

SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-00373-T



ADMINISTRATIVE OFFICE OF THE
COURTS

APPELLANT/CROSS-APPELLEE

v.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
CASE NO. 01-CI-008128

BEVERLY MILLER

APPELLEE/CROSS-APPELLANT

COMBINED REPLY AND RESPONSE BRIEF OF APPELLANT/CROSS-
APPELLEE ADMINISTRATIVE OFFICE OF THE COURTS

Margaret E. Keane
Melissa Norman Bork
Brent R. Baughman
BINGHAM GREENEBAUM DOLL LLP
3500 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202
(502) 589-4200
COUNSEL FOR APPELLANT/CROSS
APPELLEE, ADMINISTRATIVE OFFICE
OF THE COURTS

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of this **Combined Reply and Response Brief of Appellant/Cross-Appellee Administrative Office of the Courts** was served by first class U.S. mail, postage prepaid, this 23rd day of May, 2013 upon the following: Thomas E. Clay, CLAY FREDERICK ADAMS, PLC, Meidinger Tower, Suite 101, 462 South Fourth Street, Louisville, Kentucky 40202; Clerk of Jefferson Circuit Court, Louis D. Brandeis Hall of Justice, 600 W. Jefferson Street, Room 2008, Louisville, Kentucky 40202; Honorable Karen A. Conrad, Special Judge, Oldham County Courthouse, 100 W. Main Street, LaGrange, Kentucky 40031-1116. The undersigned further certifies that the Appellant/Cross-Appellee has not withdrawn the record on appeal.


COUNSEL FOR APPELLANT/CROSS-
APPELLEE

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE.....1

Kentucky Rules of Civil Procedure 76.12(4)(c)(iv)1, 2

Oakley v. Oakley,
391 S.W.3d 377 (Ky. App. 2012)1

Kentucky Rules of Civil Procedure 76.122

Flint v. Stilger,
2010 Ky. App. Unpub. LEXIS 1017 *4 (Ky. App. Jan. 22, 2010).....2

Elwell v. Stone,
799 S.W.2d 46 (Ky. App. 1990)2

A. Counterstatement of the Case as to Miller’s Whistleblower Claim.....2

KRS 61.102.....3, 19

Miller v. Admin. Offc. of the Courts,
Case No. 3:01 CV-339-S, 2005 WL 1244988 (W.D. Ky.
May 23, 2005)..... passim

B. Procedural History6

Miller v. Admin. Offc. of the Courts,
448 F.3d 887 (6th Cir. 2006)6

Miller v. Admin. Offc. of the Courts,
361 S.W.3d 867 (Ky. 2011)..... passim

Workforce Development Cabinet v. Caines,
276 S.W.3d 789 (Ky. 2008).....7

Davidson v. Commonwealth, Dept. of Military Affairs,
152 S.W.3d 247 (Ky. App. 2004)7, 19

Helbig v. City of Bowling Green,
371 S.W.3d 740 (Ky. App. 2011)7

ARGUMENT.....8

I. MILLER WAS NOT A TENURED EMPLOYEE UNDER THE COJ
PERSONNEL POLICIES8

A. Standard of Review.....8

	Kentucky Rules of Civil Procedure 52.01	8, 9, 10
	<i>Ky. Kingdom Amusement Co. v. Belo, Ky., Inc.</i> , 179 S.W.3d 785 (Ky. 2005).....	9, 10
	<i>Lewis v. B & R Corp.</i> , 56 S.W.3d 432 (Ky. App. 2001).....	9
	<i>Steelvest v. Scansteel Serv. Ctr., Inc.</i> , 807 S.W.2d 476 (Ky. 1991).....	9
	<i>Rehm v. Navistar Int'l</i> , 2005 Ky. App. LEXIS 48 (Ky. App. February 25, 2005).....	9
	<i>GE v. Cain</i> , 236 S.W.3d 579 (Ky. 2007).....	9
	<i>Ashland Coal & Iron Ry. Co. v. Wallace's Admir.</i> , 101 Ky. 626, 42 S.W. 744 (Ky. 1897).....	9
	<i>Collins v. Braden</i> , 384 S.W.3d 154 (Ky. 2012).....	10
	Kentucky Constitution, Section 110(5)(b).....	10
	<i>Jones v. Admin. Offc. of the Courts</i> , 171 S.W.3d 53 (Ky. 2005).....	10, 11
	<i>Hisle v. Lexington-Fayette Urban County Gov't</i> , 258 S.W.3d 422 (Ky. App. 2008).....	10
	Kentucky Rules of Civil Procedure 56	10
B.	A “Jury Pool Manager” Is A “Trial Court Administrator” And Thus Non-Tenured Under the COJ Personnel Policies.....	11
	<i>Nance v. Ky. Admin. Offc. of the Courts</i> , 336 S.W.3d 70 (Ky. 2011).....	14
C.	A Mistakenly Granted Probationary Increment Can Not Create Tenure	15
D.	KRS Chapter 18A Is Relevant To The Tenure Analysis	15
	KRS Chapter 18A	15, 16
	KRS Chapter 18A.115(1).....	16
	KRS 18A.115(1)(l)	16

II.	THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON MILLER’S WHISTLEBLOWER CLAIM	17
A.	Standard of Review.....	17
	<i>Reichwein v. Jackson Purchase Energy Corp.,</i> 397 S.W.3d 413 (Ky. 2012).....	17, 18, 20, 24
	<i>Blakenship v. Collier,</i> 302 S.W.3d 665 (Ky. 2010).....	17
	<i>Ellison v. Commonwealth,</i> 994 S.W.2d 939 (Ky. 1999).....	17
B.	Miller’s Admissions Foreclose Her Ability To Prove The Essential Elements of A Whistleblower Claim.	18
	KRS 61.102.....	18, 19
	<i>Boykins v. Housing Authority of Louisville,</i> 842 S.W.2d 527 (Ky. 1992).....	18
	<i>Woodward v. Commonwealth,</i> 984 S.W.2d 477 (Ky. 1999).....	18, 19
1.	Miller admits that it was known that Vize and McCubbins did not perform certain duties relating to the jury pool.	19
	<i>Davidson v. Commonwealth, Dept. of Military Affairs,</i> 152 S.W.3d 247 (Ky. App. 2004).....	19
2.	Miller did not disclose a violation protected under the whistleblower statute	21
	WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983)	21
	CONCLUSION.....	24

COUNTERSTATEMENT OF THE CASE

Miller takes umbrage with the AOC's Statement of the Case, criticizing it for, among other things, "omitting certain key facts for this Court's consideration." Miller's Brief, p. 1. Yet, Miller's 13 page Counterstatement of the Case, which purports to provide her version of the facts and events necessary for the Court's understanding of the issues on appeal, fails to contain any citation to the record as required by CR 76.12.(4)(c)(iv). *See* Miller's Brief, pp. 1-13. Although Miller occasionally provides page references to deposition testimony, she provides no citation to where the testimony appears in the lower court record. Miller devotes more than 2 ½ pages of her brief purportedly quoting from the deposition of former Judge Michael O. McDonald with no citation whatsoever. *Id.* at pp. 2-4. In fact, Miller fails to provide a single record cite for any of the depositions, documents, policies, or factual assertions made in her Counterstatement of the Case -- an omission repeated throughout her Brief. On page 21 in the Argument section relating to her whistleblower claim, Miller invites the Court to review Miller's affidavit which she states is "attached as Exhibit *** for sake of convenience." Miller's Brief, p. 21. However, not only is the Affidavit not attached, Miller provides no citation to where the affidavit appears in the lower court record. Miller's entire Brief contains only a handful of record citations. *See* Miller's Brief, pp. 16, 22, 24 and 25.

CR 76.12(4)(c)(iv) requires a party to provide "ample references to the specific pages of the record ... supporting each of the statements narrated in the summary." As the court recognized in *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012), "an appellate court cannot consider items that were not first presented to the trial court. By citing us to the specific location of the item in the record, we can confirm the document

was presented to the trial court and is properly before us.” Thus, substantial compliance with the provisions of CR 76.12(4)(c)(iv) “is essential and mandatory.” *Id.*

In recognition of the rule’s importance, CR 76.12(8) permits the court to impose penalties, including striking a brief entirely “for failure to comply with any substantial requirement of ... Rule CR 76.12.” A reviewing court “need not consider portions of briefs where the requirements of CR 76.12 are deficient.” *Flint v. Stilger*, 2010 Ky. App. Unpub. LEXIS 1017 *4 (Ky. App. Jan. 22, 2010). Alternatively, the court may alter the *de novo* standard of review of claimed legal error to a review only for palpable error, or manifest injustice. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). Given Miller’s almost complete failure to comply with the requirements of CR 76.12(4)(c)(iv), the Court would be amply justified in disregarding Miller’s Counterstatement of the Case, or reviewing her claimed error in the trial court’s grant of summary judgment on her whistleblower claim only for palpable error or manifest injustice. *Id.*

The AOC stands by its Statement of the Case with respect to its appeal of the trial court’s grant of summary judgment on Miller’s due process claim which contains ample citations to the record in compliance with CR 76.12(4)(c)(iv). AOC’s Brief, pp. 1-11. The AOC provides the following Counterstatement of the Case regarding Miller’s cross-appeal of the trial court’s grant of summary judgment on her whistleblower claim.

A. Counterstatement of the Case as to Miller’s Whistleblower Claim

In relevant part, Miller’s whistleblower claim against the AOC is as follows:

19. . . . [T]he Plaintiff discovered that Chief Court Administrator Tim Vize and Court Administrator Roger McCubbins had submitted job descriptions to Defendant AOC in support of their requests for reclassification and higher pay. These job descriptions included the following for both positions:

“performs highly responsible duties in . . . jury management.”

“Assists in the calling, pooling and coordination of jurors, answer public inquiries and individual juror complaints and questions; distribute and handle juror questionnaires.”
(Exhibits G & H)

20. Contrary to these representations, Tim Vize and Court Administrator Roger McCubbins had never performed these duties relating to the jury pool.

21. The Plaintiff raised her concerns . . . to Hon. Thomas B. Wine, Tim Vize, AOC Director Cicely Lambert, and others that Mr. Vize and Robert [sic] McCubbins were being paid to perform duties with respect to the jury pool which they, in fact, had never performed. (Exhibits I - L)

22. As a direct result of the concerns expressed by the Plaintiff relating to possible fraud, waste, and mismanagement in the conduct of the Chief Court Administrator Tim Vize and the Court Administrator Roger McCubbins, the Defendant AOC, by and through the Chief Court Administrator Tim Vize retaliated against the Plaintiff and either terminated her or conspired in her termination in violation of KRS 61.102.

23. As a direct result of the concerns expressed by the Plaintiff relating to possible fraud, waste, and mismanagement in the conduct of the Chief Court Administrator Tim Vize and the Court Administrator Roger McCubbins, the Defendant AOC, by and through the Hon. Thomas B. Wine terminated the Plaintiff's employment in violation of KRS 61.102.

[R. Vol. 1, pp. 1-31, Complaint at ¶¶ 19 and 20-23.]

At all relevant times, Vize was Chief Court Administrator for the Jefferson Circuit Court and McCubbins was Court Administrator for the Jefferson Circuit Court. In her Complaint, Miller refers to Vize's Chief-Court-Administrator title and McCubbins's Court-Administrator title as “job descriptions.” [See *id.*, ¶ 4 and Exhs. G and H.] However, the “job descriptions” for “Chief Court Administrator” and “Court Administrator” submitted by Miller are actually job “classes” or “classifications.” The duties described in the classification are only “Examples of Duties,” and not mandatory job requirements. Instead, they are part of a class specification system used by the state

court delineating a group of positions similar in duties, responsibilities, skill and training. *Miller v. Admin. Offc. of the Courts*, Case No. 3:01 CV-339-S, 2005 WL 1244988 *8 (W.D. Ky. May 23, 2005), Apx. Tab 5. “Class specifications are descriptive and explanatory. They are designed to indicate the kinds of positions which should be allocated to each class.” *Id.* The job classifications of “Chief Court Administrator” and “Court Administrator” thus comprise multiple positions, grouped together because their duties and their training, experience, and skill requirements are similar throughout the COJ system.

The Chief-Court-Administrator and Court-Administrator classifications respectively provide:

Chief Court Administrator

Characteristics of the Class:

Under administrative direction of the Chief District and Circuit Judge, performs highly responsible duties in caseflow management and jury management; acts as general liaison among court officials, the public, and the Central Administrative Office of the Courts system.

Examples of Duties:

Court Administrator over district and circuit court. Assists in the interviewing and selection of judge’s staff. Monitors judge’s schedules. Monitors caseflow to assure efficient and speedy processing of cases through the court system; makes recommendations to the Chief Judge for improvements in caseflow management; compiles statistical reports. Assists in the calling, pooling and coordinator of jurors, answers public inquiries and individual juror complaints and questions, distributes and handles juror questionnaires. Orders supplies and equipment, evaluates courts’ space utilization. Assists in the recruitment, selection, and training of specific court personnel; assists in coordinating judicial education programs. Performs other duties as assigned by the judge.

Qualifications:

Education:

Graduate of an accredited college or university with a degree in court administration and one year of court experience; or a combination of education and experience.

** ** * * * * *

Court Administrator

Characteristics of the Class:

Under administrative direction of the Chief District or Circuit Judge, performs highly responsible duties in caseload management and jury management; acts as general liaison among court officials, the public, and the Central Administrative Office of the Courts system.

Examples of Duties:

Monitors caseload to assure efficient and speedy processing of cases through the court system; makes recommendations to the Chief Judge for improvements in caseload management; compiles statistical reports. Assists in the calling, pooling and coordination of jurors, answers public inquiries and individual juror complaints and questions, distributes and handles juror questionnaires. Orders supplies and equipment, evaluates courts' space utilization. Assists in the recruitment, selection, and training of specific court personnel; assists in coordinating judicial education programs. Performs other duties as assigned by the judge.

Qualifications:

Education:

Graduate of an accredited college or university with a degree in court administration and one year of court experience; or a combination of education and experience.

[R. Vol. 1, pp. 1-31, Complaint at Exhs. G and H.]

In sum, Miller's whistleblower claim turns on the "job descriptions" for the Chief-Court-Administrator and Court-Administrator positions held by Vize and McCubbins. Miller claims that she blew the whistle by raising "concerns . . . that Vize and Robert [sic] McCubbins were being paid to perform duties [listed in their classification specifications] with respect to the jury pool which they . . . had never

performed” and that she was fired for raising these concerns. [R. Vol. 1, pp. 1-31, Complaint at ¶¶ 19-23.]

B. Procedural History

The issue of Miller’s whistleblower claim was fully briefed and considered by the federal district court which granted summary judgment on the merits finding, as a matter of law, that Miller could not “establish that she reported the type of information which is protected by the statute.” *Miller*, 2005 WL 1244988 *6, Apx. Tab 5. The district court’s decision was affirmed on appeal by the Sixth Circuit, but on other grounds. *Miller v. Admin. Offc. of the Courts*, 448 F.3d 887 (6th Cir. 2006), Apx. Tab 6. As a result, this Court determined that the district court’s decision could not have res judicata effect in this action and remanded the case for a determination of “whether Miller reported information that would entitle her to protection under the Kentucky whistleblower statute.” *Miller v. Admin. Offc. of the Courts*, 361 S.W.3d 867, 877 (Ky. 2011) (R. Vol. 5, pp. 665-685).

Eight days after the Court issued its decision, Miller filed a Motion for Summary Judgment on her Due Process Claim in the trial court. Because both parties had filed Petitions for Rehearing with this Court under CR 76.32, however, the Court’s decision did not become final until April 26, 2012, when the Court denied the parties’ Petitions for Rehearing. CR 76.30(2)(a); *Miller*, 361 S.W.3d at 877.

After the Court’s decision became final, the AOC filed a Response and Cross-Motion for Summary Judgment on Miller’s Due Process Claim and a Motion for Summary Judgment on Miller’s whistleblower claim. [R. Vols. 5-7, pp. 695-927.] Its motion for summary judgment on Miller’s whistleblower claim presented the same

arguments considered by U.S. District Court Judge Simpson in his order granting summary judgment in the federal district court. Miller's only response, as in the district court, was that the motion should be denied to allow additional discovery on her whistleblower claim. [R. Vol. 7, pp. 934-940.] Miller also submitted an Affidavit in support of her response purporting to set forth facts demonstrating the need for additional discovery which was virtually identical to the Affidavit filed by Miller in the district court. [R. Vol. 7, p. 942, Notice of Filing Affidavit.]

Upon consideration of the briefs and arguments of the parties, the trial court entered an order granting summary judgment on Miller's whistleblower claim. *See* December 3, 2012 Order, Apx. Tab 1 (R. Vol. 7, pp. 949-967). In its Order, the trial court noted that Miller admitted in her Affidavit that there had been talk since "the early 1980's that Tim Vize, the District Court Administrator at that time, claimed to perform my job in order to justify an increase in his salary from AOC." *Id.*, p. 965. The court also noted that Miller's April 23, 2001 Notification of Grievance in which she claims to have blown the whistle on Vize and McCubbins states, "[a]s you know, for over 20 years, the Court Administrators in Jefferson County have not performed [the jury management] duties assigned by the AOC" in its job classifications for the Chief Court Administrator and Circuit Court Administrator. *Id.*, p. 966 (emphasis in original). Based on these admissions, the court held:

The Whistleblower Act's purpose "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." Workforce Development Cabinet v. Caines, 276 S.W.3d 789, 793 (Ky. 2008) (citing Davidson v. Commonwealth, Dept. of Military Affairs, 152 S.W.3d 247, 255 (Ky. App. 2004)) (emphasis added). *See also*, Helbig v. City of Bowling Green, 371 S.W.3d 740, 743 (Ky. App. 2011). Miller by way of affidavit and in her grievance acknowledges that the information is

not concealed and that there had been “talk” about the issue. Miller’s admission that the information was publicly known is fatal to her claim. Accordingly, Miller’s claim under Kentucky Whistleblower statute is properly dismissed as a matter of law since she cannot satisfy one of the elements of her claim. Id.

Id., pp. 966-967 (emphasis in original). It is from this Order that Miller cross-appeals.

ARGUMENT

I. MILLER WAS NOT A TENURED EMPLOYEE UNDER THE COJ PERSONNEL POLICIES

Miller’s response primarily rests on the erroneous premise that the trial court’s holding that Miller’s position was tenured is one of fact, rather than a legal conclusion subject to *de novo* review. Contrary to Miller’s assertion, the trial court’s lengthy fact findings did not – and could not – resolve disputed fact issues. Rather, the trial court comprehensively recounted the myriad undisputed material facts germane to her legal determination that Miller was a tenured employee under the applicable COJ personnel policies. Not only does Miller advocate an erroneous standard of review, she conspicuously ignores nearly all of the AOC’s arguments as to why the trial court’s legal conclusions are in error. *See* AOC’s Brief, pp. 13-19, 22.

A. Standard Of Review

Miller erroneously argues that because this Court previously remanded this case for “further proceedings in regard to Miller’s status as a tenured employee entitled to due process protection afforded by the administrative policies of the AOC” (*See Miller*, 361 S.W.3d at 877), the trial court’s order ruling on the parties’ cross-motions for summary judgment has the effect of “findings” under CR 52.01 which can only be reviewed for clear error. Miller’s Brief, p. 14. This argument fails for a number of reasons.

First, by its very terms, CR 52.01 applies only to “actions *tried* upon the facts without a jury or with an advisory jury.” (emphasis added). Here, while the Court previously remanded this case for further proceedings on the issue of Miller’s tenure status, it did not order the lower court to act as the trier of fact. Miller’s Complaint contained a jury demand and the case was submitted to the lower court on the parties’ cross-motions for summary judgment. [R. Vol. 1, p. 5, Complaint; December 3, 2012 Order, R. 967, Apx. Tab. 1.] It is a fundamental principle of American jurisprudence that it is the jury’s function to interpret the evidence and determine disputes of fact, not the court. *Ky. Kingdom Amusement Co. v. Belo, Ky., Inc.*, 179 S.W.3d 785, 790 (Ky. 2005). Therefore, if material facts were in dispute in this case, the trial court could not have tried those facts, but would have been required to deny summary judgment to allow those facts to be decided by a jury. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001); *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

As the trial court recognized, Miller’s “status as tenured or non-tenured is a mixed question of law and fact.” See December 3, 2012 Order at p. 4, R. 953, Apx. Tab 1. “[M]ixed questions of law and fact arise when the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard.” *Rehm v. Navistar Int’l*, 2005 Ky. App. LEXIS 48 *10 (Ky. App. February 25, 2005), affirmed in part and reversed in part on other grounds by *GE v. Cain*, 236 S.W.3d 579 (Ky. 2007). In such cases, where the only dispute is the legal interpretation of admitted or undisputed facts, “it is the duty of the court to declare the law applicable.” *Ashland Coal & Iron Ry. Co. v. Wallace’s Admir.*, 101 Ky. 626, 42

S.W. 744, 746 (Ky. 1897). *See also, Ky. Kingdom*, 179 S.W.3d at 790. This is precisely what the trial court did in this case.

Contrary to Miller's argument, the findings of fact contained in the trial court's Order ruling on the parties' cross-motions for summary judgment did not represent the trial court's adjudication of disputed issues of material facts under CR 52.01.¹ December 3, 2012 Order, R. 950-957, Apx. Tab 1. Rather, they were a recitation of the admitted and established undisputed facts material to the legal determination of Miller's tenure status under the COJ's Personnel Policies. Appellate review of a lower court's determination of mixed questions of law and fact are reviewed *de novo* without any deference to the lower court's decision. *Collins v. Braden*, 384 S.W.3d 154, 161 (Ky. 2012). As such, the trial court's decision in this case is subject to a *de novo* standard of review, not the clear error standard urged by Miller. *Id.*

Moreover, the outcome of this case rests entirely upon the interpretation of the COJ Personnel Policies adopted by the Chief Justice under the authority granted in Section 110(5)(b) of the Kentucky Constitution. As this Court recognized in *Jones v. Admin. Offc. of the Courts*, 171 S.W.3d 53, 54 (Ky. 2005), "the jurisdiction to hear and determine any cause that has as its ultimate objective a judgment declaring what this court must do or not do is vested exclusively in this court." Because interpretation of the COJ Personnel Policies dictates how the Court must treat its employees, only this Court has jurisdiction to interpret those Policies and the lower court's decision is void. *See e.g., Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422, 430 (Ky. App. 2008).

¹ Indeed, CR 52.01 expressly states that findings of fact are unnecessary on decisions of motions for summary judgment under CR 56.

Thus, this Court must make its own decision as to the meaning of its Policies without regard to the conclusion of the lower court. *Id.*

Miller attempts to avoid this inescapable result by arguing that “this Court would not have remanded this case to the trial court for ‘*further proceedings*’ and ‘*findings*’ if the trial court in fact lacked subject matter jurisdiction.” Miller’s Brief, p. 15. However, this argument ignores two critical factors in this case. First, this Court has twice accepted this case on transfer under *Jones*, recognizing that only this Court has jurisdiction to issue a judgment declaring what the Court must or must not do. *See* September 26, 2013 Order Granting Transfer and August 21, 2008 Order Granting Transfer in 2007-SC-000609-T. Second, when this Court remanded the case for further proceedings, the issue before the court was whether the decision of the federal court had res judicata effect in this state court action. As the Court recognized, Judge Simpson specifically declined to decide the issue of whether Miller was tenured or at-will and there were no findings in the record on that issue. *Miller*, 361 S.W.3d at 874. Therefore, it was not clear at that time that the legal determination of the issue would ultimately rest upon an interpretation of the COJ Personnel Policies. Now that the lower court has made its findings of the established and undisputed facts, the only dispute is the legal interpretation of those facts under the COJ Personnel Policies which can only be decided by this Court. *Jones*, 171 S.W.3d at 54.

B. A “Jury Pool Manager” Is A “Trial Court Administrator” And Thus Non-Tenured Under the COJ Personnel Policies.

The legal question before this Court is whether Miller was tenured under the COJ Personnel Policies. Miller conspicuously did not attempt to address, much less defend, the trial court’s *legal* conclusions construing the COJ’s Personnel Policies. The trial court’s Order found that the COJ Personnel Policies unambiguously specified the job

categories exempted from tenure status, and that Miller's position "Professional Services Supervisor" with the working title "Jury Pool Manager" did not – *as a matter of law* – fall within the category "trial court administrators." December 3, 2012 Order, R. 964, Apx. Tab 1. The trial court held that because Miller was not expressly exempted as a "trial court administrator" she was, apparently by default, a "tenured employee." *Id.*

Of course, the very record that the trial court recounted at length refutes this conclusion in several respects. For example, the trial court found:

1. Beverly Miller, then Beverly Doyle, was hired as "coordinator" for Jury Pool operations for state court operations in Jefferson County on June 30, 1976 by Judge Michael O. McDonald. By letter of appointment, Miller was "*to serve at the pleasure of the Court.*"
3. ... a Request for Position Action dated March 10, 1977, reclassified the "Aid Coordinator" to "Jury Pool Manager #0256" effective March 1, 1977. This position was salaried, permanent full-time. Section No. 4 "*Position Merit Status*" is marked "B. *Not covered.*"
8. Request for Personnel Action dated 03/(unreadable date)/1979 with and effective date of 4/1/1979 notes "Approved by Supreme Court 2/23/1979." The position remains "Jury Pool manager #0289" and is "*unclassified.*" Next to the unclassified designation appears a notation that reads "(19-7)." The "Cabinet-Department, Division and Area or District," Box 16, is now marked "*JUD-Court Adminestrators*" [sic].

² Miller criticizes the AOC for "gleefully" pointing out this language "at every opportunity in this litigation" (Miller Brief, p. 1 n. 2), claiming that Judge McDonald's intent to appoint Miller to a tenured jury management position effectively grandfathered that status. But that is not what the trial judge held here; the Order now before this Court rests its tenure holding on the serendipitous revision of COJ Personnel Policies in 1999 enumerating 13 separate job categories as exempt from tenure. Because Miller's job title was not "trial court administrator" she was deemed tenured, apparently by default.

Miller falsely and ridiculously accuses the AOC of calling Judge McDonald a liar for recounting his intent that Miller's position be tenured when he appointed her in 1976. Miller's Brief, p. 16. Although the AOC most certainly did not accuse Judge McDonald of lying, his intent in 1976 was not in any way dispositive of the trial court's holding here. Moreover, regardless of Judge McDonald's intentions in 1976, he did not have the authority to make the position tenured, as the uncontradicted evidence demonstrates that the AOC never gave approval for the position to be tenured. [R. Vols. 5-6, pp. 745-768, Davis. Aff.] The trial court acknowledged this reality, noting that "[i]t is clear . . . from a review of the record that AOC intended her position to be non-tenured and included in the term 'trial court administrators.'" December 3, 2012 Order, R. 964, Apx. Tab 1.

20. A memorandum effective April 1, 1999 from Cicely Lambert at the AOC confirms the appointment as “3204 Jury Pool Manager.” The type of position is marked “Perm,” Employment status is marked “Part” and *Judicial Merit* is marked “*Not-Covered*.”
23. On September 1, 1999, Rita R. Cobb, Personnel Manager for AOC wrote Miler confirming that “effective September 1, 1999, she is a permanent, full-time employee earning \$4,304 monthly as ‘Professional Services Supervisor’ for Jefferson Circuit Court with the working title ‘*Jury Pool Manager*.’”
27. On or about December 7, 2000, Miller drafted a curriculum vitae in response to her discovery that certain jury management responsibilities appeared in the job descriptions for the Chief Court Administrator, Circuit Court Administrator and District Court Administrator positions. She mailed this letter to Rita Cobb and requested that it be placed in her personnel file. She described herself as the *Jefferson County Jury Administrator*.
30. On or about April 6, 2001 Miller sent a letter responding to a letter from Vize regarding her leave time taken from March 28, 2001 to April 17, 2001. She signed it in her capacity as “*Jury Administrator*.”
32. On or about April 16, 2001, Miller responded again to Vize regarding the leave and signed in her capacity as *Jefferson County Jury Administrator*.

December 3, 2012 Order, R. 950-951 and 953-956, Apx. Tab 1 (emphasis added).

Thus, throughout her initial employment, and re-employment, Miller was referred to – and referred to herself as – a jury *administrator*. Her job duties never changed throughout her employment, which were simply a subset of the duties “trial court administrators” perform in the Commonwealth’s remaining 119 counties. [*Id.*; *see also* R. Vol. 1, pp. 1-31, Complaint at Exhs. G and H.] Therefore, when Miller reported that Vize and McCubbins were not performing the jury management duties listed in the job classifications for “Chief Court Administrator” and “Court Administrator,” she was simply acknowledging that her job duties included exactly what “trial court administrators” throughout the Commonwealth also do as part of their jobs.

In spite of this clear record, the trial court determined that the COJ's Personnel Policies unambiguously enumerated 13 job titles specifically exempted from tenure. From that, the trial court further concluded that any job title not enumerated was, *ipso facto*, tenured. But the trial court's legal conclusion about the meaning of those COJ Personnel Policies was unreasonably constrained. Any fair reading of those Policies compels the conclusion that they specify job categories, rather than job titles. And the COJ Personnel Policies reinforces this conclusion as they explicitly recognize that classification specifications are broad and general, reflecting a group of positions similar in duties, responsibilities and skills. *Infra*, at pp. 21-22. It only makes sense that the tenure exemptions should be construed likewise. Any other reading would lead to patently absurd results.

Miller's duties in managing Jefferson County's jury pool operations are performed by trial court administrators throughout the Commonwealth. But, under the trial court's holding, only Miller was tenured. And the other categories similarly reflect the goal of outlining broad job categories, not specific job titles. For example, if a judge's secretary was hired as an administrative assistant, the trial court's constrained reading of the COJ's Personnel Policies would find the job to be tenured, while a "secretary" performing the very same duties would not. The non-tenured categories enumerated in the COJ Personnel Policies encompass all of the employees reporting directly to judges. As this Court held, "the elected official should decide who works directly with him or her on a daily basis. This includes choosing the person to be hired, and firing whoever does not work out successfully." *Nance v. Ky. Admin. Offc. of the Courts*, 336 S.W.3d 70, 71 (Ky. 2011). *See also* AOC's Brief, pp. 16-19.

C. A Mistakenly Granted Probationary Increment Can Not Create Tenure.

Miller's jury pool manager position falls squarely within the "trial court administrators" category the COJ Personnel Policies exempt from tenure. Although Miller also cites the probationary increment she received but once in March 2000, the trial court's tenure holding did not rest upon this point. Indeed, no mistaken administrative action, such as designating a pay increase as a "probationary" increment, could confer tenure status to an employee not otherwise tenured under the COJ Personnel Policies.

In support of her claim that she was tenured, Miller focuses on a single document that references her receipt of a probationary increment, even going so far as to claim that she received such an increment twice, once when "she took the position of Jury Pool Manager and when she was rehired and reclassified as a Professional Services Supervisor." Miller's Brief, p. 17. This assertion is demonstrably false. Under the former COJ Personnel Policies, there were 4 types of appointments: "probationary, permanent, temporary and federally funded time-limited." [R. Vol. 6, pp. 826-848, COJ Personnel Policies at Sec. 2.02.] Permanent non-tenured employees do not serve a probationary period, but both tenured and non-tenured employees received 6 month pay increments following their hire. [*Id.*, Sec. 1(4).] Miller's personnel records (which the AOC previously addressed in AOC's Brief at pp. 19-22) unequivocally demonstrate she was always a "permanent" non-tenured employee.

D. KRS Chapter 18A Is Relevant To The Tenure Analysis.

Miller takes issue with the AOC's citation to KRS 18A standards, arguing that they do not determine whether she was a tenured employee. Miller's Brief, pp. 17-19.

But the AOC never suggested anything of the sort. Nevertheless, KRS 18A's personnel classification scheme is relevant to the Court's understanding of Miller's employment status because her Personnel File contains numerous RPAs that reference KRS 18A terminology such as "merit," "status," and "unclassified."³ [R. Vol. 6, pp. 760-795.] KRS 18A.115(1) designates the state-government positions that are classified by identifying a list of exceptions to classified service, including "the judicial department." KRS 18A.115(1)(l)(am. by 2012 Ky. Laws Ch. 146 (HB 485) on other grounds). Judicial department employees are not classified, *i.e.*, terminable at-will. *Id.* Similarly, Miller's Personnel File identifies her as a member of the "Judiciary." [R. Vol. 6, p. 760, RPA eff. 7/1/79.] Based upon KRS 18A's statutory mandates, it makes no sense why the COJ Personnel Policies would transform the at-will employment of the "judiciary" to tenured positions.

In sum, Miller's position clearly falls within the COJ Personnel Policies' "trial court administrators" tenure exception, as a matter of law. Her job solely involved jury pool supervision, a job which is squarely among those performed by "trial court administrators" throughout the Commonwealth, all of whom are non-tenured. There is simply no basis to find that Miller is, alone among jury pool managers throughout the Commonwealth, a tenured employee. Accordingly, the trial court's determination that Miller was tenured should be reversed and her due process claim should be dismissed.⁴

³ Miller's Reappointment Memo and Personnel File provide documentary proof that there is a "judicial merit system," *i.e.*, personnel classification scheme. *Cf.* KRS 18A, and Miller's Reappointment Memorandum (R. Vol. 6, p. 797: "Judicial Merit" – "Not-Covered"), and Personnel File (R. Vol. 6, p. 775: Category #19: "Is this a Merit System Position?" – "No").

⁴ In the Conclusion section of her Brief, Miller asks that "[t]he determination that she be disallowed back pay and benefits be reversed." Miller's Brief, p. 28. However, even if this Court deems Miller tenured and thus entitled to due process, the determination that her potential recovery is solely limited to "a due process hearing following the administrative procedures promulgated by the Kentucky Supreme Court" (*Miller*,

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON MILLER'S WHISTLEBLOWER CLAIM.

Miller continues to argue, as she did unsuccessfully before the federal district court and the trial court, that summary judgment on her whistleblower claim was inappropriate because she was denied the ability to conduct discovery on the claim. Miller's Brief, p. 21. Although the trial court did not abuse its discretion in denying additional discovery, no amount of additional discovery could create a genuine issue of material fact in any event.

A. Standard of Review.

Miller argues that the interpretation of statutes is a legal question so that the lower court's grant of summary judgment on her whistleblower claim is subject to de novo review. Miller's Brief, p. 20. This ignores, however, that Miller's sole opposition to the AOC's motion for summary judgment was based on her argument that she needed additional discovery on the claim. [R. Vol. 5, pp. 701-702, Miller's Response to Defendant's Motion for Summary Judgment.] While a lower court's grant of summary judgment is typically reviewed *de novo*, a review of its decision that sufficient discovery has been completed to rule on summary judgment "will not be disturbed absent an abuse of discretion." *Reichwein v. Jackson Purchase Energy Corp.*, 397 S.W.3d 413, 416 (Ky. App. 2012), citing *Blakenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

Here, both the trial court and federal district court concluded that "Miller's admission that the information [she disclosed which forms the basis for her whistleblower claim] was publicly known is fatal to her claim." December 3, 2012 Order, Apx. Tab. 1,

361 S.W.3d at 875), is the final and binding law of the case. *Ellison v. Commonwealth*, 994 S.W.2d 939, 940 (Ky. 1999). See AOC's Brief, pp. 3-4.

R. 967; *Miller*, 2005 WL 1244988 at *2, Apx. Tab 5. As a result, “[r]egardless of the discovery conducted, the fact will remain that . . .” *Miller’s* claim fails as a matter of law. *Reichwein*, 397 S.W.3d at 419. Accordingly, the lower court did not abuse its discretion in denying *Miller* additional discovery and summary judgment was proper. *Id.*

B. Miller’s Admissions Foreclose Her Ability To Prove The Essential Elements of A Whistleblower Claim.

The Kentucky Whistleblower Act provides in relevant part:

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 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.

KRS 61.102(1) (emphasis added).

The statute “was designed to protect employees from reprisal for the **disclosure of violations of the law.**” *Boykins v. Housing Authority of Louisville*, 842 S.W.2d 527, 529 (Ky. 1992) (emphasis added). In *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998), this Court held that four elements must be met for a plaintiff to state a claim for violation of the statute:

First, from the context of this chapter, the employer must be an officer of the state or one of its political subdivisions. Second, the employee must be a state employee or an employee of a political subdivision. Third, the employee must make *a good faith report of a suspected violation of state or local statute or administrative regulation to an appropriate body or authority*. Fourth, the defendant must be shown to act to punish the employee for making this report or to act in such a manner so as to discourage the making of this report.

Id. (emphasis added).

In *Davidson v. Commonwealth*, 152 S.W.3d 247, 255 (Ky. 2004), this Court “specifically addressed what constitutes a ‘report’ within the meaning of KRS 61.102” and held that disclosure of information that is already known is not protected. The Court recognized that the purpose of the whistleblower statute “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.” *Id.* (emphasis added). As a result, reports of known information “do not constitute a report or disclosure that is protected by the whistleblower statute.” *Id.* Upon examination of the established facts, both the trial court and the federal district correctly concluded that Miller could not meet this essential element of her claim.

1. Miller admits that it was known that Vize and McCubbins did not perform certain duties relating to the jury pool.

The parties first briefed and argued the merits of Miller’s whistleblower claim to the district court. Judge Simpson, in a well-reasoned opinion, dismissed Miller’s claim, holding:

Miller contends that she was terminated for reporting concerns of fraud, waste and mismanagement by court personnel. Specifically, Miller claims that she reported that Vize and Court Administrator Roger McCubbins (“McCubbins”) were being paid to perform duties relating to the jury pool that were never performed. These duties were listed on the job descriptions submitted to the AOC by Vize and McCubbins. However, the letter in which Miller claims she reported the alleged fraud, waste and

mismanagement stated “as you know, for over 20 years the Court Administrators in Jefferson County have not performed these duties assigned by AOC.” ... Since the recipients of the report were already aware of the fact that court administrators did not perform jury pool management duties, Miller’s acts do not constitute disclosure or reports that are protected by the Whistleblower Act.

Also, Miller’s report cannot be said to disclose unknown information since it does not disclose a violation. The job duties Miller claims were never performed are only “Examples of Duties.” They are not mandatory job requirements. In fact, the “Example of Duties” are part of a class specification system used by the state court. “A class is a group of positions sufficiently similar as to duties performed, scope of discretion and responsibility, minimum requirements of training, experience, or skill, ... Class specifications are descriptive and explanatory. They are designed to indicate the kinds of positions which should be allocated to each class.” ... The duties Miller reported were not required, and therefore, did not disclose any fraud, waste or mismanagement. Therefore, we find that Miller did not report concealed information.

Miller, 2005 WL 1244988 at *2-3, Apx. Tab 5 (emphasis in original).

The exact same arguments were presented to the trial court on remand. And, like the district court, the trial court concluded:

Miller by way of affidavit and in her grievance acknowledges that the information is not concealed and that there had been “talk” about the issue. *Miller’s admission that the information was publicly known is fatal to her claim.* Accordingly, Miller’s claim under Kentucky Whistleblower statute is properly dismissed as a matter of law since she cannot satisfy one of the elements of her claim.

December 3, 2012 Order, R. 967, Apx. Tab 1 (emphasis added). As a result, regardless of whether additional discovery was conducted, the fact remains that Miller’s claim fails as a matter of law. Accordingly, the trial court did not abuse its discretion in denying Miller additional discovery and summary judgment was proper. *Reichwein*, 397 S.W.3d at 419.

2. Miller did not disclose a violation protected under the whistleblower statute

Moreover, as the district court recognized, the “job descriptions” Miller relies upon did not require Vize and McCubbins to perform every duty listed in the classification. Therefore, she could not have reasonably believed that Vize or McCubbins had done anything “illegal” or “fraudulent” by not performing every duty listed in the specifications. Accordingly, when she reported that Vize and McCubbins were not performing all of these duties, she “did not disclose any fraud, waste or mismanagement” and her report is not protected under the whistleblower statute. *Miller*, 2005 WL 1244988 at *2-3, Apx. Tab 5 (emphasis in original).

As set forth above, the classification specifications for “Chief Court Administrator” and “Court Administrator” are broad and general and do not establish mandatory job duties. *Supra*, pp. 13-14. In a word, the specifications are “descriptive,” not prescriptive. Miller’s whistleblower claim is that Vize and McCubbins illegally failed to perform some of the duties in their job classifications and that her employment was terminated for blowing the whistle about that. The flaw in Miller’s argument is that the duties she claims Vize and McCubbins “illegally” failed to perform were not “duties” in the legal sense of the word. Indeed, they are identified in the subject classification specifications under the heading “Examples of Duties.” [R. Vol. 1, 1-31, Complaint at Exhs. G and H.]

Webster defines “example” as “a particular single item . . . that is representative of all of a group or type” or “an instance . . . serving to illustrate a rule or precept or to act as an exercise in the application of a rule.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY, 431 (9th ed. 1983). By using “Examples of Duties” in the two

classification specifications, the COJ plainly intended the listed duties to be representative or illustrative. They are not required duties and do impose a legal obligation for each “Chief Court Administrator” and “Court Administrator” to perform every duty listed.

The COJ’s Personnel Policies reinforce this conclusion. As explained above, “Chief Court Administrator” and “Court Administrator” are job classifications under the COJ’s personnel scheme which are comprised of a group of positions similar in duties, responsibilities, skill and training. *Miller*, 2005 WL 1244988 *8, Apx. Tab 5. “Class specifications are descriptive and explanatory. They are designed to indicate the kinds of positions which should be allocated to each class.” *Id.* Thus, under the COJ’s Personnel Policies, classifications such as “Chief Court Administrator” and “Court Administrator” include multiple positions which have been grouped together because, among other things, they require the performance of “similar” duties. “Similar” is not “identical.” Therefore, the COJ’s classification specifications are, by necessity, “descriptive and explanatory.”

The final report from the 1997 University of Kentucky study urged the COJ to “reduce[] [its] number of job titles.” [R. Vol. 6, p. 893.] The final report suggested that the COJ do this by “combining job titles . . . found to perform essentially similar types of work.” *Id.* The final report noted that “[t]his system does not suggest that all employees in combined jobs are doing exactly the same work. Instead it suggests that they are engaging in similar types of interpersonal interactions, decision-making activities . . . in comparable work contexts. Each position will be slightly different. However, by grouping similar positions into a single job title, it recognizes the degree of similarity

between positions.” [*Id.*, pp. 893-894.] Thus, the University’s final report is further proof that the COJ’s classification specifications, including the two sets of specifications at issue here, are descriptive, not prescriptive.

Notably, it is undisputed that the “The Jury Manager position in Jefferson County is unique” and that “[n]o other county in the Court of Justice throughout the Commonwealth has this position.” December 3, 2012 Order, R. 956, Apx. Tab 1. It is also undisputed that the jury management duties which Miller complained that Vize and McCubbins failed to perform in Jefferson County are performed by Court Administrators in every other county in the state. [R. Vols. 5-6, pp. 745-768, Davis. Aff. at ¶¶ 3, 5-6, 8]. As the AOC created the unique position of Jefferson County Jury Pool Administrator or Jury Pool Manager which Miller held for more than 24 years, it could not possibly have been a secret to *anyone* that she performed jury management duties in Jefferson County. Therefore, when Miller reported that Vize and McCubbins were not performing the jury management duties listed in the job classifications for “Chief Court Administrator” and “Court Administrator,” she was not reporting anything that was not already widely known. For all of these reasons, the district court held that “Miller’s report cannot be said to disclose unknown information since it does not disclose a violation” (*Miller*, 2005 WL 1244988 at *2-3, Apx. Tab 5) and the trial court properly reached the same conclusion. December 3, 2012 Order, R. 966-967, Apx. Tab 1.

Miller attacks the dismissal of her whistleblower claim by arguing that the trial court should have permitted her to conduct additional discovery to “develop more fully the disclosures she made.” Miller’s Brief, p. 23. The hole in this argument is twofold. First, the argument ignores that in dismissing her whistleblower claim, the court accepted

Miller's whistleblower allegations as true and concluded that they did not state a viable claim. December 3, 2012 Order, R. 949-967, Apx. Tab 1. As such, no amount of discovery would have changed this outcome. *Reichwein*, 397 S.W.3d at 419.

In addition, to avoid the inevitable conclusion that her whistleblower claim is legally deficient as pleaded and persuade the lower court to permit additional discovery, Miller attempted to use her Affidavit to broaden her claim to include allegations of general fraud, waste, and abuse. However, Miller's whistleblower claim as asserted in her Complaint narrowly focused on Vize's and McCubbins's "job descriptions" and Miller's contention that she blew the whistle on Vize and McCubbins for not performing all the duties in their "descriptions." [R. Vol. 1, pp. 1-31, Complaint at ¶¶ 19-23.] Accordingly, the lower court did not abuse its discretion in denying Miller additional discovery and summary judgment was proper. *Reichwein*, 397 S.W.3d at 419.

CONCLUSION

The AOC respectfully requests that this Court vacate as void the trial court's Order finding that Miller is a tenured employee entitled to due process and enter its own judgment holding that Miller is not tenured under the COJ Personnel Policies, and therefore not entitled to due process as a matter of law. The AOC also respectfully requests that the Court affirm the trial court's order granting summary judgment on Miller's whistleblower claim.

Respectfully submitted,



Margaret E. Keane
Melissa Norman Bork
Brent R. Baughman
BINGHAM GREENEBAUM DOLL LLP
3500 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202
(502) 589-4200

COUNSEL FOR APPELLANT/CROSS
APPELLEE, ADMINISTRATIVE OFFICE
OF THE COURTS

15281857_4.doc

