pollard spoke in favor of eliminating French from the curriculum (ROA, Depo. of Patton, Exhibit 4, pp. 3-5).

Nevertheless, under Pollard's influence, the SBDMC voted in favor of replacing French with Spanish (ROA, Depo. of Patton, Exhibit 4, p. 5). Consequently, by letter dated April 18, 2007, Patton was informed by the Knott County Superintendent, Harold Combs ("Combs"), that, in light of the SBDMC's vote on the curriculum change proposed by Pollard, she had been placed on "suspended" status (ROA, Depo. of Patton, Exhibit 16).

The day after Combs' letter of April 18, Patton and her attorney appeared before the Board contesting the SBDMC's decision to eliminate the French teaching position (ROA, Depo. of Patton, Exhibit 7). During this meeting, Patton and her counsel explained that the SBDMC had "made an unauthorized decision to change the Language Class to Spanish because curriculum committee procedures had not been followed" and that "[t]he decision to

change class offerings was not Principal Pollard[']s decision to [m]ake and was politically motivated retaliation.” (ROA, Depo. of Patton, Exhibit 7). In response, Combs stated that Patton would remain on “suspended” status “until a determination can be made as to [the] appropriateness of SBDM[C’s] decision (ROA, Depo. of Patton, Exhibit 7). Then, by letter dated April 23, 2007, Patton appealed the SBDMC’s decision, laying out in considerable detail some of the ways that the process that had been employed to change from French to Spanish had violated multiple procedural provisions of the Knott County School Systems Policies and Procedure Manuals (ROA, Depo. of Patton, Exhibit 8). By letter dated May 15, 2007, however, Pollard informed Patton that the SBDMC had rejected her appeal without explanation (ROA, Depo. of Patton, Exhibit 11). In response, Patton, by letter dated May 17, 2007, appealed the SBDMC’s decision to the Board (ROA, Depo. of Patton, Exhibit 12). Like the SBDMC, the Board summarily rejected Patton’s appeal (ROA, Depo. of Patton, pp. 67-68).

In this action, Patton claims, among other things, that her employment with the Knott County school system was illegally terminated when the Appellants, in violation of multiple express, written policies of the Board, replaced French with Spanish in the high school curriculum despite the fact that such curriculum change was motivated, in substantial part, by Pollard’s desire to retaliate against Patton because she had asserted her rights to complain formally about Pollard’s allegedly unauthorized placement of a letter of reprimand in her personnel file and Pollard’s equally improper activities under KRS 161.155 with respect to Patton’s proper use of her statutorily-governed sick leave (ROA, Depo. of Patton, Exhibit 19). In other words, according to Patton, her termination was accomplished in an illegal manner because the Appellants, collectively and individually, failed to enforce or follow their

own mandatory procedural rules regarding a proper curriculum change. In so failing, Patton maintains that the Appellants impermissibly enabled Pollard to propose and effectuate a hasty (indeed, within a 10-day period between March 31 and April 9) curriculum change that masked Pollard's statutorily-improper, retaliatory motives for proposing such a change in the first place, which affected only a single teacher (*i.e.*, the one who, not coincidentally, had recently protested Pollard's prior disciplinary action against her). Furthermore, Patton claims that Pollard himself violated legal duties to her by proposing and supporting the curriculum change despite, or largely because of, his statutorily-retaliatory animus against the exercise of Patton's rights to protest Pollard's prior disciplinary action against her.

Before the trial court, and as proof that Appellants had clearly failed to enforce their own procedures and rules regarding the illegally discriminatory process initiated and decisively influenced by Pollard, Appellee pointed to sections 6.1 and 6.2 of the Knott County School System policy manual which provided that "[t]he use of committees to accomplish tasks of the council is considered vital" and that "[a] standing committee **will be** formed in each of the following areas – **curriculum**, discipline/attendance." (ROA, Depo. of Patton, p. 95; Exhibit 24)(emphasis added). According to the Patton's testimony, the SBDMC did not comply with this policy, as there was no standing curriculum committee at any of the times in question (ROA, Depo. of Patton, pp. 133-134). Further, although Appellee subsequently came to learn that Pollard had earlier attempted to assemble a quasi-committee 3-4 days before he first appeared at the SBDMC to recommend that Spanish replace French (ROA, Depo. of Patton, Exhibit 8, pg. 3), this action, itself, was violative of sections 6.4(C) and 6.6 of the Board's policies and procedures manual which required, respectively, the "size of the committees and representative" to be "determined by the

council” (as opposed to the Principal) and that committee meeting be “be announced via the largest media source in the district 24 hours in advance, have a prepared agenda, maintain minutes and submit copies of the agenda and minutes to the council at the next regular scheduled meeting.” (ROA, Depo. of Patton, pp. 136-137; Exhibit 24). According to Pollard, none of these requirements were complied with vis-à-vis Pollard’s quasi-committee, and, of course, she should know since she was a member of the SBDMC at the time (ROA, Depo. of Patton, pp. 96, 136). Additionally, because Patton alleges that Pollard asked some people to leave the committee he tried to assemble, that quasi-committee meeting did not comply with section 6.5 of the policy and procedure manual, which requires that “[a]ll committee meetings shall be open to the public” and that “[a]ll decisions made by committees must be made in [an] open public meeting.” (ROA, Depo. of Patton, pp. 136-137; Exhibit 24).

Patton also alleged below that the Appellants had refused to enforce or follow other provisions of the Board’s policies and procedures manual, as well as some of the SBDMC’s own written policies. For instance, because Pollard’s proposal to change curriculum was adopted by the SBDMC at the same regular meeting in which it was first introduced, it appears, and Patton claims, that section 7.3 of the Board’s policies was violated (ROA, Depo. of Patton, pp. 95-96). Furthermore, Patton asserted that Appellants had violated sections 4.02, 4.03 and 13.03 of the SBDMC’s written policies, which – like the Board’s written policies and procedures – required, among other things, the creation of a standing curriculum committee to “continuously develop[] and intensely monitor[]” curriculum, the SBDMC to determine the composition of the curriculum committee, the SBDMC to give a “charge” to the committee and the committee to report on its “curriculum improvement plan” at least twice per semester (ROA, Depo. of Patton, pp. 102-104, 136-138; Exhibits 5 and 8). Thus,

taken together, and as explained in her own words, the gravamen of Patton's procedural complaint was that the Appellants "should've gone A,B,C, D and [instead] they went from A to D" (ROA, Depo. of Patton, pg. 83), and that such shortcutting was a byproduct of Pollard's retaliatory motives and the fact that the other Appellants failed to enforce or follow the applicable rules and procedures regarding curriculum changes and otherwise failed to perform their legal duties. Accordingly, in the trial court below, Patton argued that, because she had "established sufficient evidence that Pollard's actions were motivated by a desire to retaliate against her for her [statutorily-protected] criticism of him, she has also established a sufficient case that her discharge violated Kentucky's well-defined public policy prohibiting discharges based on the exercise of her free speech rights under [] Kentucky [law]." ROA, Vol. 2, p. 199.

Patton commenced this action on April 16, 2008, seeking damages and any and all other favorable relief to which she may be entitled related to her allegedly wrongful discharge (ROA, Vol. 1, p. 7). On July 28, 2009, the Appellants jointly moved for summary judgment (ROA, Vol. 1, p. 96), contending that the SBDMC had the authority to change the curriculum (ROA, Vol. 1, pp. 102-104), that "the doctrine of respondeat superior cannot operate" here because the "Board [and its members] cannot be held vicariously liable for any alleged negligence of its employees." (ROA, Vol. 1, pp. 105-106), and, finally, that the doctrines of governmental immunity and qualified precluded any claim against the Board and its members (ROA, Vol. 1, pp. 104-105, 106-107). The Appellee timely filed a written response in opposition to Appellants' summary judgment motion (ROA, Vol. 2, pp. 167-175). On March 18, 2010, the trial court entered findings of fact, conclusions of law and a judgment in favor of Appellants, proffering the following conclusory and incorrect

rationales: (1) “[t]here is no proof of record to indicate that the site based counsel (*sic*) breached any duties arising under [the] constitution, statute, common law, policy procedure, construction (*sic*) and practice as alleged in the complaint and these claims fail as a matter of fact and law” (ROA, Vol. 2, p. 207); (2) “a council cannot delegate statutory authority to a committee” (ROA, Vo. 2, p. 208); (3) “any claims against the [] Board [] are barred by governmental immunity as plaintiff[']s own proof indicate[s] that board policies were in place and utilized by the plaintiff” (ROA, Vol. 2, p. 208); (4) “the doctrine of respondeat superior cannot operate to impose vicarious liability upon these persons [*i.e.*, individual members of the Board, site-based council, the district superintendent and the principal] for the alleged tortuous (*sic*) acts of their subordinate” (ROA, Vol. 2, p. 208); and (5) “[t]here has been no showing that any of the named individuals violated any ministerial duties owed to plaintiff.” (ROA, Vol. 2, p. 209). On March 29, 2010, Patton moved the trial court to vacate its summary judgment against her (ROA, Vol. 2, pp. 211-219), which was denied without explanation by an order entered on June 24, 2010 (ROA, Vol. 2, p. 149). Patton timely appealed on July 22, 2010 (ROA, Vol. 2, p. 250).

By published Opinion entered on December 2, 2011, the Kentucky Court of Appeals unanimously reversed the grant of summary judgment regarding Patton’s retaliation claims against the Knott County Board of Education under the Whistleblower Act, KRS 61.102, and her statutory claims against the individually named Appellants under KRS 160.345 and 160.290, but affirmed the dismissal of Appellee’s other claims. After unsuccessfully petitioning for re-hearing, Appellants sought discretionary review, which was granted by Order entered October 17, 2012.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLEE'S RETALIATION AND OTHER STATUTORY CLAIMS

Standard of Review: The grant of summary judgment is reviewed *de novo*. Blevins v.

Moran, 12 S.W.3d 698, 700 (Ky. App. 2000).

Appellants' First Argument:

The first contention advanced by Appellants is "that at no time were issues concerning any alleged violations of KRS 61.102 or the 'whistleblower act' raised or addressed." Appellants' Brief herein, p. 8. Relatedly, Appellants argue further that "there was no argument made that the Appellee made any effort to report or disclose a 'suspected violation of state or local law'" and that "[t]he first time that this issue was addressed was in th[e] [Court of Appeals'] Opinion rendered December 2, 2011." Appellants' Brief herein, p. 8. In fact, the record shows that Patton's retaliatory discharge claims were repeatedly raised by Appellee in the courts below, and that Patton also specifically argued (both to the trial court and the Court of Appeals) that she had made an effort to report and disclose a suspected violation of state law and that she was wrongfully terminated for same.

First, Patton's Complaint alleged that Appellants had violated their duties and her "property rights and personal rights" under the "constitution, statute[s] [and] common law" of the Commonwealth of Kentucky in connection with the allegedly illegal termination of her public school employment (ROA, Vol. 1, pg. 8, Complaint, p. 2)(emphasis added). Although it is true that Patton's Complaint did not specifically reference KRS 61.102, it is also true that Appellants never moved the trial court for a more definite statement under CR 12.05, thereby waiving any objection to any alleged lack of specificity or clarity in Patton's pleading. *See*

McCollum v. Garrett, 880 S.W.2d 530, 533 (Ky. 1994)(“We note that he timely and properly filed an answer to the complaint and did not move pursuant to CR 12.05 for a more definite statement, an approved method for clarifying vague or ambiguous pleadings.”)(internal citation omitted); *Natural Resources and Environmental Protection Cabinet v. Williams*, 768 S.W.2d 47, 51 (Ky. 1989)(“If she considered that the claim as stated was ‘so vague or ambiguous’ that she could not reasonably respond, she should have filed a Motion for More Definite Statement under CR 12.05. She has done neither. What she could not do was . . . on appeal attack the judgment against her as void because she thought the allegations of the Complaint were insufficient.”); *Morgan v. O’Neil*, 652 S.W.2d 83, 86 (Ky. 1983)(“If he believed that the claim was ‘so vague or ambiguous’ that he could not reasonably respond, he should have filed a Motion for More Definite Statement under CR 12.05.”); *McDonald’s Corp. v. Ogborn*, 309 S.W.3d 274, 293 (Ky. App. 2009)(“If [McDonald’s] considered that the claim as stated was ‘so vague or ambiguous’ that [they] could not reasonably respond, [they] should have filed a Motion for More Definite Statement under CR 12.05.”). Furthermore, “[i]n regard to pleadings, Kentucky has always followed the notice pleading theory which only requires a short and plain statement of claim demonstrating that relief is warranted and necessary.” *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006). To that end, all that is necessary is that a pleading sufficiently identify the factual and/or substantive basis of the claim, rather than cite any and all particular statutes which might apply. *See, e.g., Natural Resources and Environmental Protection Cabinet*, 768 S.W.2d at 51.

Moreover, Patton specifically and repeatedly argued to the trial court that her allegations included claims of retaliatory discharge in her responses to Appellants' summary judgment motions (See ROA, Vol. 2, pp. 173-175, 199-201, Responses to Motion for Summary Judgment, pp. 6, 7-8). For example, on page 6 of Patton's two (2) summary judgment responses, Appellee twice argued as follows:

Furthermore, because Plaintiff has established sufficient evidence that Pollard's actions were motivated by a desire to retaliate against her for her criticism of him [*i.e.*, that he had illegally placed something in her personnel file], she has also established a sufficient case that her discharge violated Kentucky's well-defined public policy prohibiting discharges based on the exercise of her free speech rights under the Kentucky Constitution.

ROA, Vol. 2, pp. 173, 199. Additionally, these same retaliation claims were re-raised before the trial court when Patton moved to alter, amend or vacate the improper grant of summary judgment, arguing as follows:

[T]his case clearly seems to be **an arguable case of illegal termination, and the Plaintiff here plausibly alleged that the illegal outcome was motivated, at least in substantial part, by retaliatory animus related to Plaintiff's protest of an illegal personnel entry which Principal Pollard filed in Plaintiff's employment record.** . . . For the foregoing reasons, the Court should alter amend or vacate its judgment in this case and allow Plaintiff's wrongful/retaliatory discharge . . . claims to proceed to jury.

ROA, Vol. 2, pp. 213, 217, Motion to Alter, Amend or Vacate, pp. 3, 7 (emphasis added). What is more, although it denied Patton's post-judgment motion for relief without explanation (ROA, Vol. 2, pg. 249, Order), there is no doubt that the trial court itself had earlier recognized that Patton's Complaint, fairly and liberally construed in accordance with law, included retaliation-based claims, as its written opinion explained its erroneous grant of summary judgment, in part, as follows:

The bulk of allegations in this matter are directed towards the alleged retaliatory motives of the principal, Robert Pollard, who had no authority by law to change

the foreign language offering at the school. . . There has been no showing that any of the named individuals violated any ministerial duties owed to plaintiff.

ROA, Vol. 2, p. 209, Findings of Fact, Conclusions of Law, Order and Judgment, p. 6

(emphasis added). The above-emphasized language of the trial court obviously had no relevance or coherence unless the trial court recognized that Patton was asserting retaliation-based claims, a recognition which the Appellants herein never previously challenged or questioned. Thus, Appellants' argument that Patton's retaliation-based claims were not properly pled, raised and/or briefed before the trial court is totally unpersuasive, and should be summarily rejected.

Likewise, and contrary to Appellants' argument otherwise, it also clear that Patton sufficiently raised the erroneous reversal of her retaliatory discharge claims on appeal. More specifically, in her initial appellate brief, Patton urged, in part, as follows:

[A] public school teacher has a right to express his or her displeasure with her supervisor's enforcement of statutory and internal rules and procedures. *See, e.g., Leary v. Daeschner*, 349 F.3d 888, 899-900 (6th Cir. 2003) . . . see also Kentucky Constitution § 8 ("Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."). **As a consequence of Appellant's undisputed exercise of her constitutional right to express protestations regarding Pollard's placement of a letter of reprimand in her personnel file, allegedly in violation of the 2006 agreement between the Knott County Education Association and the Knott County Board of Education ("Board"), as well her rights to leave under KRS § 161.155 (ROA, Depo. of Patton, Exhibit 19), it is beyond dispute that Pollard had a concomitant, non-discretionary duty to refrain from taking any employment action against her in retaliation for Appellant's exercise of her constitutional rights.** *See Gryzb v. Evans*, Ky., 700 S.W.2d 399, 401 (1985)(recognizing and re-affirming that a "public policy exception" to the "employment-at-will doctrine" exists where "[t]he discharge [is] contrary to a fundamental and well-defined public policy as evidenced by existing law" that is "evidenced by a constitutional or statutory provision.")(citations omitted). Accordingly, inasmuch as the Trial Court's judgment overlooks the fact that Pollard had an absolute, ministerial duty to refrain from illegal retaliation against Appellant for the exercise of her rights under section 8 of the Kentucky Constitution, . . . it must be reversed.

Patton's Brief in 10-CA-1404-MR, pp. 12-14 (emphasis added). Also, in her Reply Brief filed with the Court of Appeals, Patton argued as follows:

That is, the only claim of protected speech in this case involves, and always has involved, **Appellant's letter of March 23, 2007 to Principal Pollard whereby Appellant protested Pollard's placement of a letter of reprimand in her personnel file allegedly in violation of a 2006 agreement between the Knott County Education Association and the Knott County Board of Education ("Board"), as well as KRS § 161.155** (ROA, Depo. of Patton, Exhibit 19; ROA, Vol. 2, pp. 194-195, 199, Response to Motion for Summary Judgment, pp. 1-2, 5). **There is no doubt that Appellant's letter of protest to her public employer regarding an alleged violation of her statutory and contract-based rights constitutes "protected speech" under the Kentucky Constitution[.]**

Patton's Reply Brief in 10-CA-14040-MR, p. 5 (emphases added). While it is true that the Court of Appeals correctly determined that, by virtue of certain Kentucky precedent, Patton's retaliatory discharge claim is not apparently cognizable under the Kentucky Constitution (see Court of Appeals' Opinion, pp. 10-11), it did not err, and has not been shown to have erred, in also correctly determining that such claim does have a proper statutory foundation under KRS 61.102 (see Court of Appeals' Opinion, pp. 11-12). Hence, Appellants' argument that Patton's retaliation-based claims were not properly raised and briefed before the Court of Appeals is likewise unpersuasive, and, thus, Appellants' first argument herein is not convincing.

Equally unavailing are the Appellants' related claims that "there was no argument made that the Appellee made any effort to report or disclose a 'suspected violation of state or local law'" and that "[t]here is no proof of record that 'the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law.'" Appellants' Brief herein, pp. 8, 10. As the Court of Appeals properly found, the evidence of record plainly (indeed, irrefutably) shows that by letter dated March 26, 2007, Patton clearly complained to Superintendent, Harold Combs, that Pollard had illegally and improperly

placed a letter of reprimand in her employee file. Court of Appeals' Opinion, pp. 2-3. More specifically, Patton's letter of March 26, 2007, states her complaint "that the written reprimand received [received from Pollard on] February 22, 2007 is null and void" and must "be expunged from [her] professional evaluation folder" because of the "Knott County School PN Agreement (see items 6-14-6, 8-2-1, and 13-1)," "directives from superiors at the Kentucky Department of Education," "a doctor's excuse for sick days mention[ed] in item 1 of reprimand that has not been requested neither by the school nor the office of Knott County Board," and "KRS 161.155." See Exhibit 19 to Patton's deposition. Though it is true that this letter did not precisely, in Appellants' words, "articulate what KDE directives were reviewed and does not state that Pollard violated them" (Appellants' Brief herein, p. 10), it is also true that, in ruling on a motion for summary judgment, a reviewing Court must construe the evidence in a light most favorable to the non-movant. *Commonwealth v. Whitworth*, 74 S.W.3d 695, 698 (Ky. 2002). So construed, it was (and is) more than arguable that Patton's letter of March 26, 2007 reasonably communicated to Pollard, and, more importantly for "whistleblowing" purposes, Pollard's supervisor, Superintendent Combs, that Patton alleged that Pollard's written reprimand of February 22, 2007 had violated her rights under the "following list" of authorities which specifically included KRS 161.155. As a result, the Court of Appeals certainly did not err in describing Patton's letter of March 26, 2007 as a complaint that Pollard's "reprimand was 'null and void' because (1) it was contradictory to an email sent by Pollard a few weeks earlier, (2) it had been issued and placed in her file in violation of the collective bargaining agreement between the Knott County Education Association ('the KEA'), and the Knott County Board of Education (the 'Board'), (3) it violated directives of the Kentucky Department of Education (the 'KDE'), (4) a doctor's

excuse was never requested for the sick days in question, and (5) it was in violation of Kentucky Revised Statutes (KRS) 161.155.” Court of Appeals’ Opinion, pp. 2-3. Appellants have not shown otherwise; nor have they presented any authorities whatsoever in support of their desired, minimalistic “non-interpretation” of Patton’s letter of March 26, 2007. Indeed, it is highly probative that Appellants have never previously denied that they too fully understood that Patton’s letter of March 26, 2007 clearly expressed the criticism that Pollard had violated her rights under the authorities listed therein, at least not until it became potentially helpful for them to feign ignorance of same in the context of the instant appeal when they sought rehearing before the Court of Appeals. Furthermore, of course, because Appellants never raised an issue about the proper interpretation of Patton’s letter of March 26, 2007 until they filed their petition for rehearing, this issue has been waived on appeal. *See Reed v. Reed*, 457 S.W.2d 4, 7 n. 1 (Ky. 1969); *Herrick v. Wills*, 333 S.W.2d 275, 276 (Ky. 1959)(“Errors not called to the attention of the appellate court prior to the time a decision is rendered may be deemed waived. Except for [the] most extraordinary cause, we will not consider an issue on appeal raised for the first time in a petition for rehearing.”); *see also* CR 76.32(b) (“Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal”).

Appellants’ Second Argument:

Similarly waived is the Appellants’ argument that Patton “failed to exhaust available administrative remedies concerning any alleged exercise of statutory right and this alone acts as a bar to her KRS 61.102 retaliation claim against the Knott County Board of Education.” Appellants’ Brief herein, p. 11. Although Appellants assert that their “arguments were raised and preserved in the motion for summary judgment and the petition for rehearing”

(Appellants' Brief herein, p. 7), this is simply not true, as there were absolutely no arguments about administrative exhaustion contained in Appellants' summary judgment motions before the trial court. Indeed, this is no doubt why Appellants have not even attempted to show the Court specifically where and/or how in the record these arguments were allegedly preserved in the trial court. This failure is surely no mere accident or oversight by an inexperienced counsel who is unfamiliar with CR 76.12(4)(c)(v)'s requirement that an appellate brief "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." And while Appellants' administrative exhaustion arguments did appear in Appellants' rehearing petition, it is also well settled that a contention first presented in a petition for rehearing will not be considered absent an affirmative showing of extraordinary cause. *Reed*, 457 S.W.2d at 7 n. 1; *Herrick*, 333 S.W.2d at 276; CR 76.32(b). The Appellants have not shown that this is one of those few "extraordinary cases when justice demands" that they be permitted to argue contentions which they did not originally raise before the trial court or the Court of Appeals. Thus, as an initial matter, it appears that the Court should decline to consider the merits of Appellants' exhaustion argument, as Appellants have not satisfactorily shown that they have any preserved arguments to present to the Court in the first instance. In fact, the bottom line is that nowhere either in the trial court or in the Court of Appeals did the Appellants ever raise an exhaustion argument as a basis for sustaining the trial court's total grant of summary judgment in this case; nor did any of the Appellants ever once ask that this action be stayed, or dismissed without prejudice, so that the Knott County Board of Education ("Board") could consider Patton's retaliation or other claims in an administrative context.

Moreover, besides being waived, the Appellants' administrative exhaustion argument is also substantively meritless, as it is clear and undisputed that Patton raised the issues related to her retaliation and other claims in her April 23, 2007 letter to the Knott County Site-Based Decision-Making Council ("SBDMC") and the Board, when she expressly stated as follows:

[Pollard] has **went so far as to improperly place reprimands/negative assessments in [Appellant's] personnel file. Thus was all motivated by his hurt feelings** [regarding Appellant's March 26, 2007, letter]. I also believe that Mr. Pollard's conduct stems from some [deep-] seated issue of inability to deal with women who are not submissive to his authority [as expressed in Appellant's March 26, 2007, letter]. However, this issue will probably have to wait for another day. The only reason I articulate this is because we believe it [*i.e.*, Pollard's retaliation against Appellant for her March 26, 2007, letter] is the motivating factor that set all of this in motion.

See Exhibit 8, unnumbered p. 2, to Patton's deposition (emphasis added). Furthermore, it was only after Patton's letter of April 23, 2007, that the SBDMC and the Board each rejected Patton's administrative appeals. More specifically, it was not until May 15, 2007, that Pollard informed Patton that the SBDMC had rejected her appeal without explanation (Exhibit 11 to Patton's deposition), and it was not until after May 17, 2007, that the Board summarily rejected Patton's appeal (Patton's deposition, pp. 67-68). Consequently, by the time they each acted to reject Patton's appeals, both the SBDMC and the Board had already heard, and been given an opportunity to consider, Patton's retaliation claims in the administrative context, and the record clearly shows that it would have been hopelessly futile for the trial court or the Court of Appeals to have ordered Appellee to present those claims again to either body (which, again, as noted, was never timely asked of the trial court or the Court of Appeals in the first instance). Conspicuously in this regard, Appellants never specifically claim how or why Patton allegedly failed to comply with any specific requirements of the

alleged internal grievance procedures. Accordingly, Appellants' second argument fails on multiple grounds.

Appellants' Third and Final Argument:

The Appellants' third and final argument is that "[t]he Court of Appeals erred in reversing the trial court's entry of summary judgment with respect to each of the individual Defendants in finding a ministerial duty where none previously existed." Appellants' Brief herein, p. 12. The crux, or *sine qua non*, of this argument is that the Court of Appeals "relied upon and cited various alleged SBDMC policies at page 20 of the opinion that are not the applicable policies" and that "[t]he sections cited [by the Court of Appeals] cited were contained in a 1998 policy that had been revised and were no longer applicable." Appellants' Brief herein, pp. 12-13. Notably, however, the Appellants present no proof in support of their very recent claim that the policies relied upon by the Court of Appeals (and the trial court) were not the applicable policies at the time of Patton's termination. Moreover, the Appellants are totally silent about why they did not raise this issue previously in this appeal, or in the lower court below, when Patton repeatedly presented the policies accurately summarized by the Court of Appeals' Opinion (ROA, Vol. 2, pp. 167-175, 199, 211-219; see also Patton's Brief in 10-CA-1404-MR), and the trial court even relied on the policies as testified to by Patton in reaching its conclusions (ROA, Vol. 2, pp. 207-209), all without objection from Appellants. Indeed, it was at the Appellants' own initiative that these policies were attached as Exhibit 24 to Patton's deposition (ROA, Patton's deposition, p. 95), and Patton has testified, without contradiction, that these were taken from "the Knott County policy manual" (ROA, Patton's deposition, p. 95). Any factual dispute regarding the applicability of the policies presented by Patton, therefore, has been waived by the Appellants' failure to raise

this issue previously, or, alternatively, are issues for the jury in light of the Appellants' recent dispute with the Patton's testimony.

Lastly of note, in their Brief the Appellants claim that Patton testified "that **she did not believe the curriculum committee was established correctly** as opposed to that **there was no committee.**" Appellants' Brief herein, p. 13 (emphases in original)(internal citations omitted). In fact, however, Patton testifies as follows on this matter:

Q: You don't believe there was a standing committee formed in the area of curriculum?

A: No, they were not standing. They did not report monthly; they did not meet monthly.

ROA, Patton's deposition, p. 98. Therefore, as with their prior arguments in this appeal, the Appellants' final argument is without merit and is no basis upon which to reverse the Court of Appeals' unanimous decision to allow a jury to pass upon the merits of Patton's retaliation and other statutory claims.

CONCLUSION

For the reasons set forth above, the Appellee respectfully requests that the Court affirm the Court of Appeals' Opinion rendered on December 2, 2011, and remand this matter for jury trial on Appellee's retaliation and other statutory claims, and for any and all other favorable relief to which Appellee may appear entitled.

Respectfully submitted:



ADAM P. COLLINS

APPENDIX

In accordance with CR 76.12(4)(d)(v), nothing additional is attached hereto, as Appellee believes that all documents that are helpful to a resolution of this appeal have already been filed of record and/or are attached to Appellants' Appendix.