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SUPREME COURT

SUPREME COURT OF KENTUCKY
NO. 2012-SC-000139-D

ON REVIEW OF OPINION OF
COMMONWEALTH OF KENTUCKY COURT OF APPEALS
NO. 2010-CA-001404
DATED DECEMBER 2, 2011 AND ORDER DENYING PETITION FOR
REHEARING DATED FEBRUARY 2, 2012

APPEAL FROM KNOTT CIRCUIT COURT
CIVIL ACTION NO. 08-CI-000152
HON. JOHNNY RAY HARRIS, PRESIDING JUDGE

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

REPLY BRIEF FOR APPELLANT

GRACE PATTON — APPELLEE

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CERTIFICATE OF SERVICE

In accordance with CR 76.12(6), I certify that a copy of the Reply Brief for Appellants has been served on February 27, 2013, by United States Mail, postage prepaid, upon: Hon. Adam P. Collins, Collins & Collins, PSC, P.O. Box 727, Hindman, KY 41822; Hon. Johnny Ray Harris, Special Judge, Knott Circuit Court, Justice Center, 127 S. Lake Drive, Prestonsburg, Kentucky 41653; Mr. Sam Givens, Jr., Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; Judy Watson Conley, Clerk, Knott Circuit Court, 1st Floor, Justice Center, P.O. Box 1317, Hindman, Kentucky 41822; and ten (10) copies of the original upon Susan Stokley Clary, Clerk,, Supreme Court of Kentucky, State Capitol Building 700 Capitol Ave, Rm 209, Frankfort, Kentucky, 40601-3488. This is to further certify that the record on appeal was not removed from the Clerk's office.

Jonathan C. Shaw

AUTHORITIES

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APPELLANT'S REPLY

A. THE RECORD DOES NOT DEMONSTRATE THAT APPELLEE RAISED STATUTORY BASED CLAIMS OF "WHISTLE BLOWING"

Generally, as the moving party, it was the Appellants' burden of showing the absence of a genuine issue of material fact; then, as the nonmoving party, it was the Appellee's burden to present sufficient evidence from which a jury could reasonably find for her. This burden would include raising KRS 61.102 as a cause of action in this matter at the summary judgment phase of the case. Here, Appellee failed to address any statutory based claims of "whistle blowing" at the trial level. Answers to interrogatories attached at Appendix 2 to Appellants Brief demonstrate that the question was asked and in response to interrogatory number 10 no answer was given. The citations to the record contained in Appellee's brief at pages 10 -11 contain references to retaliation based upon "*exercise of her frees speech rights under the Kentucky Constitution*" and "*exercise of her constitutional rights*". Appellant, Board of Education, as well at the trial court, were not given the opportunity to address any allegations of retaliation outside of "*free speech rights under the Kentucky Constitution*" and "*politically motivated retaliation*" as stated in Appellee's SBDMC decision appeal. (*See* ROA – listed separately, Deposition of Grace Patton, Exhibit 7). Issues concerning *statutory* based retaliation for alleged "*whistle blowing*" were never raised as an issue in this matter until the Court of Appeals rendered its Opinion December 2, 2011. Although argued interchangeably by Appellee, state constitutional free speech claims are not the same as statutory whistle blowing claims. The Court of Appeals correctly found at page 11 of their opinion that:

> Although *Grzyb* involved a private employer, rather than a public employer, the high Court followed the logic of *Grzyb* in later cases involving public employers. *See, Boykins v. Housing Authority of Louisville*, 842 S.W.2d 527 (Ky. 1992), and *Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479 (Ky. App. 2005). In both cases, the Court **refused to find a cause of action against the employer under a state constitutional public policy exception to the at-will doctrine**. In *Baker, supra,* **the Court found that Ky. Const. § 1 cannot by itself sustain a wrongful discharge action**. *Id.* Thus, **there is no prior case law in Kentucky allowing suit for retaliation or wrongful discharge against an employer based on freedom of speech or association under state *constitutional* grounds**. Therefore, we decline to entertain the claim today.

The Court then went on to address retaliation for alleged "*whistle blowing*" that had not previously been raised as an issue and in a manner which misinterprets and misapplies the narrow exceptions under which one may seek protection under KRS 61.102.

B. THE OPINION CREATES A CAUSE OF ACTION UNDER THE WHISTLEBLOWER ACT FOR INTERNAL PERSONNEL MATTERS WHERE NO SUCH AUTHORITY PREVIOUSLY EXISTED

As recently addressed in the attached *to be published* opinion *Rogers v. Pennyrile Allied Community Services, Inc.*, 2012-CA-000204-MR, (Dec. 14, 2012) "while lengthy, KRS 61.102 uses intelligible, ordinary words to describe a government employer's prohibited "response to an employee who in good faith reports or otherwise brings to the attention of an appropriate agency either violations of the law, suspected mismanagement, waste, fraud, abuse of authority or a substantial or specific danger to public safety or health." See *Id.* at p. 9 citing *Commonwealth, Dept. of Agriculture v. Vinson*, 30 S.W.3d 162, 164 (Ky. 2000). As is correctly discussed in the dissent in *Rogers*, KRS 61.102(1) prohibits an employer from reprising against an employee who makes a good faith report of misconduct or illegal activity to an appropriate agency. *Id.* at p. 13. The dissent also correctly acknowledges that In *Workforce Development Cabinet*

v. Gaines, 276 S.W.3d 789, 792 (Ky. 2008), this Court held that an internal report of a suspected violation of law would be sufficient to satisfy the disclosure element. *Id. at p. 14*. Here, the record is clear that there was no good faith reporting of misconduct or illegal activity and the holding of the Court of Appeals essentially creates a cause of action under the Whistleblower Act for internal personnel matters where no such authority previously existed.

A review of the record shows that Principal Pollard had received information raising concern regarding Appellee's possible abuse of sick leave and signing of a sick leave affidavit when, in fact, she was on vacation with her family in Miami, Florida.[1] *See* ROA, Patton deposition, Exhibit 18; See also Brief for Appellant, Appendix 7. Pollard copied Superintendent Combs on the January 18, 2007 (*mistakenly dated as 2006*) letter to Patton and had requested that the three of them (Superintendent Combs, Principal Pollard, and Ms. Patton) meet concerning this matter. Appellee Patton then drafted a response citing "the following items influence my request" listing KRS 161.155 (sick leave for employee or teacher) and later tendered a doctor's excuse from her mother. *Id.*, at pp. 55, 59 and Exhibits 19 and 20; *see also* Brief Appx. 7. KRS 161.155(1)(c) defines "immediate family" and (2) that "sick leave shall be granted to a teacher or employee if he or she presents a personal affidavit or a certificate of a physician stating that the teacher or employee was ill, that the teacher or employee was absent for the purpose of attending to a member of his or her immediate family who was ill, or for the purpose of mourning a member of his or her immediate family." Here, Appellee's mother explained

[1] The execution of a false affidavit in regard to a sick days is in violation of KRS 523.030, second-degree perjury, a Class A misdemeanor. More importantly, this act alone is a terminable offense constituting conduct unbecoming a teacher under KRS 161.790(1)(a) and (b). See *Board of Educ. of Laurel County v. McCollum*, 721 S.W.2d 703, 705 (Ky.,1986).

that "Ms. Patton took sick leave due to the condition of her father" and was required "*to come to Miami to pick up their daughter*" as opposed to *attending to her ill father. Id.* at Exhibit 20. **It is clear that there is no allegation in this letter that Principal Pollard violated any state or local law,** merely that her response and request to have this letter removed from her file was influenced by the cited sections. There 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" as is required under the act.

The purpose of the Whistleblower Act "is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Davidson v. Commonwealth, Dept. of Military Affairs,* 152 S.W.3d 247, 255 (Ky.App.2004). Generally, for purposes of protection under the Whistleblower Act there must be some actual legal basis to support public employee's subjective belief that a violation of law occurred. It serves to discourage wrongdoing in government, and to protect those who make it public. Appellee's *response* was made as a part of an internal personnel matter between a school principal and teacher and clearly states that the items listed were "information found" in support of her response. (See Brief for Appellant, Appendix 7). **Both the initial letter from Pollard and Patton's response were copied to Superintendant Combs as he was to attend the meeting concerning the issue.** In fact, it was Appellant Pollard's letter that requested a meeting between Superintendent Combs, Principal Pollard and Patton to address the items of concern. The letter does not articulate what KDE directives were reviewed and does not state that Pollard violated them. The letter speaks for itself and it is clear that Patton did not "blow the whistle" on any alleged wrongdoing.

Although described by the appellee as "hasty" at p. 4 and noted by the Court of Appeals at page 5 of the opinion that the entire process from proposal to enactment occurred within a ten day period, the unrefuted proof of record established that a student survey had been taken prior to the April 2, 2007 meeting. (See Brief for Appellant at pages 3 - 6).

C. APPELLEE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO FILING SUIT

As a general rule, a party is required to exhaust available administrative remedies prior to seeking judicial relief. Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may: (1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471 (Ky.2004), *quoting* 2 AM.JUR.2D Administrative Law § 505 (1994). See also *Kentucky Retirement Systems v. Lewis*, 163 S.W.3d 1, 3 (Ky.2005) (quoting *Board of Regents of Murray State University v. Curris*, 620 S.W.2d 322, 323 (Ky.App.1981)).

In this case, a similar rationale compels the application of the doctrine. The board's policy and procedure manual sets forth specific steps to be taken to initiate the grievance procedures and ultimately entitled Appellee Patton to the district's grievance procedure. In fact, Patton utilized Policy 02.42411 (Appeal of SBDMC Decisions) and pursued her internal remedies concerning allegations of unauthorized change to class offerings alleging that the decision "was not Principal Pollard's decision to make and was **politically motivated retaliation**". (See Brief for Appellant, Appendix 5; attached board

minutes of record at ROA 141, Exhibit 7). The Knott County Board of Education also had Policy 03.16 (Grievances) in place. The Board of Education was not given the opportunity to address any allegations of retaliation outside of "politically motivated retaliation" as stated in the SBDMC decision appeal. **Issues concerning retaliation for alleged "whistle blowing" were at no time raised.** To allow her to "sidestep these procedures would undermine the internal grievance procedure that the parties had agreed to and encourage other litigants to ignore the available procedure as well." *See Mullins v. Gooch*, 2005-CA-002480-MR, Ky.App.,2006 at page 3 citing *Neiman v. Yale University*, 270 Conn. 244, 851 A.2d 1165, 1172 (Conn.2004).

The 2006 agreement between the Knott County Education Association and Knott County Board of Education likewise contains a professional grievance procedure. (See Brief for Appellant, Appx. 8). Appellee failed to avail herself of this process as well. Under Kentucky law, "when one accepts employment under the collective agreement, (s)he thereby ratifies and accepts its terms, and her rights and her employer's rights are to be measured and adjudged by that contract." *Bridge v. F.H. McGraw & Co.*, 302 S.W.2d 109, 112 (Ky.1957).

D. THE COURT ERRED IN DENYING INDIVIDUAL SCHOOL BOARD MEMBERS, SCHOOL ADMINISTRATORS, AND SITE BASED DECISION MAKING COUNCIL MEMBERS IMMUNITY FOR THEIR ACTS

The Court, in reversing the trial court's entry of summary judgment with respect to each of the individually named Appellants, correctly stated at page 21 of the Opinion that:

> "Here, while KRS 160.345 plainly gave the SBDMC discretion to establish committees, once the body exercised that discretion, it was required to adhere to the procedures and rules it voluntarily established."

As addressed in the brief for appellant, the Court relied upon and cited various alleged SBDMC policies at page 20 of the opinion that **are not the applicable policies. (See** Brief for Appellant at p. 12 - 13). As previously explained these sections cited were contained in a 1998 policy that had been revised and were no longer applicable. The Court of Appeals found a ministerial duty under policies that were no longer applicable and were no longer the applicable policies. The 2001 revisions were the applicable SBDMC policies during the 2006 /07 school year. (See Brief for Appellant, Appendix 6). A complete copy of the SBDMC policies in effect during the 2005 - 2006 school year is attached at Brief for Appellant, Appendix 9.

Additionally, at page 20 of the Opinion, the Court states that "upon review of the minutes of meetings present in the record, there appears to be no other evidence of a standing curriculum committee". Overwhelming testimony in this record demonstrates that there was, in fact, a standing curriculum committee during the relevant time period. (See ROA, deposition of Patricia Hackworth, p. 7; Charles Jones, p. 5; Sharon Smith, p. 6; Robert Pollard, p. 9 - 10; and Harold Combs, p. 12). Appellee Patton's complaint in her testimony was that she did not believe the curriculum committee was established correctly as opposed to that there was no committee. (ROA, Patton deposition, pp. 77-78, 105). Her belief was based partially upon training materials from the Kentucky Association of School Councils as opposed to the applicable Knott County Central High School SBDMC policies. *Id.* Patton also relied upon an old replaced 1998 version of the SBDMC policies. *Id.* at 105 - 106. **Regardless, there is nothing stated in the policies that indicate that the curriculum committee is the sole means by which this issue could be presented to the site based council.** The principal, as well as any member of

the faculty, would have the authority to bring matters before the school's site based decision making council. Here, this issue was presented after a poll of the students revealed a majority desire to have Spanish taught. The individual defendants were clearly acting within a discretionary realm in deciding that the students would be better served by having Spanish taught at the high school as opposed to French. **Actions of a legislative body are generally entitled to absolute legislative immunity.** "Such immunity derives from the doctrine of sovereign immunity, which holds that the state, legislators, prosecutors, judges and others doing the essential work of the state enjoy an absolute immunity from suit." *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky.2007). Outside of allegations against Principal Pollard, there is no evidence of record or argument that these members of public bodies (site based council and school board) were not acting in good faith. While the Appellee identifies through argument allegations of procedural deficiencies and errors by the site based council, there is no evidence, beyond their mere allegations, that anyone (other than Principal Pollard) acted in bad faith.

A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment. Rules Civ.Proc., Rule 56.01. *Haugh v. City of Louisville*, 242 S.W.3d 683, Ky.App.,2007. Additionally, the party opposing summary judgment cannot rely on its own claims or arguments without significant evidence in order to prevent a summary judgment. *See Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App.,2004). The Court of Appeals opinion was directly influenced by (1) arguments of Appellee's counsel misstating the evidence of record, (2) Appellee's subjective beliefs about the nature of the evidence, and (3) claims

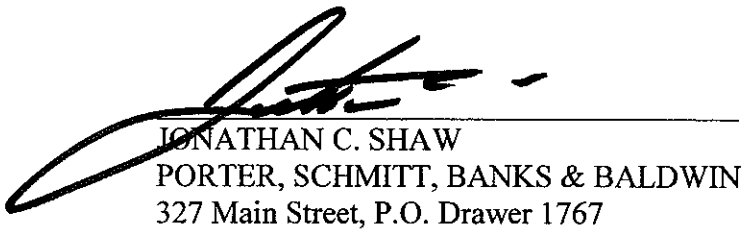
and arguments of both Appellee and Appellee's counsel without any evidence of record to support them in finding that the individual defendants (school board members, school administrators, and site based decision making council members) are not entitled to qualified immunity and that the record contains material issues of fact requiring trial. Arguments and statements of this nature are insufficient to defeat a supported motion for summary judgment under Kentucky law. Generally, as the moving party, it was the Appellants' burden of showing the absence of a genuine issue of material fact; then, as the nonmoving party, it was the Appellee's burden to present sufficient evidence from which a jury could reasonably find for her. Likewise, it is an untenable burden upon the trial court to address any and all specious claims in ruling upon a motion for summary judgment when it is not the duty of the Court to scour the record in order to plead Appellee's arguments for her. *See* Beecham v. Com., 657 S.W.2d 234, 236 (Ky. 1983) and *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky.2003). Given the "shotgun approach" of Appellee's complaint in this matter and lack of assertion throughout three years of litigation, it is an untenable burden to require counsel to defend against any and all specious and broad based claims when at no time prior were they properly raised.

CONCLUSION

As expressed by Justice Palmore, "[w]hen all is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Insurance Commission*, 450 S.W.2d 235, 237 (Ky.1970). Here, the *opinion affirming in part and reversing in part* that was entered on December 2, 2011 by the Court of Appeals addressed issues not previously raised before the trial court, created a cause of action under the Whistleblower Act for addressing internal personnel matters where no such

authority previously existed, and has placed unprecedented individual risk and exposure to individual site based council (SBDMC) members, including parent members, and individual school board members where no such risk previously existed for essentially engaging in a legislative function. For the reasons set forth above, the Opinion of the Knott Circuit Court which granted summary judgment to Appellants in this matter should have properly been affirmed.

Respectfully submitted,



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APPENDIX

1. *Rogers v. Pennyrile Allied Community Services, Inc.*, 2012-CA-000204-MR, (Dec. 14, 2012)