SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000012-D

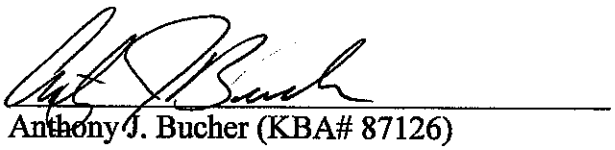
PENNYRILE ALLIED COMMUNITY SERVICES, INC. **APPELLANT**

vs.

KATRICIA ROGERS **APPELLEE**

APPELLEE'S BRIEF

Submitted by:



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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was sent by U.S. Mail on the 18th of December, 2013 to: Ms. Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415; Mr. Samuel Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. William Engle III, Judge, Perry County Hall of Justice, 545 Main Street, Hazard, Kentucky 41701; and David E. Crittenden, BOEHL, STOPHER & GRAVES, 400 W. Market Street, Suite 2300, Louisville, Kentucky 40202-3354, *Attorney for Appellee, Pennyrile Allied Community Services, Inc.* I further certify that the record on appeal was not removed from the Perry Circuit Court Clerk by Appellee.

ANTHONY J. BUCHER

I. STATEMENT CONCERNING ORAL ARGUMENT

While Appellee, Katricia Rogers, believes the issue before the Court is a somewhat straight-forward question of statutory interpretation and may not necessitate oral arguments, Appellee would welcome the opportunity.

II. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

III. STATEMENT OF THE CASE

A. Summary of Relevant Facts

Appellee, Katricia Rogers ("Ms. Rogers") was hired as a Nutritional Outreach & Wholeness ("NOW") Consumer Educator Coordinator for Appellant, Pennyrile Allied Community Services, Inc. ("PACS") beginning on September 1, 2010.[1] As a Consumer Educator Coordinator, Ms. Rogers was responsible for presenting educational programs at area schools and other community partners. To do so, Ms. Rogers contacted community partners to schedule programs and would then travel to those facilities on scheduled dates to present those programs.[2] Ms. Rogers and other Consumer Educator Coordinators were thereby regularly away from the office.

At the time of hire, Ms. Rogers worked under the direct supervision of NOW Regional Supervisor, Dennis Gibbs.[3] Although Mr. Gibbs could easily confirm employees' whereabouts by consulting the master schedule and/or by contacting the community partner where they were scheduled to be, Mr. Gibbs chose to periodically drive to employees' homes, presumably check on them to see if they were at home when they were supposed to be at work.[4] On at least one occasion in or around early February, 2011, while Ms. Rogers was still in her probationary period, Mr. Gibbs drove to her

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[1] Rogers Depo. (Appendix Item 1, pg. 23).

[2] Rogers Depo. (Appendix Item 1, pp. 34-35).

[3] Rogers Depo. (Appendix Item 1, pg. 30).

[4] Rogers Depo. (Appendix Item 1, pp. 65-66).

home.[5] On this occasion, Mr. Gibbs drove onto Ms. Rogers' gravel driveway, which was marked as "private property".[6] While driving on her "private property", Mr. Gibbs's car got stuck and caused some minor damage to her driveway. Mr. Gibbs later admitted, in a conversation with Ms. Rogers, that he had been on her property and had gotten stuck in her driveway.[7]

Shortly after this incident Ms. Rogers went to the local sheriff's department to raise the issue as to the legality of Mr. Gibbs coming onto her property without her permission. The law enforcement officials confirmed that her supervisor did not, by virtue of her employment, have a license or privilege to trespass onto her property.[8]

In or around the week of April 18, 2011, Rose Shields was hired into the newly created NOW Assistant Regional Supervisor position.[9] In this position, Ms. Shields worked under the supervision of Mr. Gibbs and became the immediate supervisor of Ms. Rogers and the other Consumer Education Coordinators.

On the afternoon of May 4, 2011 at a regular staff meeting held in London, Kentucky, Ms. Rogers confronted Mr. Gibbs about his practice of going onto employees' property to check on their whereabouts.[10] Mr. Gibbs responded by suggesting he could

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[5] Defendant's Motion for Summary Judgment was granted before Mr. Gibbs's deposition could be taken. Therefore, Mr. Gibbs has not testified as to why he specifically had gone to Plaintiff's house.

[6] Rogers Depo. (Appendix Item 1, pg. 49).

[7] Rogers Depo. (Appendix Item 1, pp. 52-53).

[8] Rogers Depo. (Appendix Item 1, pp. 113-114).

[9] Rogers Depo. (Appendix Item 1, pg. 91).

[10] Rogers Depo. (Appendix Item 1, pg. 112).

do whatever he wanted to check up on employees, including but not limited to looking into the windows of their homes.[11] Ms. Rogers informed Mr. Gibbs that she had gone to the sheriff's department and was told that he was not legally allowed to go on her private property, thereby threatening him with prosecution if he trespassed on her property again.[12] Ms. Rogers, Mr. Gibbs, Ms. Shields, and several co-workers were all present when this exchange took place.

Immediately after this exchange, Mr. Gibbs left the meeting and went to his office, where he remained for approximately one hour before returning to end the meeting and send everyone home.[13] The following morning – May 5, 2011 – Ms. Rogers was terminated. In response to written discovery, PACS acknowledged that the decision to terminate Ms. Rogers was not made until after the exchange between Ms. Rogers and Mr. Gibbs during the May 4, 2011 staff meeting.[14]

B. Procedural History

On July 21, 2011, Appellee filed the present lawsuit asserting that she had been terminated in violation of the Kentucky Whistleblower Act, KRS § 61.102. On October 20, 2011 and before Appellee had the opportunity to depose a single witness, Appellant filed a Motion for Summary Judgment. On December 12, 2011, the Perry Circuit Court granted Appellant's Motion, concluding: (a) that a report or disclosure of unlawful

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[11] Rogers Depo. (Appendix Item 1, pp. 113-114).

[12] Rogers Depo. (Appendix Item 1, pp. 113-114).

[13] Rogers Depo. (Appendix Item 1, pp. 113-114). It is unclear exactly what Mr. Gibbs was doing during this time since summary judgment was granted before his deposition could be taken, but presumably Mr. Gibbs had begun Ms. Rogers's termination process.

[14] PACS Response to Requests for Admissions (Appendix, Item 2).

conduct must "touch on a matter of public concern" to be afforded protection under the Kentucky Whistleblower Act, and (2) that Appellee's report or disclosure did not "touch-on-a-matter-of-public-concern".

After the trial court denied Ms. Rogers's Motion to Alter, Amend or Vacate the order granting PACS's Motion for Summary Judgment, Ms. Rogers appealed the decision to the Court of Appeals. The Court of Appeals reversed the trial court's decision, finding that the Kentucky Whistleblower Act is clear and unambiguous and that a report of a suspected violation of law does not have to "touch on a matter of public concern" to be afforded whistleblower protection.[15]

PACS then filed a Motion for Discretionary Review on January 9, 2013 asking the Court to determine whether or not a report or disclosure of unlawful conduct must touch on a matter of public concern to be afforded protection under the Kentucky Whistleblower Act. The Court granted PACS's Motion.

IV. ARGUMENT

A. The Kentucky Whistleblower Act protects public employees that disclose facts or information relative to an actual or suspected violation of *any* law, mismanagement, waste, fraud, abuse of authority, or a specific danger to public health or safety.

In its entirety, KRS 61.102(1) reads as follows:

> **No employer shall subject to reprisal**, or directly or indirectly use or threaten to use, any official authority or influence in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against **any employee who in good faith, reports discloses, divulges, or otherwise brings to the attention of** the Kentucky Legislative Ethics Commission, the Attorney

[15] Since the Court of Appeals concluded that a report of unlawful activity did not have to touch on a matter of public concern to be afforded protection under the Kentucky Whistleblower Act, it did not consider whether or not Plaintiff's report of unlawful activity touched on a matter of public concern.

> General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary, **any law enforcement agency or its employees, or any other appropriate body or authority, any facts or information relative to an actual or suspected violation of any law**, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, **or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.** No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence. (Emphasis added).

The clear and unambiguous language of the Kentucky Whistleblower Act ("KWA") prohibits retaliation against "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." *Commonwealth, Dept. of Agriculture v. Vinson*, 30 S.W.3d 162, 164 (Ky. 2000). In interpreting this statute this Court found that the purpose of the KWA is to discourage wrongdoing in government and to protect public employees who disclose such wrongdoing. *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 793 (Ky. 2008).

B. The Kentucky Whistleblower Act protects employees that report wrongdoing in government *regardless* of whether that disclosure *touches on a matter of public concern.*

In its brief, PACS contends that there is an implied requirement that an employee's reported violation of law must *touch on a matter of public concern.* Although PACS acknowledges there is no express *touch-on-a-matter-of-public-concern* element within the KWA, it argues that such a requirement is somehow "inherent in the statute" and must be included to meet the essential purpose of the statute.

The Court of Appeals rejected Appellant's argument, holding that KRS 61.102 uses intelligible, ordinary words, and that the clear and unambiguous language of the statute protects employees that disclose violations of the law ***regardless of whether or not*** the reported violation of law touches on a matter of public concern. The Court of Appeals further recognized that it is not within the judiciary's purview to add such a requirement when the legislature clearly could have included such language if it had wanted to and did not.

PACS illogically suggests that a *touch-on-a-matter-of-public-concern* element must be implied since the purpose of the KWA is to prevent wrongdoing in government. This argument is not cogent. This Court has previously stated that the purpose of the KWA is to "discourage wrongdoing in government, and to protect those who make it public." *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 793 (Ky. 2008). The statute does not, as Appellant suggests, require the employee to prove that he/she reported wrongdoing **and** that such wrongdoing *touches on a matter of public concern.*[16] PACS asks the Court to add an element to a whistleblower claim which is not discernable from the statute, and that goes beyond judicial construction and becomes an act of legislation, which is clearly prohibited. *See, Hatchett v. Glasgow*, 340 S.W.2d 248, 251 (Ky. 1960).

As the Court of Appeals held, the KWA protects any and all employees that disclose wrongdoing by a government official – end of story. Since Ms. Rogers disclosed

[16] An argument can be made that any wrongdoing by a government official in his official capacity "touches on a matter of public concern". PACS, however, asks the Court to interpret the allegedly implied "touch on a matter of public concern" element as federal courts have interpreted that phrase in completely unrelated federal 1983 claims.

a violation of the law by a government official in the performance of his official duties[17], her disclosure is protected under the KWA.

C. A review of the history of the Federal Whistleblower Act confirms that it was the legislative intent to protect employees that disclose a violation of *any* law.

In concluding that the KWA clearly and unambiguously protects employees that disclose any wrongdoing, the Court of Appeals noted that there was "no reason to consult federal or sister state statutes." While Appellee agrees that it is not necessary to consult federal law, this Court has previously acknowledged that the KWA is "similar in almost every respect" to the federal whistleblower statute. *Commonwealth Dept. of Agriculture v. Vinson*, Ky., 30 S.W.3d 162, 169 (2000). Therefore, a brief review of the legislative history of the federal Whistleblower Protection Act ("WPA") may be insightful.

As set forth below, a review of the evolution of the WPA will confirm that it is and has always been the intent of the Legislature to protect public employees that disclose wrongdoing by public officials regardless of what type of wrongdoing is reported and the employee's motivation for reporting that conduct. The review will further demonstrate the Legislature's continuing frustration with courts that have failed to understand that.

In 1978, Congress passed the predecessor to the WPA, the Civil Service Reform Act ("CSRA"). Among its provisions, the CSRA prohibited taking personnel action against federal employees in retaliation for "a disclosure" of government wrongdoing or

[17] PACS disingenuously compares Ms. Rogers's report of unlawful activity to a government employee reporting unlawful, non work-related activity. The evidence, however, demonstrates that Mr. Gibbs was acting in his official capacity when he trespassed on employees' property.

fraud.[18] In 1989, Congress enacted the WPA "to improve the protections for federal employees who disclose, or 'blow the whistle' on, government mismanagement or fraud."[19]

In the Committee Report accompanying the adoption of the WPA, the Senate Committee on Governmental Affairs was critical of previous court decisions limiting the protection afforded to whistleblowers under the CSRA. The Report specifically criticized the U.S. Court of Appeals for the Federal Circuit's decision in *Fiorello v. Dept. of Justice.* In *Fiorello*, the Court held that a disclosure is not protected if the employee's primary motivation for reporting the misconduct was personal and not for the public good.[20] In its criticism of that decision, the Report noted that the statutory language of the CSRA did not allow for the consideration of the employee's motives for disclosing unlawful conduct.[21]

In its attempt to avoid similar misinterpretations of the legislative intent and to further encourage employees to disclose wrongdoing and to further protect employees that do disclose wrongdoing, the WPA modified the language of the CSRA to provide that "any disclosure" of wrongdoing is protected.[22] The Committee emphasized that this change in statutory language from "a disclosure" to "any disclosure" was to "stress that

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[18] Senate Report 100-413 (July 6, 1988) (Appendix Item 3, pg. 2).

[19] Senate Report 100-413 (July 6, 1988) (Appendix Item 3, pg. 1).

[20] 795 F.2d 1544, 1550 (Fed. Cir. 1986) (Appendix Item 4).

[21] Senate Report 100-413 (July 6, 1988) (Appendix Item 3, pg. 13).

[22] Senate Report 100-413 (July 6, 1988) (Appendix Item 3, pg. 13).

any disclosure is protected."[23] The Committee further noted that courts "should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing."[24]

Despite Congress's attempt to remove any doubt about its intent to protect any and all disclosures of unlawful behavior, abuses of authority, etc., subsequent case law interpreting the WPA did not reflect that intent and the federal courts and the Merit Systems Protection Board ("MSPB") continued to differentiate between disclosures of wrongdoing that were afforded protection and disclosures of wrongdoing that were not afforded protection. In the House report accompanying the 1994 amendments to the WPA, the House of Representatives expressed its frustration with the MSPB and the Federal Circuit Court of Appeals on this issue.[25] The House noted particular frustration with decisions being rendered by the MSPB, stating:

> Perhaps the most troubling precedents involve the Board's inability to understand that "any" means "any." The WPA protects "any" disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind.[26]

Like the WPA, the KWA prohibits reprisal against ***ANY*** employee who in good faith reports ***ANY*** facts or information relative to an actual or suspected violation of ***ANY*** law. Because it is clearly the General Assembly's intent to protect employees that disclose ***ANY*** wrongdoing, Ms. Rogers's disclosure of unlawful conduct by Mr. Gibbs is

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[23] Senate Report 100-413 (July 6, 1988) (Appendix Item 3, pg. 13).

[24] Senate Report 100-413 (July 6, 1988) (Appendix Item 3, pg. 13).

[25] House Report 103-769 (1994) (Appendix Item 5 at pp. 14-15).

[26] House Report 103-769 (1994) (Appendix Item 5 at pg. 15).

a protected disclosure regardless of whether or not her disclosure is deemed to "touch on a matter of public concern."

D. Ms. Rogers's internal report of misconduct and threat to report the conduct externally are both protected disclosures under the Kentucky Whistleblower Act.

As an alternative theory for overturning the Court of Appeals' well-reasoned opinion, PACS argues that Ms. Rogers did not make a protected disclosure when she contacted the local sheriff's department about Mr. Gibbs's unlawful conduct. Regardless of whether or not Ms. Rogers's discussion with the local sheriff's department was a protected disclosure[27], Ms. Rogers's internal disclosure of unlawful activity is clearly a protected disclosure for purposes of the KWA.

This Court has previously concluded that KRS 61.102 ***protects employees that report, or threaten to report***, facts or information relative to an actual or suspected violation of law, abuse of authority, etc. *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852, 857 (Ky. 2008). During the May 4, 2011 staff meeting, Ms. Rogers made an internal report of illegal activity and further threatened to report the illegal conduct to law enforcement officials if it continued.

1. Ms. Rogers's internal report of illegal activity is a protected disclosure under the Kentucky Whistleblower Act.

KRS 61.102(1) protects disclosures to a number of specific authorities and generally protects disclosures to "any other appropriate body or authority." In *Workforce Development Cabinet v. Gaines*, this Court concluded that the phrase - *any other*

[27] As argued in Appellee's Response to Appellant's Motion for Summary Judgment, Appellee put law enforcement officials, who had the power and authority to remedy the misconduct, on notice of the illegal activity and therefore made a protected disclosure.

appropriate body or authority – "should be read to include any public body or authority with the power to remedy or report the perceived misconduct."[28] This Court further held that an internal report of a suspected violation of law would be sufficient to satisfy the "disclosure" element.[29]

In reaching this conclusion, the Court noted that "(a)n internal report is often the logical first step, and in many cases may be the only step necessary to remedy the situation."[30] The Court further noted that it would be absurd to require a low-level employee (such as Mrs. Rogers) to make a report directly to the Attorney General or Legislative Resource Commission.[31] Even in a situation involving an outright violation of the law, this Court recognized that a reasonable employee "may wish to first make an internal report."[32]

Ms. Rogers took a very logical approach to correcting a seemingly minor issue. When she learned that Mr. Gibbs had trespassed onto her property and that he would similarly go to other employees' property to check up on them, she first went to the local law enforcement officials to determine whether or not his conduct was legal. Upon confirming that his conduct was in fact illegal and to avoid unnecessarily and prematurely escalating matters, she advised her immediate supervisor and the offending manager that the conduct was illegal and that she wanted it to stop or she would take

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[28] 276 S.W.3d 789, 793 (Ky. 2008).

[29] *Id.* at 794.

[30] *Id.*

[31] *Id.*

[32] *Id.*

further action. Therefore, while Ms. Rogers could have filed a criminal complaint against Mr. Gibbs, she chose to attempt to resolve the issue with individuals that had the "power to remedy or report the perceived misconduct", and *Gaines* holds that such a complaint is sufficient to invoke the protections of the KWA.

2. Ms. Rogers's threat to report the illegal activity to local law enforcement officials is a protected disclosure under the Kentucky Whistleblower Act.

Further invoking the protections of the KWA, Ms. Rogers threatened to take action if the unlawful act continued. Reading KRS 61.102(1) and KRS 61.103(1) together, this Court previously concluded that "disclosure not only occurs when a report is *actually* made, but also when *the threat* of a report is made." *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852, 856 (Ky. 2008).

In the May 4, 2011 staff meeting, Ms. Rogers made it clear that she planned to pursue legal action if he continued to trespass on her property by telling him that his conduct was illegal and by telling him that she wanted it to stop.[33] Therefore, while her internal report constitutes an actual disclosure, her threat to take further action if the unlawful conduct continued is also a protected disclosure for the purposes of the KWA.

3. It would be contrary to the purpose of the Kentucky Whistleblower Act to find that Ms. Rogers's internal report of unlawful activity is not protected.

As noted above, the purpose of the KWA is to discourage wrongdoing in government and to protect those who disclose it. *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 793 (Ky. 2008). To find that Ms. Rogers's conduct is not

[33] Rogers Depo. (Appendix Item 1, pp. 99 and 113). Furthermore and although summary judgment was granted at the trial court before Ms. Rogers had the opportunity to depose Mr. Gibbs or Ms. Shields in this case, there is reason to believe that both perceived Ms. Rogers's conduct as a "threat".

protected would be contrary to that purpose, as it would expose principled employees that want to redress wrongdoing in government to disciplinary action up to and including termination. Appellant's proposed outcome would effectively encourage "dirty" government officials to act quickly to remove employees that are a real or even perceived threat to their illicit activity.

In the present case, PACS and Mr. Gibbs would be rewarded for taking steps to get rid of Ms. Rogers before she had a chance to take her concerns to the next level. Unquestionably, such an outcome is not consistent with the remedial purpose of the KWA. As such, Ms. Rogers's attempt to resolve this issue internally, by informing her immediate supervisor and the offending manager that his conduct was illegal and by threatening to take further action if the conduct continues, is a protected disclosure.

V. CONCLUSION

In conclusion, it is undisputed that the purpose of the Kentucky Whistleblower Act is to protect employees that expose wrongdoing in government. It is further undisputed that the express language of the Kentucky Whistleblower Act prohibits reprisal against ***any*** employee that discloses ***any*** facts or information relative to an actual or suspected violation of ***any*** law without regard to whether or not that disclosure "touches on a matter of public concern." Because the KWA clearly and unambiguously protects employees that disclose a violation of ***any*** law, the Court of Appeals' decision should be affirmed.

Furthermore and because Ms. Rogers reported a suspected violation of law to authorities with the power to remedy or report the perceived misconduct and also threatened to report any continuing violations to law enforcement officials, her disclosure

is protected under the KWA, and Appellant's alternative theory for overturning the Court of Appeals' decision must be rejected.

Respectfully submitted,

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