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

PENNYRILE ALLIED
COMMUNITY SERVICES, INC. APPELLANT

APPELLANT'S BRIEF

v.

KATRICIA ROGERS APPELLEE

* * * *

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 13th of November, 2013 to: Ms. Susan Stokley Clark, Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Mr. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable William Engle, III, Perry Circuit Court, Hall of Justice, 545 Main Street, Hazard, KY 41701-1702; and Mr. Anthony J. Bucher, B. Dahlenburg Bonar, P.S.C., 3611 Decoursey Avenue, Covington, KY 41015. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Perry Circuit Court by the appellant.

COUNSEL FOR APPELLANT

I. STATEMENT CONCERNING ORAL ARGUMENT

Pennyrile Allied Community Services, Inc. welcomes oral argument but believes it's unnecessary.

II. STATEMENT OF POINTS AND AUTHORITIES

III. STATEMENT OF THE CASE

A. INTRODUCTION

This is a whistleblower case under KRS 61.102(1). The plaintiff is Katricia Rogers. The defendant is Pennyrile Allied Community Services, Inc. (PACS). Rogers's complaint against PACS contains one claim—a whistleblower claim under KRS 61.102(1). Rogers alleges that PACS fired her "[a]s a direct result of [her] good faith reports of unlawful conduct" in violation of KRS 61.102(1).[1]

The Perry Circuit Court dismissed Rogers's whistleblower claim on summary judgment because her allegations don't touch on matters of public concern. The Kentucky Court of Appeals reversed. The court of appeals held that a KRS 61.102(1) claim doesn't have to touch on a matter of public concern.

B. ROGERS'S STORY

Rogers began working for PACS in September 2010.[2] In February 2011, her supervisor, Dennis Gibbs, "went to [her] home, uninvited[,] to check to see if [she] was home during work hours."[3] Gibbs didn't try to hide his visit from Rogers. On the day he stopped by her house (pulled into her driveway), he "came into [Rogers's] office and told [her] that he had been at [her] house."[4] Gibbs also told Rogers that he knew where

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1 Complaint, p. 2 (Appendix Item 1).

2 *Id.*

3 *Id.*

4 Deposition of Katricia Rogers, p. 52 (Appendix Item 2).

all his employees lived and needed to know where she lived.[5] Rogers didn't complain.[6] In her words, she "did not discuss . . . that [this] bothered [her]."[7]

Nevertheless, Rogers says that she went to the Sheriff's Department "and asked them if that was legal or not."[8] Rogers didn't file a complaint with the Sheriff or anything of the sort.[9] She merely asked a deputy "whether or not her supervisor could go on her property uninvited" to see whether she was home during work hours.[10]

About two months later, on May 4, 2011, after not complaining about Gibbs's visit in the interim, Rogers "confronted Mr. Gibbs about coming on to her property without her permission" during a PACS staff meeting.[11] PACS fired Rogers, an at-will employee, for insubordination and other reasons the next day. Rogers claims that PACS fired her for making "a good faith report to local law enforcement officers and representatives of PACS . . . regarding an actual or suspected violation of the law" in violation of KRS 61.102(1).[12] Rogers's alleged "good faith report" was the question she asked the deputy sheriff about whether Gibbs could come on her property to check on her whereabouts during work hours.

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5 *Id.*

6 *Id.* at 53.

7 *Id.*

8 *Id.* at 54, 61.

9 *Id.*; Complaint, p. 2.

10 Complaint, p. 2.

11 *Id.*

12 *Id.* at 3.

After PACS deposed Rogers, it moved the Perry Circuit Court for summary judgment. The circuit court granted the motion because Rogers's whistleblower allegations are nothing but personal grievances against Gibbs and don't touch on matters of public concern. The court of appeals reversed. It held that, under KRS 61.102(1)'s plain language, a Kentucky whistleblower claim doesn't have to touch on a matter of public concern like federal and sister-state whistleblower claims do.

IV. ARGUMENT

A. THE CARDINAL RULE OF STATUTORY CONSTRUCTION IS THAT THE INTENTION OF THE LEGISLATURE SHOULD BE ASCERTAINED AND GIVEN EFFECT. TO SATISFY THIS CARDINAL RULE, COURTS OFTEN HAVE TO READ STATUTES IN CONTEXT AND IN LIGHT OF THEIR ESSENTIAL PURPOSE. KRS 61.102(1) IS KENTUCKY'S WHISTLEBLOWER STATUTE. THE STATUTE'S PURPOSE IS TO REDUCE ILLEGAL ACTIVITY, FRAUD, WASTE, AND ABUSE IN STATE GOVERNMENT. KRS 61.102(1) DOES THIS BY PROTECTING STATE EMPLOYEES FROM REPRISAL WHEN THEY DISCLOSE ILLEGAL ACTIVITY, FRAUD, WASTE, OR ABUSE IN STATE GOVERNMENT. IN THIS CASE, THE COURT OF APPEALS HELD THAT KATRICIA ROGERS'S "DISCLOSURE" ABOUT DENNIS GIBBS PULLING INTO HER DRIVEWAY WAS PROTECTED UNDER KRS 61.102(1). BUT ROGERS'S "DISCLOSURE" WAS A PERSONAL GRIEVANCE AND NOT A DISCLOSURE OF GOVERNMENT ILLEGALITY, FRAUD, WASTE, OR ABUSE. DID THE COURT OF APPEALS ERR BY HOLDING THAT ROGERS'S "DISCLOSURE" DIDN'T HAVE TO TOUCH ON A MATTER OF GOVERNMENT (PUBLIC) CONCERN TO BE PROTECTED UNDER KRS 61.102(1)?[13]

The circuit court dismissed Rogers's whistleblower claim because her "disclosure" that Dennis Gibbs pulled into her driveway during work hours was a personal grievance that didn't disclose illegality, fraud, waste, or abuse in state government. The court of appeals reversed. It held that KRS 61.102(1)'s language is

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[13] PACS preserved this statutory-interpretation issue in its summary-judgment memoranda, its brief to the court of appeals, and in its motion for discretionary review. (Attached as Appendix Items 3, 4, and 5). The Court's review is *de novo*. *Jefferson County Bd. of Ed. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012).

plain and doesn't require Rogers to prove that she disclosed illegality, fraud, waste, or abuse in state government. According to the court of appeals, there's no touch-on-a-matter-of-public-concern element in a Kentucky whistleblower claim. The issue on this appeal is whether the court of appeals got this right. The issue is a statutory-construction issue. The Court's review is *de novo*.[14]

(1) The Court should construe KRS 61.102(1) in light of the statute's essential purpose, not in a vacuum.

"The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect."[15] "This fundamental principle is underscored by the General Assembly itself in the. . . language of KRS 446.080(1): 'All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . . .'"[16] "A court [should] derive [the legislature's] intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. A court presume[s] that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. . . . [A court] also presume[s] that the General Assembly did not intend an absurd statute."[17]

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14 *Fell*, 391 S.W.3d at 718.

15 *Id.*

16 *Id.* at 718-19.

17 *Id.* at 719.

To avoid absurdity when construing statutes, courts read "particular word[s], sentence[s] [and] subsection[s] . . . in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent."[18] Courts don't focus on "a single sentence or member of a sentence but . . . look to the provisions of the whole."[19] By looking at statutes in their entirety, courts can more accurately discern the General Assembly's intent and decide whether a particular word, sentence, or subsection has an implicit meaning that conveys that intent.[20]

Commonwealth v. Adkins is a good example of a court construing a statute as a whole. The *Adkins* Court held that, although KRS 218A.1412 and KRS 218A.1417 don't expressly include innocent-possession and innocent-trafficking defenses, read as a whole, the statutes implicitly recognize the defenses.[21] Another good example of a court construing a statute as a whole is *Commonwealth Dept. of Ed. v. Smith.*[22] In *Smith,* the plaintiff argued that he was an "employee" for workers'-compensation purposes because KRS 342.640(4) doesn't expressly require a contract for hire for a person to be an "employee." The Court disagreed. It held that, read as a whole, KRS 342.640(4) implicitly included a contract-for-hire requirement.[23]

Adkins and *Smith* show that it's important to consider statutes as a whole when construing them. The two cases also show that a court may find implicit meaning

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18 *Id.*

19 *Id.*

20 *Id.*

21 331 S.W.3d 260, 264 (Ky. 2011).

22 759 S.W.2d 56, 58 (Ky. 1988).

23 *Id.*

in a statute if it construes the statute in light of its essential purpose. The court of appeals didn't consider these things here. It used a plain-language approach to interpret KRS 61.102(1) and held that Rogers's whistleblower claim under the statute doesn't have a touch-on-a-matter-of-public-concern element. In so holding, the court of appeals ignored Justice Palmore's advice about the importance of "common sense . . . in the house of the law."[24]

(2) The General Assembly enacted KRS 61.102(1) to reduce illegality, fraud, waste, and abuse in state government. And this Court has recognized that.

Now that we've established that the Court can and should construe KRS 61.102(1) as a whole and in light of its essential purpose, the question becomes "what is the statute's essential purpose?" We'll address that question now. We'll start with KRS 61.102(1) itself, which provides:

> **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 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 or any member or employee of 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

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24 *Cantrell v. Ky. Unemployment Ins. Co.*, 450 S.W.2d 235, 237 (Ky. 1970).

> 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.[25]

KRS 61.102(1) is cumbersome. To simplify things, we'll reduce the statute to what's essential here. The following sentence contains the words in bold above.

> No employer shall subject to reprisal any employee who in good faith discloses to any law enforcement agency any facts or information relative to an actual or suspected violation of any law 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.

These words from KRS 61.102(1) create a public-policy exception to Kentucky's terminable-at-will doctrine by protecting at-will government employees from reprisal when they disclose illegal activity, fraud, waste, or abuse. That's undisputed. It's also undisputed that Katricia Rogers was a terminable-at-will employee when PACS fired her. As an at-will employee, Rogers could "be discharged 'for good cause, for no cause, or for a cause that some might view as morally indefensible.'"[26]

The dispute on this appeal is over the breadth of KRS 61.102(1)'s public-policy exception to the terminable-at-will doctrine. The Perry Circuit Court held that KRS 61.102(1)'s public-policy exception is limited to protecting disclosures that have a government nexus—disclosures that touch on matters of public concern.[27] The court of appeals disagreed. It held that KRS 61.102(1) protects state employees from reprisal

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25 KRS 61.102(1).

26 *Mitchell v. Univ. of Ky.*, 366 S.W.3d 895, 898 (Ky. 2012) (citing *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983)).

27 Opinion and Order (Appendix Item 6).

whenever they disclose illegal activity, fraud, waste, or abuse regardless of whether the alleged illegality, fraud, waste, or abuse touches on matters of public concern. In the court's words:

> [W]e reject PACS' drumbeat that government employees are insulated from employer reprisals only when they report items that impact issues of public concern. Such a reading of Kentucky's statute would directly conflict with the legislature's use of the word "any" throughout KRS 61.102(1). If the General Assembly had intended to limit the types of reports and disclosures that trigger the Act, it would have been simple enough to write:
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> . . . any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance [touching on a matter of public concern] . . . , or any facts or information [touching on a matter of public concern] relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.
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> But they did not include the foregoing bracketed language and we cannot supply those words for them.[28]

Our dispute with the court of appeals' analysis isn't with what the court considered in the analysis but with what the court failed to consider. In holding that Rogers's whistleblower claim doesn't have a public-concern element, the court of appeals didn't consider the public policy that underlies KRS 61.102(1). As this Court has recognized, on its face, KRS 61.102(1) only applies to state government employers and employees.[29] Because the statute's scope is limited to state employers and employees, the Court has held that the public policy underlying the statute "[is] to discourage wrongdoing *in government*" and to maintain "the public confidence in the integrity of

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28 Opinion, p. * 14 (Appendix Item 7).

29 *Wilson v. Central City,* 372 S.W.3d 863, 867 (Ky. 2012); *also* KRS 61.101(1)(2).

state government and its officials."[30] Similarly, the court of appeals has held that the public policy underlying KRS 61.102(1) is to "protect[] public employees who disclose wrongdoing *in the government.*"[31] These holdings show that the General Assembly intended KRS 61.102(1) to reduce illegality, fraud, waste, and abuse *in state government*, not at large. These holdings make common sense.

(3) In light of the fact that the General Assembly enacted KRS 61.102(1) to reduce illegality, fraud, waste, and abuse in state government, Katricia Rogers's whistleblower claim has a touch-on-a-matter-of-public-concern element, and the court of appeals erred to hold otherwise.

We'll start this argument where we ended the last. The General Assembly enacted KRS 61.102(1) to reduce illegality, fraud, waste, and abuse in state government. The court of appeals' plain-language interpretation of KRS 61.102(1) in this case ignores that remedial purpose and protects state employees from reprisal even when their disclosures have nothing to do with illegality, fraud, waste, or abuse in state government. Under the court of appeals' interpretation of KRS 61.102(1), state employees are protected from reprisal anytime they report illegality, fraud, waste, or abuse regardless of whether the alleged illegality, fraud, waste, or abuse is connected to state government. That could lead to absurd results. The example we gave in our motion for discretionary review was that, under the court of appeals' interpretation, KRS 61.102(1) would protect a state employee from reprisal if she reported her supervisor to

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[30] *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792-93 (Ky. 2008) (italics added); *Commonwealth Dept. of Agriculture v. Vinson*, 30 S.W.3d 162, 170 (Ky. 2000) (italics added); *see also Thornton v. Fayette County Attorney*, 292 S.W.3d 324, 331 (Ky. App. 2009).

[31] *Thornton*, 292 S.W.3d at 331.

authorities for speeding on his way to work. And the potential for absurdity doesn't stop there. Without a government-nexus/public-concern element, KRS 61.102(1) would protect a state employee who reported her neighbor to authorities for running a red light. The statute would protect a state employee who reported her auto mechanic to authorities for defrauding her. We could go on. The possibilities for absurd results under the court of appeals' interpretation of KRS 61.102(1) are virtually endless. That can't be what the General Assembly intended. The General Assembly enacted KRS 61.102(1) to reduce illegal activity, fraud, waste, and abuse in state government, not in the world at large. Without a public-concern element, a whistleblower claim could be disconnected from that purpose. The court of appeals ignored this in deciding this case even though it had previously held that "[KRS 61.102(1)] has a remedial purpose in protecting public employees who disclose wrongdoing *in the government*."[32]

In addition to ignoring KRS 61.102(1)'s essential purpose in interpreting the statute, the court of appeals also erred in concluding that KRS 61.102(1) is unambiguous. Once again, here's the subsection in full:

> 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 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 or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, any facts or

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32 *Id.* (italics added).

> 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.[33]

Of the two sentences in KRS 61.102(1), the one that counts here is the first. The sentence is 183 jumbled words long. Nevertheless, the court of appeals held that the sentence unambiguously protects state employees from reprisal when they disclose illegal activity, fraud, waste, or abuse regardless of whether it has a connection to state government. The court of appeals reached this conclusion because KRS 61.102(1) doesn't contain the words "touching on a matter of public concern."[34] The court failed to consider the fact that, on its face, KRS 61.102(1) only applies to government employees and government employers.[35] The court of appeals also failed to consider that "mismanagement, waste, fraud, abuse of authority" as used in KRS 61.102(1) necessarily means "government mismanagement," "government fraud," and "abuse of governmental authority." These elements of KRS 61.102(1) strongly signal that the General Assembly intended the statute to protect "public employees who disclose wrongdoing *in the government,*" not wrongdoing at large.[36] The Court picked up on this in deciding cases like *Workforce Development Cabinet v. Gaines* and *Commonwealth Dept. of Agriculture v. Vinson* where it held that KRS 61.102(1) protects state employees

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33 KRS 61.102(1).

34 Opinion, p. *14 (Appendix Item 7).

35 *Wilson*, 372 S.W.3d at 867.

36 *Thornton*, 292 S.W.3d at 331 (italics added).

when they disclose wrongdoing *in the government.*[37] The court of appeals picked up KRS 61.102(1)'s government-nexus signal in *Thornton v. Fayette County Attorney* where it held that KRS 61.102(1) "has a remedial purpose in protecting public employees who disclose wrongdoing *in the government.*"[38] But the court of appeals failed to pick up the signal here and that led to the court's erroneous conclusion that Katricia Rogers's whistleblower claim against PACS doesn't have a touch-on-a-matter-of-public-concern element.

In sum, the court of appeals' holding in this case fails to take into account the fact that Kentucky's whistleblower statute is designed to prevent illegality, fraud, waste, and abuse in state government. By design, the statute is concerned with public matters. Accordingly, the touch-on-a-matter-of-public-concern element is inherent in the statute and in whistleblower claims under the statute. Without the element, a Kentucky whistleblower claim could be about private matters such as a state government employee's personal relationship with her supervisor. Without a touch-on-a-matter-of-public-concern element, a state government employee could sue her employer over a disclosure wholly unrelated to government business. Neither of these situations would further the public policy underlying KRS 61.102(1). But that's how the court of appeals interpreted the statute. The court disregarded that the public policy underlying KRS 61.102(1) is to reduce illegality, fraud, waste, and abuse *in state government.* In doing so, the court of appeals reached an absurd result. This Court should reverse and reinstate the circuit court's summary judgment in favor of PACS.

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37 276 S.W.3d at 792-93; 30 S.W.3d at 169.

38 292 S.W.3d at 331 (italics added).

(4) There are persuasive cases contrary to the court of appeals' holding herein. But the court of appeals disregarded them.

Although this Court hasn't directly addressed PACS's touch-on-a-matter-of-public-concern argument, there are persuasive cases that have. The court of appeals disregarded these cases, which was a mistake.

The first case that we'll look at is *Barber v. Louisville and Jefferson Cty. Metro Sewer Dist.*[39] *Barber* held that "a [Kentucky whistleblower] claim must involve a disclosure that concerns a public matter."[40] In granting PACS summary judgment, the Perry Circuit Court relied on *Barber*. The court of appeals rejected *Barber* because it's a federal case and it contains very little analysis. We agree that *Barber* is a federal case. And we agree that *Barber* doesn't contain much analysis. But *Barber* is on point. And, in light of the fact that KRS 61.102(1) is designed to reduce illegality, fraud, waste, and abuse in state government, *Barber* makes sense.

Our second case is *Ferrel v. Colorado Dept. of Corrections.*[41] *Ferrel* is persuasive because the plaintiff in *Ferrel* made the same plain-language argument under Colorado's whistleblower statute that Rogers makes under KRS 61.102(1). Specifically, Ferrel argued that his whistleblower claim didn't contain a touch-on-a-matter-of-public-concern element because Colorado's statute lacked express language to that effect.[42] The *Ferrel* court disagreed.

> A court must read a statute as a whole and construe it to give consistent, harmonious, and sensible effect to all its parts.

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39 2006 U.S. Dist. LEXIS 92065 (W.D. Ky)(Appendix Item 8).

40 *Id.*

41 179 P.3d 178 (Colo. App. 2007)(Appendix Item 9).

42 *Id.* at 186.

> The purpose of the whistleblower statute . . . is that "state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest." The disclosure of information must be "regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency."
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> Thus, although the statutory definition for disclosure does not use the phrase "public concern," § 24-50.5-101 clearly contemplates that such disclosures must relate to information about agency conduct contrary to the "public interest." Therefore, disclosures that do not concern matters in the public interest, or are not of "public concern," do not invoke this statute. Courts in other jurisdictions have reached similar conclusions.[43]

Ferrel's analysis is common sense and speaks for itself. Whistleblower statutes are intended to reduce fraud, waste, and abuse *in government*. Therefore, they only protect disclosures that are of public concern.

There are other cases like *Barber* and *Ferrel*. The touch-on-a-matter-of-public-concern element appears to be universal in whistleblower actions, including federal whistleblower actions.[44] Cases under the federal whistleblower statute are particularly persuasive because both this Court and the Kentucky Court of Appeals have held that "the Kentucky Whistleblower Act is so similar to the federal Whistleblower Protection Act (WPA) that [Kentucky courts] can look to federal precedent for

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43 *Id.*

44 *E.g., David v. ANA Television Network, Inc.* 2000 LEXIS 2477 *17 (6th Cir.) (Michigan law); *Nelson v. Pima Comm. College*, 83 F.3d 1075, 1081 (9th Cir. 1996) (Arizona law); *Fiorillo v. U.S. Dept. of Justice*, 795 F.2d 1544, 1550 (Fed.Cir. 1986) (federal law); *Barber*, 2006 U.S. Dist. LEXIS 92605 *5 (Kentucky law); *Wolcott v. Champion Int'l Corp.*, 691 F.Supp. 1052, 1065 (W.D.Mich. 1987)(federal and Michigan law).

guidance."[45] We urge the Court to adopt the common-sense approach in these persuasive cases and reverse the court of appeals.

B. THE CIRCUIT COURT WAS RIGHT TO HOLD THAT ROGERS'S QUESTION TO THE SHERIFF WASN'T A DISCLOSURE THAT TOUCHED ON A MATTER OF PUBLIC CONCERN. THEREFORE, THE COURT WAS RIGHT TO HOLD THAT ROGERS'S WHISTLEBLOWER CLAIM FAILS AS A MATTER OF LAW.[46]

The Perry Circuit Court dismissed Rogers's whistleblower claim because it held that the claim included a touch-on-a-public-concern element and that Rogers's "disclosure" that Dennis Gibbs pulled into her gravel driveway didn't touch on a matter of public concern. For its part, the court of appeals didn't decide whether Rogers's "disclosure" touched on a matter of public concern because the court held that her whistleblower claim didn't include a touch-on-a-public-concern element.

As the touch-on-a-public-concern question is a question of law, the Court can decide it on this appeal even though the court of appeals didn't decide it below.[47] The leading case on what it means to "touch on a matter of public concern" is *Connick v.*

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45 *Gaines*, 276 S.W.3d at 792-93 n. 1; *Commonwealth Dept. of Agriculture v. Vinson*, 30 S.W.3d 162, 169 (Ky. 2000) (the federal whistleblower statute is "similar in almost every respect" to KRS 61.102); *Davidson v. Commonwealth Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004).

46 PACS preserved this issue in its summary-judgment memoranda, its brief to the court of appeals, and in its motion for discretionary review. (Appendix Items 3, 4, and 5). The Court's review is *de novo*. *Barnes v. McDowell*, 848 F.2d 725, 733 (6th Cir. 1988).

47 *Banks v. Wolfe Cty. Bd. Of Ed.*, 330 F.3d 888, 892-93 (6th Cir. 2003); *Barber*, 2006 U.S. Dist. LEXIS 92605 *5.

Meyers.[48] This Court adopted *Connick*'s public-concern analysis in *Commonwealth Transportation Cabinet v. Whitley*.[49] We'll look at *Connick* next.

In *Connick*, Sheila Myers was an assistant district attorney who worked for Harry Connick.[50] When Connick told Myers that he was going to transfer her, Meyers objected; but Connick transferred her anyway.[51] Myers then prepared and distributed a questionnaire that sought her fellow employees' views on Connick's office policies.[52] When Connick discovered the questionnaire, he fired Meyers for insubordination.[53]

Myers filed suit against Connick. She alleged that Connick fired her because she had blown the whistle on him. The district court agreed and entered judgment in Meyers's favor. The court of appeals affirmed. But the United States Supreme Court reversed. The Supreme Court reversed because it held that Myers's questionnaire amounted to a personal grievance about Connick's office policies and not a disclosure on a matter of public concern. The Court further held that the small bit of Meyers's questionnaire that did touch on matters of public concern was outweighed by Connick's right to seek efficient service from his employees.

The *Connick* Court began its analysis by discussing *Pickering v. Board of Ed. Pickering* held "that a state cannot condition public employment on a basis that

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48 461 U.S. 138 (1983).

49 977 S.W.2d 920 (Ky. 1998).

50 *Connick*, 461 U.S. at 140.

51 *Id.*

52 *Id.* at 141.

53 *Id.*

infringes the employee's constitutionally protected interest in freedom of expression."[54] But *Pickering* also held that public employers are entitled to pursue efficient government service. According to *Connick*, *Pickering*'s two holdings require courts to strike "a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[55]

To strike this balance, the *Connick* Court focused on a threshold issue. The issue was whether Myers's questionnaire could "fairly [be] characterized as constituting speech on a matter of public concern."[56] The Court explained that, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials . . . enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the Whistleblower."[57] In other words, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a . . . court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[58]

Having framed the threshold issue as whether Meyers's questionnaire was speech on a matter of public concern, the *Connick* Court then explained that the issue's

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54 *Id.* at 142.

55 *Id.* (citations omitted).

56 *Id.* at 146.

57 *Id.*

58 *Id.* at 147.

answer could only be found by examining "the content, form, and context of [Myers's] statement[s] as revealed by the whole record."[59] The Court also explained that the whether-the-speech-touches-on-a-public-concern issue is a question of law.[60]

The *Connick* Court examined Meyers's questionnaire in the context of the entire record and held that all but one of her questions were extensions of her personal dispute with Connick over her transfer. The Court explained that these personal questions were not "of public import in evaluating the performance of [Connick] as an elected official."[61] "[The questions did not] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others."[62] The questions, the Court held, merely "reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause celebre*."[63]

The one question that the *Connick* Court held did touch on a matter of public concern had to do with whether employees felt pressured to work in political campaigns.[64] As to that question, the Court held that Connick's interest "in the effective and efficient fulfillment of [his] responsibilities to the public" outweighed Meyer's right to speech.[65] In reaching this conclusion, the Court explained that, "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and

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59 *Id.* at 147-48.

60 *Id.* at 147 n. 7.

61 *Id.* at 148.

62 *Id.*

63 *Id.*

64 *Id.* at 149.

65 *Id.* at 151-52.

efficient fulfillment of its responsibilities to the public."[66] "'[T]he Government . . . must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive . . . employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.'"[67] Furthermore, because Meyers's questionnaire was speech that arose directly out of a dispute with Connick, the Court added that "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."[68]

With all this in mind, the *Connick* Court concluded that Meyers's questionnaire was "most accurately characterized as an employee grievance concerning internal office policy."[69] "[Meyers's] limited Whistleblower interest . . . [did] not require that Connick tolerate action which he reasonably believed would disrupt the office."[70] "Meyers's discharge therefore did not offend the Whistleblower."[71]

Applying *Connick* here is relatively simple. Rogers's whistleblower claim is that she was fired for disclosing that Dennis Gibbs pulled into her driveway to see whether she was at home during work hours.[72] Rogers's "disclosure" is analogous to

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66 *Id.* at 150.

67 *Id.* at 150-51 (internal citations omitted).

68 *Id.* at 153.

69 *Id.* at 154.

70 *Id.*

71 *Id.*

72 Complaint, pp. 2-3.

Meyers's questionnaire in *Connick*. The "disclosure" is a personal complaint about work conditions—her boss checking to see whether she was home during work hours. The "disclosure" doesn't touch on a matter of public concern. Here are some parallels between Rogers's "disclosure" and Meyer's questionnaire in *Connick*.

First, Rogers's "disclosure" was about a personal disagreement Rogers had with her supervisor regarding whether he could stop by her house during work hours. This "disclosure" was not "of public import in evaluating the performance of [Gibbs] as a ["public"] official."[73] By making the "disclosure," "[Rogers] did not seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [Gibbs] or others."[74] Rogers's "disclosure" merely "reflect[ed] one employee's dissatisfaction with [her supervisor] and an attempt to turn that displeasure into a *cause celebre*."[75]

Second, Rogers's "disclosure," like Meyers's questionnaire in *Connick*, was not made public.[76] Rogers didn't make the "disclosure" to her attorney, the media, or the general public. As the *Connick* Court noted, this is a strong indication that Rogers's complaint about Gibbs concerned internal operating procedures, not public issues.

Third, Rogers's "disclosure" directly challenged Dennis Gibbs's authority to hold Rogers accountable for her whereabouts during work hours, and Rogers used the "disclosure" at a staff meeting to challenge Gibbs's authority in front of other PAC employees. To put it bluntly, Rogers ambushed Gibbs with the "disclosure" at a meeting

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73 *Connick*, 461 U.S. at 148.

74 *Id.*

75 *Id.*

76 *Id.*

in an attempt to embarrass him. Rogers's use of the "disclosure" to support her personal agenda is analogous to Meyer's use of her questionnaire in *Connick*.

A final similarity between Rogers's "disclosure" and Meyers's questionnaire is that Rogers's "disclosure" didn't "seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [Gibbs]."[77] Read in the worst possible light to Gibbs, Rogers's "disclosure" was that Gibbs drove into her driveway to see whether she was home during work hours. The "disclosure" reveals nothing more than that Gibbs was doing his job as a supervisor. He was ensuring that Rogers was working during work hours. Rogers may not approve of Gibbs's method. But it can't reasonably be argued that he was breaching public trust by checking up on her.

In sum, Rogers's "disclosure" was a personal gripe about internal office policy and nothing more. Her "disclosure" is "most accurately characterized as an employee grievance concerning internal office policy."[78] *Connick* makes it clear that such grievances don't touch on matters of public concern. And other courts, including this Court, have held the same.[79] In fact, courts have gone so far as to hold that even employee complaints about the use of public funds don't necessarily "touch on matters of public concern."[80] "Public concern" is a matter of context and content. And, in the

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77 *Id.*

78 *Id.* at 154.

79 *Whitley*, 977 S.W.2d at 922-923; *Rahn v. Drake Ctr., Inc.*, 31 F.3d at 407 (6th Cir. 1994); *Brown v. City of Trenton*, 867 F.2d 318 (6th Cir. 1989); *Barnes*, 848 F.2d 725 (6th Cir. 1985).

80 *Rahn*, 31 F.3d at 407 (although press release by nurse challenged public hospital's spending, it was still most accurately characterized as employee grievance); *Barnes*, 848 F.2d at 725 (although state employee challenged state agency's spending, the employee's speech was still a quintessential employee beef).

end, a fact-specific analysis under *Connick* and *Whitley* is required. Here, that analysis shows that Rogers's "disclosure" wasn't a complaint about government fraud, waste, or abuse. Rogers's "disclosure" was a personal gripe about how Dennis Gibbs kept tabs on his staff. Under *Connick*, *Whitley*, and related cases, Rogers's "disclosure" is "most accurately characterized as an employee grievance concerning internal office policy."[81] Such a "disclosure" doesn't touch upon a matter of public concern and, therefore, the circuit court was right to hold that Rogers's whistleblower claim fails as a matter of law.[82] The Court should reverse the court of appeals and affirm the circuit court.

C. KENTUCKY'S WHISTLEBLOWER STATUTE PROTECTS AT-WILL GOVERNMENT EMPLOYEES FROM REPRISAL WHEN THEY DISCLOSE A VIOLATION OF LAW, FRAUD, WASTE, OR ABUSE. IN THIS CASE, KATRICIA ROGERS DIDN'T DISCLOSE ANYTHING. SHE ASKED A QUESTION. SHE ASKED A DEPUTY SHERIFF WHETHER HER SUPERVISOR WAS ENTITLED TO DRIVE INTO HER DRIVEWAY TO CHECK ON HER DURING WORK HOURS. THE DISSENT IN THE COURT OF APPEALS CONCLUDED THAT ROGERS'S QUESTION WASN'T A "DISCLOSURE" AND SO WASN'T PROTECTED UNDER THE WHISTLEBLOWER ACT. WAS THE DISSENT CORRECT?[83]

To make out her whistleblower claim, Rogers has to show that (1) PACS is effectively a state agency; (2) she was effectively a state-agency employee; (3) she disclosed illegality, fraud waste, or abuse in state government; and (4) PACS fired her

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81 *Connick*, 416 U.S. at 154; *Whitley*, 977 S.W.2d at 922-923.

82 *See, e.g., Barber*, 2006 U.S. Dist. LEXIS 92605 *5 ("a [Kentucky whistleblower] claim must involve a disclosure that concerns a public matter."); *also David*, 2000 LEXIS 2477 *17; *Nelson*, 83 F.3d at 1081; *Fiorillo*, 795 F.2d at 1550; *Wolcott*, 691 F.Supp. at 1065.

83 PACS preserved this statutory-interpretation issue in its summary-judgment memoranda, its brief to the court of appeals, and in its motion for discretionary review. (Appendix Items 3, 4, and 5). The Court's review is *de novo*. *Jefferson County Bd. of Ed. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012).

for making her disclosure.[84] In our first argument above, we explained that Rogers's "disclosure" has to touch on a matter of public concern. In our second argument, we explained that Rogers can't meet this public-concern element because her "disclosure" was a personal gripe about Dennis Gibbs and not an allegation of government wrongdoing. The circuit court agreed with us that Rogers's "disclosure" was a personal gripe and so granted PACS summary judgment. The court of appeals reversed because it concluded that Kentucky whistleblower claims don't include a touch-on-a-matter-of-public-concern element.

Notably, neither lower court decided whether Rogers's question to the deputy sheriff amounted to a "disclosure" under KRS 61.102(1) in the first place. The circuit court didn't decide the "disclosure" question because it held that Rogers's question to the deputy sheriff didn't touch on a matter of public concern. The court of appeals' majority didn't decide the "disclosure" question because the majority determined that the record doesn't reveal what Rogers's question to the deputy was.[85] That's not so. Rogers testified that she asked the deputy whether Gibbs driving into her driveway during work hours "was legal or not."[86] The dissent in the court of appeals picked that up. And the dissent concluded that "Rogers did not report an actual or suspected violation of the law. She informally asked a deputy if her supervisor was entitled to come on her property."[87] The dissent would have affirmed the circuit court on

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84 *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998).

85 Opinion, p. *3, n. 3 (Appendix Item 7).

86 Rogers, pp. 54, 61.

87 Opinion, p. *19, (Judge Maze dissenting).

the ground that Rogers's question to the deputy wasn't a "disclosure" under KRS 61.102(1).[88] This Court can affirm on the same ground.[89] By Rogers's own testimony, her "disclosure" was a question. She asked a deputy whether Dennis Gibbs driving into her driveway "was legal or not."[90] Rogers didn't file a complaint against Gibbs or fill out a report or anything of the sort.[91] She asked a deputy sheriff "whether or not her supervisor could go on her property uninvited" to see whether she was home during work hours.[92] That's a question. It's not a disclosure or a report of "a suspected violation of state or local statute or administrative regulation to an appropriate body or authority."[93] Thus, Rogers's whistleblower claim fails for lack of a "disclosure."[94]

Below, Roger's response to this argument was, "[g]iven that the Kentucky Whistleblower Act is to be liberally construed in favor of protecting employees that disclose suspected violations of the law, [her] 'disclosure' is sufficient."[95] That's it. Rogers didn't explain how her question to the deputy amounted to a "disclosure" under the whistleblower act other than to argue that the act should be liberally construed.

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88 *Id.* (Judge Maze dissenting).

89 *Fischer v. Fischer*, 348 S.W.3d 582, 591-92 (Ky. 2011) (appellate court can affirm a trial court for any reason appearing in the record).

90 Rogers at 54, 61.

91 *Id.*; Complaint, p. 2.

92 Complaint, p. 2.

93 *Woodward*, 984 S.W.2d at 480-81.

94 *See id.*

95 Plaintiff's Response to Motion for Summary Judgment, p. 7 (Appendix Item 10).

Rogers's liberal-construction argument is empty. Even the most liberal construction of "disclosure" can't stretch the term to include "question." And when the Court reads "disclosure" in its statutory context, Rogers's liberal-construction argument is even further off base. At a minimum, a whistle-blowing disclosure under KRS 61.102(1) is a request for an investigation. More likely, a whistle-blowing disclosure is an accusation accompanied by a request for a sanction. Rogers's question to the deputy was neither a request for an investigation nor an accusation accompanied by a request for a sanction. Rogers merely asked a question. She didn't ask the deputy to investigate or pursue any sort of action against Gibbs. Rogers's question wasn't a "disclosure" under KRS 61.102(1). Therefore, her whistleblower action fails as a matter of law as the dissent in the court of appeals concluded.[96] This Court should so hold.

V. CONCLUSION

Rogers's whistleblower claim against PACS includes a touch-on-a-matter-of-public-concern element. The court of appeals defied common sense to hold otherwise. The Court should reverse.

Rogers's "disclosure" that Dennis Gibbs pulled into her driveway during work hours is a personal gripe about Gibbs and not a disclosure that touches on a matter of public concern. The Court should affirm the circuit court's holding on this point.

Rogers's "disclosure" to the deputy sheriff wasn't a disclosure under KRS 61.102(1) at all. Rogers's "disclosure" was a question. She asked a sheriff's deputy

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[96] The only statute that Gibbs could have violated by driving into Rogers's driveway is KRS 511.080—criminal trespass in the third degree. Criminal trespass in the third degree isn't even a misdemeanor. It's a violation. Thus, if Rogers had asked the Sheriff to take action against Gibbs, he couldn't have arrested Gibbs. KRS 431.005.

whether Gibbs pulling into her driveway during work hours was legal or not. The Court should so hold.

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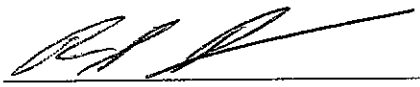

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