COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-095

ASBURY COLLEGE, NOW ASBURY UNIVERSITY — APPELLANT

v.

DEBORAH POWELL, DEBRA A. DOSS, and BRYAN BEGLEY DALEY — APPELLEES

KENTUCKY COURT OF APPEALS
NO. 2012-CA-000653-MR

JESSAMINE CIRCUIT COURT
CIVIL ACTION NO. 09-CI-00140

BRIEF FOR APPELLANT ASBURY COLLEGE (NOW ASBURY UNIVERSITY)

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CERTIFICATE OF SERVICE

I hereby certify that on the 12TH day of December, 2014, ten copies of the following Motion for Discretionary Review were hand delivered to: Hon. Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; and a true and accurate copy was also served by first class mail upon Hon. C. Hunter Daugherty, Judge, Jessamine Circuit Courthouse, 101 North Main Street, Nicholasville, Kentucky 40356; Debra A. Doss, Suite 200, 108 Pasadena Drive, Lexington, Kentucky 40503; Bryan Begley Daley, 2692 Richmond Road, Suite 204, Lexington, Kentucky 40509-1542; and Hon. Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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INTRODUCTION

In this case, Asbury University requests that the Court announce the correct but-for causation standard for Kentucky Civil Rights Act retaliation claims, clarify the requirements and jury instructions appropriate to such claims, and declare, based upon the undisputed facts, that Asbury is entitled to judgment as a matter of law on Powell's retaliation claim. The Court of Appeals approved an abrogated motivating factor standard for Plaintiff Deborah Powell's retaliation claim, in direct conflict with the but-for causation standard announced in the United States Supreme Court's *University of Texas Southwestern Medical Center v. Nassar* Opinion. The Kentucky Supreme Court has not issued a published opinion stating the causation standard applicable to retaliation claims. These matters are now squarely before the Court.

STATEMENT CONCERNING ORAL ARGUMENT

Asbury University respectfully requests oral argument. All Kentucky litigants with Kentucky Civil Rights Act retaliation claims pending, and all those involved in KCRA retaliation claims in the future will be affected by this Court's rulings on the extent to which Kentucky law is consonant with Title VII. The important issues presented in this appeal merit oral argument to supplement the parties' briefs.

STATEMENT OF POINTS AND AUTHORITIES

May it please the Court:

STATEMENT OF THE CASE

Asbury University, a small Christian school in Wilmore, Kentucky, hired Deborah Powell as its part-time Head Women's Basketball Coach in 2002. In 2003, Powell accepted a full-time position combining her coaching duties with responsibilities as Intramural Coordinator. Powell continued at Asbury until 2008 when the majority of her team complained about Powell's embarrassing public displays of affection with her assistant coach.

After investigating the student athletes' complaints, Asbury's Provost Jon Kulaga decided not to invite Powell to return to coach at Asbury. Kulaga explained that he had to protect Asbury's students, and after members of the women's basketball team told him that they felt uncomfortable in Powell's presence, he decided that it was time for a change. Kulaga had been with Asbury for only a few months at the time, and had no history with Powell.

Powell filed suit against Asbury, claiming that Provost Kulaga fired her in retaliation for allegations of gender discrimination that Powell had made years before Kulaga came to Asbury. Over Asbury's objections, the trial court erroneously instructed the jury using a substantial motivating factor causation standard, rather than the correct but-for causation standard for retaliation claims. Although the jury determined that Asbury had not discriminated against Powell, she was granted an inconsistent judgment in her favor on her retaliation claim. The verdict in Powell's favor was further contaminated by improper evidence and jury misconduct.

Asbury requests that this Court announce the correct but-for causation standard for KCRA retaliation claims, and explain that the jury instruction Asbury proposed concerning retaliation properly reflects that standard and should have been given in this case. The Court should also hold that a KCRA retaliation claim must be founded on an underlying violation of the KCRA, or at least on a claimant's good faith, reasonable belief that an underlying violation has occurred. When the Court applies the correct standards in Powell's case, her retaliation claim fails as a matter of law. Asbury requests that this Court vacate the verdict in Powell's favor and grant judgment in Asbury's favor.

Factual Summary

When Powell became head coach at Asbury in 2002, the position was part-time. [VR No. 1: 1/30/12; 1:27:56]. Powell asked her supervisor, Dr. Barry May, Chair of the Health, Physical Education, Recreation and Athletics Department, for a full-time job. [Id. at 1:30:02 – 43]. May crafted a full-time job for her by combining her coaching duties with the newly vacant part-time position of Intramural Coordinator. [VR No. 1: 1/31/12; 1:24:42]. Shortly after Powell accepted the full-time position, she wanted help with her intramural duties and asked May whether she could hire a student assistant. [Id. at 1:35:05 – 41; 1:42:30]. May agreed, and also assigned the Head Women's Volleyball Coach, Craig Mosqueda, and the Head Women's Soccer Coach, Josh Oakley, to assist Powell. [Id. at 1:39:08 – 32 and 1:42:30].

Asbury hired a new Athletic Director, Gary Kempf, to begin work in the 2005-2006 academic year. [VR No. 1: 2/1/12; 10:46:32]. Powell participated in the hiring

process for Kempf, and as soon as he arrived on campus, Powell told him that she wanted to restructure her job. [VR. No. 1: 1/30/12; 1:56:14]. Powell wanted a new and different full-time position that included only the tasks that she enjoyed (coaching and teaching) and excluded the intramural duties that she disliked. [Id. at 1:54:55 – 1:55:09]. When May and Kempf did not respond to her satisfaction, Powell submitted a formal grievance to Provost Ray Whiteman on August 30, 2005. [Id. at 1/30/12; 2:00:46 – 2:01:26]. In her grievance, Powell wrote that she believed that she was "being discriminated against based on [her] gender" because of her workload and her supervisors' failure to create a new job for her that met her specifications. [RA Exhibit Folder, JX 7]. Provost Whiteman responded to Powell's grievance in September 2005, explaining, among other things, that Asbury did not have a position available to accommodate her request to eliminate her intramural duties and replace them with teaching. [Id. at JX 11]. The Provost asked Powell to make a schedule for Coaches Mosqueda and Oakley and offered to ease Powell's workload further by removing her teaching duties without decreasing her pay. [Id.]

Powell was not pleased and so she took the final step in Asbury's internal grievance process, writing to Asbury's President Paul Rader detailing a specific proposal for restructuring her job duties to eliminate her responsibilities for the intramural program. [VR No. 1: 1/30/12; 2:06:41 – 2:07:41; RA Exhibit Folder, JX 14]. President Rader met with Powell to discuss her complaint and told her to discuss her proposal with Gary Kempf. [VR. No. 1: 1/30/12; 2:07:42; 2:08:41]. On November 3, 2005, Powell submitted a restructuring proposal to Kempf. [RA

Exhibit Folder, JX 17]. By October 2005, the grievance process was complete. [VR No. 1: 1/30/12; 2:14:45].

The next year, Whiteman and Rader retired. Asbury hired Dr. Sandra Gray as interim Provost and Dr. William Crothers as interim President. [VR No. 1: 2/1/12; 9:24:50]. Powell made no complaint or grievance to either of these administrators. [VR No. 2: 1/30/12; 3:58:57; 5:45:00]. In 2007, Asbury hired Dr. Jon Kulaga as Provost and Dr. Sandra Gray as President. [VR No. 2: 1/31/12; 1:42:36; VR No. 1: 2/1/12; 9:24:58]. Powell made no complaint or grievance to either of these administrators. [VR No. 2: 1/30/12; 3:58:57; 5:45:00; VR No. 2: 1/31/12; 1:54:37].

Powell did make a few minor workplace gripes to Gary Kempf in 2006 and 2007. She told Kempf:

- Asbury's Sports Information Director, Heath Tingle, published a media guide for the men's basketball team before the women's media guide was published. [VR No. 1: 1/30/12; 2:16:47]
- The men's basketball team earns money from guarantee games and uses the money to take a trip to Hawaii every other year. [Id. at 2:20:48].
- The women's basketball team always plays the first game in "doubleheaders." [Id. at 2:21:42].
- Powell had to leave town for personal reasons and missed a scheduled audit of the athletics department. [Id. at 2:41:37].
- Heath Tingle nominated a women's basketball player for an award without Powell's permission. [Id. at 2:44:20].

Powell discussed these petty grievances only with Kempf, who had no authority to terminate Powell's employment. [Id. at 3:59:10; VR No. 2: 1/31/12; 3:10:23]. She did not share these complaints with Dr. Kulaga or Dr. Gray. [VR No. 2: 1/30/12; 3:58:57; VR No. 2: 1/31/12; 1:54:37].

In the Fall of 2007, Kempf offered Powell the honor of serving on the search committee for the commissioner of the Kentucky Intercollegiate Athletic Conference

as representative of all of the coaches at all of the schools in the Conference. [VR No. 2: 1/30/12; 5:35:57]. Powell accepted the position. [Id. at 5:37:24 – 48].

A few months later, on the morning of February 8, 2008, three students on the women's basketball team contacted Gary Kempf and his wife Dorothy (the women's swim team coach at Asbury) to request an urgent meeting. [VR No. 1: 2/1/12; 11:46:35]. The students told the Kempfs that during bus rides to and from the team's game against Berea College the previous evening, Powell and her assistant coach, Heather Hadlock, had been holding hands and caressing each other. [Id. at 11:47:45]. The students said that this upset team members and made them uncomfortable. [Id. at 1:35:05].

Later that day Provost Kulaga met with the team. [Id. at 1:36:47]. Team members concurred that the behavior reported to the Kempfs earlier that morning had been widely observed, and that the majority of the team members were upset by the behavior, and that the majority of team members had lost confidence in the coaches and no longer wanted to play basketball under their supervision. [Id. at 1:37:59; 1:38:50].

Between February 8 and February 26, 2008, Provost Kulaga and Judith Kinlaw from Asbury's counseling center further investigated the teams' complaints against Powell and conducted follow-up interviews. [Id. at 3:07:34]. The team members, the team manager, and the bus driver all confirmed that the embarrassing touching between the coaches had been going on for some time.[1]

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[1] For example, the team manager described seeing an intimate embrace between the coaches. [VR No. 1: 2/2/12: 11:40:24]. Students complained that the coaches put whipped cream on each other's bodies at a team retreat. [Id. at 11:41:30; 2:02:12;

Kulaga and Kinlaw also interviewed Powell and Hadlock. [Id.] **Neither Hadlock nor Powell denied the conduct that formed the basis of the students' complaints.** [VR No. 2: 1/30/12; 4:34:17; 5:59:48; VR No. 1: 1/31/12: 9:36:00].

On February 28, 2008, the Provost issued a Report of Findings, summarizing the conclusions derived from the investigation he and Kinlaw had conducted. [RA Exhibit Folder, JX 33]. The conclusions, in brief, were as follows:

> There was little disagreement among everyone interviewed that the reported behavior on the bus did occur; however, there were significant discrepancies in interpreting the behavior.
>
> While Powell and Hadlock explained that Powell was simply consoling Hadlock, and that the two were holding hands while praying about Hadlock's problems, everyone else interviewed had felt uncomfortable with the behavior and considered it inappropriate.
>
> Multiple witnesses also reported that similar behaviors had occurred previously, with increased frequency during recent months.
>
> While the players expressed care and concern for both Powell and Hadlock, they had lost confidence in them as leaders. [Id.]

Dr. Kulaga decided not to invite either Coach Powell or Coach Hadlock to return to coach Asbury's students for the next academic year. The Provost explained that he had an obligation to protect the students.

On February 29, 2008, Kulaga met with Powell to advise that she was on paid leave through the remainder of the academic year ending June 30, 2008, and that she would not be invited to return to Asbury for the following year. [VR No. 2:

2:03:07]. One student talked about times when the coaches lingered in the locker room while the team showered. [Id. at 2:55:20]. The bus driver said that the coaches' "intimate affection" made him very uncomfortable and he'd never seen anything like it in all his years driving buses. [VR No. 1: 2/1/12; 2:15:25, 1:20:05; 2:21:54].

1/31/12; 3:16:17; 3:19:49 – 20:48]. He told Powell that she could contact Human Resources if she felt aggrieved. [VR No. 2: 1/30/12; 3:58:11]. He followed up with a termination letter dated March 3, 2008. [RA Exhibit Folder, JX 34]. Powell made no internal appeal of her suspension with pay or her dismissal. [VR No. 2: 1/30/12; 3:58:11; 5:45:00].

Procedural History

Powell filed a lawsuit in the Jessamine Circuit Court on February 6, 2009, alleging gender discrimination, retaliation and defamation. [RA 2 – 11]. The trial court dismissed Powell's defamation claim on summary judgment on October 4, 2011. [RA 215-216]. On February 2, 2012, the court submitted Powell's claims of gender discrimination and retaliation to the jury. [VR No. 2: 2/2/12; 5:13:15]. The jury returned a verdict for Asbury as to gender discrimination, but then awarded Powell more than $380,000 on her retaliation claim based on the trial court's erroneous motivating-factor jury instruction. [RA 681-682].

Asbury appealed, arguing that: (1) the trial court erroneously gave a motivating factor retaliation jury instruction; (2) Powell's retaliation claim failed as a matter of law in the absence of an underlying violation of the KCRA; (3) the evidence at trial did not support the retaliation verdict; (4) the trial court improperly allowed Powell to introduce her everyday workplace gripes as evidence of discrimination; (5) the trial court improperly admitted into evidence lay witness Rita Pritchett's testimony to the effect that, in her opinion, Powell's behavior on the bus trip to Berea was appropriate; (6) the trial court improperly declined to give an at-will employment jury instruction; (7) the jury rendered a void "quotient verdict,"

and the damages awarded by the jury are the result of improper passion or prejudice and violate the "first blush" rule; and (8) the trial court's supplemental judgment awarding Powell her court costs and attorneys' fees must be vacated in conjunction with the reversal of the verdict in Powell's favor.

A few months after the parties briefed the appeal, the United States Supreme Court issued its Opinion in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), holding that the but-for causation standard, not lesser the motivating factor standard, is the correct standard for Title VII retaliation claims. Asbury supplemented the record on appeal with a copy of the *Nassar* case.[2]

In January 2014, the Court of Appeals entered a not-to-be-published, disjointed opinion erroneously affirming the verdict in Powell's favor, misstating and fabricating facts in support of its decision, approving an erroneous and prejudicial retaliation jury instruction, and refusing to recognize that the *Nassar* but-for causation standard applies to KCRA retaliation claims.

ARGUMENT

For at least twenty years, this Court has directed that the Kentucky Civil Rights Act is interpreted consonant with Title VII. *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814 (Ky. 1992). In that time, Congress amended Title VII. Federal courts' interpretations of the statutory language evolved. Some of Kentucky's lower courts interpreted the KCRA as continually developing along with Title VII, while

[2] Shortly after *Nassar* issued, Asbury submitted to the Court of Appeals a motion to file supplemental authority, along with a copy of the *Nassar* opinion. By Order entered July 25, 2013, the Court of Appeals granted the motion. Inexplicably, the same judge that signed the order granting that motion wrote in that court's January 31, 2014 Opinion that the court denied the motion. [Powell Opinion, p. 6].

others, including the Court of Appeals panel in Powell's case, interpreted *Meyers* as stating a concrete standard that did not progress with Title VII, but was instead forever locked in place. This Court should announce that Kentucky's law advances along with Title VII.

When interpreted consistent with current Title VII law, KCRA retaliation claims must be proved according to a but for causation standard. A jury deciding a retaliation claim cannot be instructed on the lesser motivating factor causation standard. A KCRA claimant can only succeed when she can prove that she opposed employer activity that she reasonably and in good faith believed to be unlawful, and the decision-maker knew about the employee's protected activity and took adverse action against her because she engaged in protected activity. Application of these correct standards in Powell's case requires reversal of the verdict in her favor.

Furthermore, this Court should clarify that not every workplace inconvenience can be used to supplement a claimant's KCRA retaliation claim. Rather, protected opposition activity must occur in reaction to employer conduct that could reasonably form the basis of a KCRA discrimination claim. A plaintiff cannot extend indefinitely the causal chain that begins with a good faith complaint of discrimination by submitting a steady stream of petty gripes. When the minor inconveniences Powell describes for the period between 2005 and 2008 are properly eliminated from consideration, Powell is left with an insurmountable two-year gap between her discrimination complaint and the end of her employment.

I. The But-For Causation Standard Applies to Kentucky Civil Rights Act Retaliation Cases.

The United States Supreme Court has announced that the but-for causation standard applies to Title VII retaliation claims, and explained that but-for causation and motivating-factor causation are not interchangeable. *Nassar, supra*. There is no cause of action for a plaintiff who claims that retaliation was a motivating factor in an adverse employment decision when there were other, legitimate reasons for the decision. There is no published Kentucky Supreme Court case directly addressing the causation standard for a KCRA retaliation claim, and Kentucky's trial courts have applied various standards. This important matter is now squarely before this Court.

A. The United States Supreme Court Applies a But-For Causation Standard to Title VII Retaliation Claims.

On June 24, 2013, while Asbury's appeal was pending, the United States Supreme Court decided that but-for causation is the correct standard for Title VII retaliation claims. *Nassar, supra*. The *Nassar* Plaintiff, a Muslim man of Middle Eastern descent, worked for the University of Texas and for its affiliate, Parkland Memorial Hospital. Dr. Nasser claimed that his supervisor at the University, Dr. Levine, harassed him on the basis of his religion and national origin. He lodged a complaint against Dr. Levine with her supervisor, Dr. Fitz. Thereafter, Dr. Nassar quit his position with the University in order to work solely for the Hospital. He wrote a letter to Dr. Fitz and others explaining that Dr. Levine's harassment was the reason for his departure from the University. In response, Dr. Fitz successfully protested the Hospital's employment of Dr. Nassar as a breach of the affiliation

agreement between the Hospital and the University. The affiliation agreement required that staff positions be filled by University doctors.

Dr. Nassar filed suit in the United States District Court for the Northern District of Texas, claiming that Dr. Levine's harassment resulted in his constructive discharge from the University, and that Dr. Fitz's actions were in retaliation for his harassment complaints against Dr. Levine, all in violation of Title VII. The jury found in Dr. Nassar's favor on both counts. On the Defendants' appeal, the Court of Appeals for the Fifth Circuit vacated the jury's constructive discharge verdict due to insufficient evidence, but affirmed the retaliation verdict, finding that the evidence supported Dr. Nassar's theory that Dr. Fitz's actions were motivated, *at least in part,* by retaliation. The United Stated Supreme Court granted certiorari to define the proper standard of causation for Title VII retaliation claims.

The Court held that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Nassar,* 133 S. Ct. at 2528. "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in §2000e-2(m) [the motivating factor test]." *Id.* at 2533.

The *Nassar* Court distinguished the causation standards available for Title VII "status-based" discrimination claims (race, color, religion, sex, national origin) and retaliation claims. For status-based claims, the law states:

> [A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

§2000e-2(m). This is the lessened motivating factor causation standard. *Nassar*, 133 S. Ct. at 2526. There is no motivating factor provision applicable to retaliation claims. Instead, Title VII's anti-retaliation provision states that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter....

§2000e-3(a). The requirement that an employer take adverse action "because" of retaliation means that retaliation is the but-for cause of the employer's decision. *Nassar, supra*. In short, Title VII expressly allows motivating factor causation for status-based claims and omits motivating factor language from its retaliation provisions. Accordingly, a plaintiff making a status-based discrimination claim may choose to proceed on either a but-for (single motive) or motivating factor (mixed motive) causation theory, while a plaintiff bringing a retaliation claim must proceed on a but-for causation standard.

B. The Kentucky Civil Rights Act is Interpreted Consonant with Title VII.

Kentucky's courts "interpret[] unlawful retaliation under the KCRA consistent with the interpretation of unlawful retaliation under federal law." *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 802 (Ky. 2004).

> [C]onstruing the KCRA consistent with federal law (1) is consistent with the KCRA's stated purpose to "provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended," KRS 344.020(1)(a); (2) promotes predictability in the law; (3) discourages forum shopping; and (4) attempts to strike an appropriate balance between an employer's legitimate interests ...and its employees' legitimate interests ....

Id. at 801-801.

Like Title VII, the KCRA prohibits retaliation "because" an individual has complained about unlawful discrimination. There is no motivating factor language in KRS 344.280 (or anywhere else in the statutory text of KRS Chapter 344). Consistent with Title VII, KCRA claims must be proved using but-for causation. The KCRA does not provide a mixed-motive theory of liability, with the attendant "motivating factor" causation standard.

C. The Rule of Retroactivity Requires Application of *Nassar* to Powell's Case.

The *Nassar* decision states the "controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review..." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). "[I]t is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991). Kentucky courts have long recognized this binding rule of retroactivity. *E.g., Washington v. Goodman*, 830 S.W.2d 398, 401 (Ky. App. 1992) (applying the *James B. Beam* decision, writing: "it now seems that the rule of retroactivity in civil cases is limited only by the need for finality.")

Because *Nassar's* controlling interpretation of Title VII governs Kentucky courts' interpretation of the KCRA, and *Nassar's* holding applies retroactively, the "but-for" causation standard stated in *Nassar* must be applied in Powell's case. This Court is not the first one to confront the issue of *Nassar's* retroactive application. In

Sass v. MTA Bus Company, 6 F. Supp. 3d 229 (E.D.N.Y. 2014),[3] a retaliation plaintiff won a jury verdict after the trial court gave an instruction that included a motivating factor causation standard. Four days after the jury rendered its verdict, the U.S. Supreme Court issued *Nassar*. Although the defendant had not objected to the trial court's motivating factor jury instruction, the district court granted the defendant a new trial, holding: "Because the language of the jury charge is precisely the language that was rejected by the Supreme Court in *Nassar*, and because the Supreme Court applied the "but-for" standard to the parties before it, the Court is required to apply *Nassar* to this case." *Id.* at 238. Likewise, the United States District Court for the District of Connecticut, in *Cassatto v. Potter*, Civil Action No. 3:09-CV-1303,[4] found that the rule of retroactivity required it to order a new trial in which the jury was instructed as to retaliation in accordance with *Nassar*. Here, a more conclusive result must follow. Powell never disputed the public displays of affection that led to her team's complaint. She never disputed that the complaint occurred. Asbury has steadfastly maintained that it declined to invite Powell to return because her public displays of affection with Hadlock had caused her team to lose confidence in her leadership. Asbury is thus entitled to judgment as a matter of law on the retaliation claim.

D. But-For Causation Applies to KCRA Retaliation Claims.

Even if the Court declines to adopt *Nassar*, it should define the standard for KCRA retaliation claims as "but for" causation. The correct standard for KRS

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[3] A copy of the case is attached as Appendix Item 4.

[4] The *Cassatto* Order is attached as Appendix Item 5.

344.280 retaliation plaintiffs is set forth in *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 701 (Ky. App. 1991):

> The plaintiff, in making out a *prima facie* case, must show that 1) she engaged in a protected activity, 2) she was disadvantaged by an act of her employer, and 3) there was a causal connection between the activity engaged in and the employer's act. ...[I]f the employer articulates a legitimate, non-retaliatory reason for the decision, the employee must show that "**but for**" the protected activity, the adverse action would not have occurred. (Emphasis added).

The statutory language of the KCRA does not authorize mixed-motive theories of liability at all. Instead, the statute makes it unlawful for an employer to discriminate against an individual "because of" the individual's membership in a protected class or "because" the individual has opposed a practice that the KCRA declares unlawful. The United States Supreme Court has explained that the ordinary meaning of the word "because" indicates a but-for causal relationship. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009); *Nassar*, 133 S. Ct. at 2526-2528.

Kentucky's law regarding mixed-motive discrimination claims is borrowed entirely from federal courts' interpretations of Title VII. Kentucky's Supreme Court in *Meyers v. Chapman Printing Co.* relied on the U.S. Supreme Court's construction of Title VII set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) to find that a plaintiff in a KCRA gender discrimination case (the *Meyers* case did not involve a retaliation claim) could prevail upon proving that her sex was a "substantial contributing factor in causing discharge, even if not the sole cause." *Price Waterhouse* set up a burden-shifting framework for motivating factor claims requiring first that the plaintiff prove that her protected status played a motivating

part in an adverse employment decision. Then, the employer could avoid liability only by proving that it would have made the same decision regardless of the plaintiff's membership in a protected class.

In 1991, in response to the *Price Waterhouse* holding, Congress amended Title VII, expressly incorporating mixed-motives concepts into the law for status-based discrimination cases, and omitting them from retaliation claims. *Nassar*, 133 S. Ct. at 2532-2533. The *Price Waterhouse* burden-shifting scheme was entirely displaced by the 1991 Amendment. *Id.* at 2534. Under the amended Title VII, designation as a single motive or mixed-motive claim determines both the applicable causation standard and available remedies. A mixed-motive claimant need only establish that discrimination was "a motivating factor" in an employment decision, but if the employer can establish that it would have made the same decision absent discrimination, then the claimant is limited in her recovery to injunctive relief and attorney's fees. 42 U.S.C. 2000e-2(m) and 5(g)(2)(B). In contrast, a single motive plaintiff must show that her employer made an adverse decision "because of" discrimination and she has available to her the entire gamut of compensatory relief. *Nassar, supra.*

Despite Congress's clear abrogation of the *Price Waterhouse* standard, Kentucky's courts perpetuated the obsolete principles stated therein by continuing to follow *Meyers v. Chapman Printing Co.* In *First Property Management Corporation v. Zarebidaki*, 867 S.W.2d 185 (Ky. 1994), the Court relied on *Meyers* to extend mixed-motive principles to worker's compensation retaliation cases. By subsequent extension of the *Zarebidaki* holding, Kentucky's courts have apparently sometimes

applied mixed-motive theories to KCRA retaliation cases, as the trial court and Court of Appeals did in this case. Other times, Kentucky's courts have recognized that "a mixed-motive analysis is not applicable" to a KCRA retaliation case. *Bach v. Crews*, No. 2010-CA-331-MR, p. 12 (Ky. App. July 8, 2011) (unpublished). *See also Plucinski v. Community Action Council*, No. 2010-CA-2056, p. 12 (Ky. App. April 6, 2012) (unpublished) (declining to stray from the but-for causation standard set forth in *Handley* for retaliation claims, although plaintiff argued for motivating factor causation).[5] Because the causation language in Kentucky's anti-retaliation statute does not authorize mixed motive claims, this Court should follow the United States Supreme Court's lead and announce that the correct standard for retaliation claims is but-for causation.

E. Powell's Retaliation Claim Fails as a Matter of Law.

There is no statutory framework, state or federal, under which Powell could bring a mixed-motive retaliation claim. Moreover, there is no statute under which Powell could recover lost wages and damages for humiliation, embarrassment, and emotional distress on a mixed-motive theory of liability, because Asbury has articulated an undisputed legitimate basis for ending Powell's employment. Therefore, the jury's verdict as to retaliation has no legal foundation and is an unsupportable windfall to Powell.

Analyzed under the correct but-for standard, Powell's evidence of causation is insufficient to support a verdict in her favor. To prevail on a retaliation claim

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[5] Asbury cites these unpublished cases pursuant to CR 76.28(4)(c) to illustrate the lower courts' application of inconsistent causation standards. Copies of the cases are attached as Appendix Items 6 and 7.

through circumstantial evidence, a plaintiff must offer proof that the decision-maker was aware of her protected activity at the time when a materially adverse decision was made, that there is a "close temporal relationship" between the protected activity and the adverse action. *E.g.*, *Brooks v. LFUCHA*, 132 S.W.3d 790, 804 (Ky. 2004).

A lapse of time four months or longer "is too long to create, by itself, an inference of causality." *Id.* There is a gap of over two years between Powell's only gender discrimination complaint and her termination. Powell admits that the grievance procedure she used to complain about her job ended in 2005. In 2005, Asbury's Provost was Ray Whiteman and its President was Paul Rader. The next year, Asbury hired Sandra Gray as interim Provost and William Crothers as interim President. Powell admits that she made no complaint or grievance to either of these administrators. In 2007, Asbury hired Jon Kulaga as its Provost and Sandra Gray as its President. Powell admits that she made no complaint or grievance to either of these administrators. Kulaga had no association with Asbury prior to 2007. [VR No. 2: 1/31/12; 1:42:36].

Then, in February 2008, two years and two administration changes after Powell's grievance was resolved, Powell's team complained about her intimate physical conduct with her assistant coach. Heeding the students' complaints, and mindful of Asbury's duty to protect them, Provost Kulaga decided not to invite at-will employee Powell to return to Asbury. When asked about the basis for his decision, the Provost explained:

> It's a combination really of the coach is a position of leadership and if your team, and the information I had

> was that the entire team, no longer wanted to play for them, the trust had been eroded, that they had felt made to feel unsafe and uncomfortable in their presence that it was time for a change. ...
>
> This was an issue of leadership and was an issue for me to protect the students and to not put them into a situation again where they have to confront the situation on a daily basis. [Id. at 3:15:14].

Powell introduced no evidence at trial that could establish that Powell's 2005 grievance was the reason for Dr. Kulaga's decision. The change in Asbury's administration, the two-year gap in time between the end of the grievance procedure and Powell's termination, and the intervening complaints of Powell's team members break any reasonable inference of a connection between Powell's complaints and her discharge. In the face of these undisputed facts, Powell cannot possibly prove that retaliation for her years-old complaint was *the* reason that Dr. Kulaga ended her employment.

In its eagerness to affirm the trial court, the Court of Appeals made up facts to support Powell's retaliation claim. The Court of Appeals incorrectly states that Dr. Kulaga destroyed "emails regarding his investigation into [Powell's] assertions [and failed] to follow protocol in dealing with the allegations of gender discrimination." [Powell Op., p. 7]. This is a complete misstatement of the facts, and highly prejudicial to Asbury. *Powell admits that she never raised any allegations of gender discrimination with Dr. Kulaga.* Powell's gender discrimination grievance was resolved two years and two administration changes before Asbury hired Dr. Kulaga. Powell admitted that the grievance procedure she used to complain about her job ended in 2005. [VR No. 1: 1/30/12; 2:14:45]. She admitted that she never

made any complaint or grievance to Kulaga. [VR No. 2: 1/30/12; 3:58:57; 5:45:00; VR No. 2: 1/31/12; 1:54:37]. Clearly, Kulaga could not have failed to follow protocol related to a gender discrimination complaint that was not made, nor could he have destroyed emails about an investigation of a non-existent complaint. The Court of Appeals' inexplicable invention of these allegations against Dr. Kulaga shows that the court misunderstood the timing of Powell's gender discrimination complaint, misidentified the recipient of that complaint, and failed to confirm the facts before accusing the Provost of conduct in which he could not have engaged.

The Court of Appeals relied solely on these non-existent facts to find that there was evidence in the record to support Powell's wholly groundless retaliation claim. The Court of Appeals applied fictitious evidence to the wrong legal standard in order to affirm the verdict for Powell. Reversal is required.

II. KCRA Retaliation Jury Instructions Cannot Include "Motivating Factor" Language.

The "motivating factor" and "but for" causation standards are not interchangeable. As the United States Supreme Court explained in *Nassar*, the but for causation standard is more difficult to meet than the reduced motivating factor standard. Under the lesser standard, a plaintiff need only establish that retaliation was a motivating factor in an employment decision. The but for causation test requires proof that the employer would not have made the adverse decision absent the employee's protected activity. In other words, it is not enough that retaliation is a cause of adverse employment action – it must be *the* cause. *Rattigan v. Holder*, 982 F. Supp. 2d 69, 81 (D.C. Cir. 2013).

Asbury tendered to the trial court a retaliation jury instruction that uses the correct "but for" causation standard [RA 621-631]:

> To prevail on her claim of retaliation, Powell must prove all of the following:
>
> 1. She engaged in protected activity by complaining about sex discrimination;
>
> 2. She had a good-faith, reasonable basis for making her complaints;
>
> 3. Provost Jon Kulaga was aware of Powell's protected activity at the time when he made the decision to terminate Powell's employment with Asbury;
>
> 4. Provost Jon Kulaga decided to terminate Powell's employment with Asbury because Powell had complained about sex discrimination.

Instead, over Asbury's objections, the trial court gave Powell's generalized mixed-motive jury instruction [RA 435-442; VR No. 1: 2/1/12; 8:10:50; VR No. 1: 2/2/12; 8:30:18; 3:17:43]:

> To prevail on her claim of retaliation, Deborah Powell must prove that:
>
> 1. She engaged in protected activity by complaining about gender discrimination.
>
> 2. She had a good-faith, reasonable basis for her complaints.
>
> 3. She suffered material adverse employment action in connection with her employment.
>
> 4. Asbury University officials responsible for the actions against Deborah Powell were aware of Deborah Powell's complaints of gender discrimination.
>
> 5. Deborah Powell's complaining about gender discrimination was a substantial and motivating factor in the adverse employment action; and

> 6. But for her complaining about gender discrimination she would not have suffered the adverse employment action.

This instruction misstates the law because it permits the jury to find for Powell based on a mixed-motive theory of retaliation. The trial court used the exact language rejected in *Nassar* when it instructed the jury to consider whether "Deborah Powell's complaining about gender discrimination was a substantial and motivating factor in the adverse employment action." A mixed-motive jury instruction is <u>*never*</u> proper in a Title VII or KCRA retaliation case because there is no mixed-motive theory available to a retaliation plaintiff.

Erroneous instructions to the jury are presumed to be prejudicial. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 276 (Ky. App. 2006). If the Court "cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed." *Id.* at 276-277, *quoting Prichard v. Kitchen*, 242 S.W.2d 988, 992 (Ky. 1951). Likewise, "where there is a substantial likelihood the jury was confused or misled by the instructions, reversal is required." *Id.* at 278, *quoting City of Middlesboro v. Brown*, 63 S.W.3d 179, 182 (Ky. 2001). The trial court's plainly erroneous jury instruction requires reversal.

The trial court's inclusion of the words "but for" in the erroneous jury instruction does not alleviate the reversible error. The "but for" language in the instruction does not state the *Nassar* standard because it never requires the jury to consider whether Provost Kulaga would have decided to end Powell's employment had she not made any gender discrimination complaints. Rather than ask about the employer's motives, the "but for" sentence in the erroneous instruction focuses

solely on Powell. Even if the "but for" sentence accurately instructed the jury, the Court cannot assume that the jury applied the correct legal test when it was presented with two conflicting standards. "It is only in a case which is clear and free of all doubt on the point that an instruction which is erroneous can be said by the court to have been without prejudicial effect on the minds of some of the jurors." *Id.* at 276 *quoting Southeastern Greyhound Lines v. Buckles*, 183 S.W.2d 965, 966 (1944). Further, "[a] correct instruction will cure the error in another only where the instructions, as a series, state the law correctly, and it is evident that no harm has been done by the erroneous instruction." *Id.* at 277-78 (citations omitted).

On proper instructions, no reasonable jury could have found in Powell's favor. As explained above, multiple circumstances broke the causal chain between Powell's years-old complaint and Provost Kulaga's decision. Asbury established a legitimate, non-retaliatory reason for its decision – it declined to invite Powell to return to coach its students for another year because students complained about her embarrassing conduct and Asbury's investigation confirmed that the conduct actually occurred. In fact, Powell admitted that she engaged in the conduct that led to the students' complaints. In other words, Powell admitted that retaliation was *not* the but-for cause of her dismissal.

III. An Underlying Violation of the KCRA is Required to Support a KCRA Retaliation Claim.

According to the only Kentucky case to directly address the issue, a KRS 344.280 retaliation claim must arise from an **underlying violation** of the KCRA.

Parker v. Pediatric Acute Care, P.S.C., No. 2007-CA-000548-MR, 2008 WL 746677 (Ky. App. March 21, 2008) (attached hereto as Appendix Item 8).[6]

A. The *Parker* Holding.

In *Parker*, the plaintiff complained that she experienced harassment when her co-workers publicly gave her a gift card to a sex-themed novelty shop and her employer refused to take action in response to her complaints about the gift. When she was fired a few months later, Ms. Parker claimed that the action was in retaliation for her harassment complaint. The trial court found that Ms. Parker's allegations did not amount to an actionable hostile work environment claim. The trial court further held that without an underlying discrimination claim, Ms. Parker could not establish the elements of her retaliation claim. In affirming the trial court's rulings, the Court of Appeals explained that a plaintiff must establish a violation of the KCRA to maintain a retaliation claim. "Having determined that Parker has not offered proof sufficient to sustain her claim of being subjected to a sexually hostile work environment, the circuit court properly concluded that Parker could not proceed with the retaliation claim."

Likewise, in *Himmelheber v. ev3, Inc.*, Civil Action No. 3:07-CV-593-H, 2008 WL 360694 (W.D. Ky. Feb. 8, 2008), the U.S. District Court for the Western District of Kentucky explained that "if no 'practice declared unlawful by [the KCRA]' has occurred, there can be no retaliation or discrimination as contemplated by Ky. Rev. Stat. § 344.280." The *Himmelheber* plaintiff complained that her employer placed her on a performance improvement plan, and when she complained that the

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[6] Asbury cites the *Parker* case pursuant to CR 76.28(4)(c).

discipline was the result of gender discrimination, fired her in retaliation for making her complaint. The plaintiff failed to establish the elements of her gender discrimination claim. The court held that she could not succeed on her retaliation claim in the absence of an underlying KCRA violation.

In *Thompson v. Next-tek Finishing, LLC*, Civil Action No. 3:09-CV-940-S, 2010 WL 1744621 (W.D. Ky. April 28, 2010),[7] the plaintiff claimed that her employer altered her work environment after she revealed that she was pregnant, and then fired her for complaining about discrimination. After dismissing the plaintiff's discrimination claim, the court reasoned,

> "[R]etaliation" is illegal only if it comes "because [the plaintiff] has opposed a practice declared unlawful by this chapter." KRS 344.280. A predicate for invoking [the retaliation] cause of action is the existence of an illegal practice for the aggrieved plaintiff to oppose; "if no practice declared unlawful by this chapter has occurred, there can be no retaliation or discrimination as contemplated by KRS 344.280."

Id. at *2, *quoting Himmelheber v. ev3, Inc., supra.* Accordingly, the court dismissed the plaintiff's retaliation claim.

B. Title VII Requires as an Element of a Retaliation Claim a Plaintiff's Good Faith, Reasonable Belief that the Employer's Conduct Amounted to Unlawful Discrimination.

Title VII case law does not require a meritorious status-based discrimination claim to support a retaliation claim. However, in order to receive protection under the federal anti-retaliation statute, a plaintiff must have a good faith, reasonable belief that the conduct she opposes constitutes unlawful discrimination. *Wasek v.*

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[7] Copies of *Thompson* and *Himmelheber* are attached as Appendix Items 9 and 10.

Arrow Energy Servs., 682 F.3d 463, 469 (6th Cir. 2012); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). *See also Clark County School Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (dismissing plaintiff's retaliation claim upon finding that no one could reasonably believe that the underlying allegation violated Title VII). "Utterly baseless claims do not receive protection under Title VII." *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004). The purpose of requiring that plaintiffs reasonably believe in good faith that they have suffered discrimination is clear. Title VII was designed to protect the rights of employees who in good faith protest the discrimination they believe they have suffered and to ensure that such employees remain free from reprisals or retaliatory conduct. Title VII was not designed to "arm employees with a tactical coercive weapon" under which employees can make baseless claims simply to "advance their own retaliatory motives and strategies." *Id.*

C. Whether the Court Follows Title VII or *Parker*, Powell's Retaliation Claim Fails.

If this Court determines that the KCRA is interpreted consistent with Title VII, then the Court must adopt the good faith, reasonable belief standard for KCRA retaliation claims. On the other hand, if this Court determines that the KCRA is not interpreted consonant with current federal law, then the Court should adopt the *Parker* standard, precluding plaintiffs from succeeding on retaliation claims in the absence of meritorious underlying discrimination claims. Either way, Powell's retaliation claims fails as a matter of law.

Since Asbury committed no underlying violation of the KCRA, Powell lacked a required element of her retaliation claim under *Parker*. At trial, the jury determined

that Asbury *did not* discriminate against Powell because she is a woman. [VR No. 2: 2/2/12; 8:03:18]. In other words, the practices that Powell opposed **were not** prohibited by the KCRA. "[I]f no 'practice declared unlawful by [the KCRA]' has occurred, there can be no retaliation or discrimination as contemplated by Ky. Rev. Stat. § 344.280." *Himmelheber, supra*

When the Court interprets the KCRA consistent with Title VII, it must apply the but-for causation standard to Powell's claim, a standard that Powell cannot meet for all of the reasons set forth in the foregoing sections of this brief.

IV. Petty Workplace Gripes are Not Actionable Under the KCRA.

In light of the two-year time gap (and intervening administration changes and student complaints) between Powell's discrimination claim and the end of her employment, Powell cannot establish even motivating factor causation in support of her retaliation claim. Powell attempts to fill the gap between her 2005 grievance and 2008 termination with petty workplace gripes. But Powell's whining about ordinary tribulations is not activity protected under the KCRA because minor annoyances do not rise to the level of tangible workplace detriments. *E.g., Davis v. Town of Lake Park*, 245 F.3d 1232 (11th Cir. 2001). Asbury was prejudiced by the introduction of Powell's petty complaints at trial because, as Powell admits, she relied on them to establish the causation element of her retaliation claim. [Powell's Court of Appeals Brief, p. 15].

The KCRA does not protect every workplace complaint. "[T]he protections of Title VII simply do not extend to 'everything that makes an employee unhappy.'" *Davis v. Town of Lake Park*, 245 F.3d 1232, 1242 (11th Cir. 2001) (citation omitted).

"Title VII...[is not] a statute making actionable the 'ordinary tribulations of the workplace.'" *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000). "The discrimination laws do not guarantee employees a stress-free work environment." *Burton v. Batista*, 339 F.Supp.2d 97, 111 (D.D.C. 2004) (*citing Connors v. Chrysler Fin'l Corp.*, 160 F.3d 971, 976 (3d Cir. 1998)). Only complaints expressing opposition to practices declared unlawful by the KCRA are protected, and therefore relevant to Powell's claims. KRS 344.280. KRS 344.040 provides, in pertinent part:

> It is an unlawful practice for an employer:
>
> > (a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's ... sex...;
> >
> > (b) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's ...sex...

The words " 'hire,' 'discharge,' 'compensation, terms, conditions or privileges of employment' and 'status as an employee' explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 63 (2006). "Title VII...is not a " 'general civility code,' " and " 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' " *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Powell's complaints about issues

falling outside of the scope of KRS 344.040 are not protected activities and they are irrelevant to her retaliation claim.

Some of Powell's workplace gripes focus on the actions of Heath Tingle, who served as Asbury's sports information director. [VR No. 1: 1/30/12: 2:16:47]. According to Powell, Tingle published the media guide for the men's basketball team before he published the media guide for the women's basketball team. [Id.] Powell also complained that Tingle nominated a member of the women's basketball team for the "player of the week" award without Powell's consent. [VR No. 1: 1/30/12]. Neither of these complaints can fairly be characterized as having to do with sex discrimination against Powell as to the terms, conditions and privileges of her employment. Tingle had no authority over Powell. He had no say in any decisions regarding her employment. Since Tingle was not Powell's employer, his alleged conduct, or the motives Powell assigns to it, are irrelevant.

Powell also complained that the men's basketball team had money in its budget to take the team to Hawaii every other year. However, Powell admits that Asbury did not fund the Hawaii trip. [Id. at 2:20:48]. Instead, the men's basketball team was able to book some paid games to pay for the trip. Powell admits that *Asbury had no control over whether the women's team could be paid to play certain teams*. [VR No. 2: 1/30/12; 5:19:05]. As Powell's employer had no control over this situation, her complaint about it clearly falls outside the scope of KRS 344.040.

Powell complained that, during "double headers," the women's basketball team always played during the 6 p.m. time slot and the men's basketball team played in the 8 p.m. time slot. Powell's complaint is not related to Powell's

compensation, terms, conditions, or privileges of employment. Powell made no complaint that the way double headers were scheduled constituted discrimination against Powell because she is a woman. Powell never complained that the timing of the games inconvenienced her as a coach and employee. As noted above, "not everything that makes an employee unhappy is an actionable adverse action." *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). Furthermore, "[p]urely subjective injuries...are not adverse actions" falling within the scope of the "terms, conditions, or privileges of employment" protected under the Civil Rights laws. *Burton v. Batista, supra, citing Forkkio v. Powell*, 306 F.3d 1127, 1130-1131 (D.C. Cir. 2002).

KRS § 344.040 governs the way that **employers treat employees** with respect to "compensation, terms, conditions or privileges **of employment**." (Emphasis added). Powell's picayune complaints in the interim between the end of her grievance claim and her discharge do not relate to the terms of Powell's employment and therefore do not constitute protected activity. These petty grievances do not rise to the level of tangible employment detriments, nor do they express opposition to unlawful practices. The evidence should have been excluded.

Furthermore, Powell admits that she complained only to Kempf, Kulaga specifically denied any knowledge of Powell's little grievances, and Powell offered no evidence to contradict his testimony. [VR No. 1: 1/31/12; 1:54:37]. Since Provost Kulaga was not aware of Powell's gripes, he could not possibly have taken any action *because of* them.

V. The Judgment in Powell's Favor is Invalid for Reasons Other than Incorrect Application of the KCRA and Must be Reversed Regardless of the Court's Determination on that Matter.

A. Rita Pritchett's Testimony was Improperly Admitted into Evidence.

Dr. Rita Pritchett's testimony was presented at trial by reading portions of her deposition. Pritchett testified that she learned about the students' allegations against Powell when she attended a meeting with Heather Hadlock and Provost Kulaga, as Hadlock's representative. [VR No. 1: 1/31/12; 1:29:59]. Pritchett recalled that the students alleged that Powell and Hadlock were touching on the bus trip to Berea, and that there were concerns about a team retreat and the students' locker room experiences. [Id. at 1:31:28; 1:33:16]. Pritchett was further allowed to testify, over Asbury's objections, as follows:

> Q: Was there anything in – sitting there and listening to the questions and answers and based on the your years of experience as a coach and athletic director, was there anything in her responses that caused you concern?
>
> A: No.
>
> Q: And when I say caused you concern, was there anything about her answers that made you concerned that she had been engaged in any type of inappropriate conduct with Coach Powell or any other player?
>
> A: No. [Id. at 1:33:35 – 1:34:03].

Pritchett has no personal knowledge of any of the events reported by the students. She did not witness any of the behavior that made the students uncomfortable. Her testimony was based on hearsay. Further, Pritchett's testimony was improper lay opinion testimony pursuant to KRE 701. Accordingly, she should

not have been permitted to share with the jury her irrelevant opinion that Powell's conduct was appropriate.

The trial court incorrectly permitted this testimony on the stated grounds that Pritchett was a quasi-expert on this topic. [VR Hearing Date 1/26/12, 10:44:30]. Powell never identified Pritchett as an expert, and Asbury had no opportunity to cross-examine her as an expert because she did not appear at trial and had not been identified as an expert before her discovery deposition. Moreover, the propriety of Powell's conduct was not a proper subject for expert testimony because there is no generally accepted standard for interpersonal behavior that others may find offensive, or from which a university may feel compelled to shield its students. On the contrary, opinions about appropriate standards of conduct will differ from person to person and sport to sport. Ideas about appropriate conduct change over time. And it was ultimately Asbury, not Powell or her supporters, that had the right and the duty to declare what standards of public behavior it considered appropriate from employees engaged in professional duties.

Finally, Pritchett had no authority to make the determination about the appropriate level of physical touching between Powell and Hadlock. Pritchett was not Powell's supervisor and she played no role in making employment decisions relevant to Powell. The trial court erred by declaring Pritchett a "quasi-expert" and permitting her to countermand the Provost and usurp the jury's role in judging Powell's conduct.

B. The Trial Court Improperly Declined to Give an At-Will Employment Jury Instruction.

By rejecting Asbury's proffered "at-will employment" instruction, the trial court further prejudiced Asbury. Asbury employed Powell at-will when Provost Kulaga decided not to invite her to return to the school following her team's complaints. [VR No. 2: 1/31/12; 3:16:17]. Pursuant to the at-will doctrine, Asbury was entitled to end Powell's employment for any reason, for no reason, and even for a reason that some might view as morally indefensible, so long as the reason was not (in the context of this case) unlawful retaliation. *See Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730 (1983). It was critical that the jury understood that even if it viewed Asbury's decision to end its relationship with Powell as incorrect or unfair, that alone was insufficient to find that Asbury violated the law. An at-will instruction would have clarified this longstanding law for the jury.

C. The Jury Rendered a Void "Quotient Verdict."

At the conclusion of the flawed trial, the jury found that Asbury **did not** discriminate against Powell, but awarded Powell $300,000 in damages for humiliation, embarrassment, and emotional distress for retaliation. Shortly after the verdict was rendered, juror Susan Morgan contacted Janet Dean, an Assistant Professor at Asbury. [Dean Affidavit, ¶ 2 (RA 803-804)]. Morgan told Dean that the jurors could not decide on damages to award Powell, so they wrote proposed figures anonymously on papers which were then drawn and averaged. [Id. at ¶ 3] According to Morgan, the amount the jury awarded was the average based upon this drawing. [Id.] Morgan stated that she "recused" herself from this process. [Id.]

A "quotient verdict" of the type described by Morgan is "condemned by the rules of common law." *Louisville & N.R. Co. v. Marshall's Adm'x*, 158 S.W.2d 137, 143 (Ky. 1942). "A quotient verdict occurs when a jury agrees in advance to arrive at a verdict by averaging the individual amounts arrived at by each juror. Such a verdict is void." *Wilkerson v. Williams*, 336 S.W.3d 919, 922 (Ky. App. 2011). "Such verdicts are regarded by the courts in the same light as gambling verdicts, and will invariably be set aside, just as if the jury had thrown dice or resorted to any other method of gaming to determine the amount. *Louisville & N.R. Co. v. Marshall's Adm'x*, 158 S.W.2d at 143.

D. The Jury's Damages Award is the Result of Passion or Prejudice.

The jury's award is the product of improper passion or prejudice. When called upon, "the trial court is charged with the responsibility of deciding whether the jury's award appears to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. App. 2001). The "first blush rule" is the court's tool in performing this task. As it relates to excessive damages, "first blush" simply means that the judicial mind is immediately shocked and surprised at the great disproportion of the size of the verdict to that which the evidence in the case would authorize. *See Wilson v. Redken Labs., Inc.*, 562 S.W.2d 633, 636 (Ky. 1978).

KRS § 344.450 authorizes only "actual" damages. *Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003). "Actual damages are compensatory in nature and, as such, do not include punitive damages." *Id.* at 138 (citation omitted). Actual damages are "those damages directly and naturally resulting, in the ordinary

course of events, from the injury in question." *Id.* In this case, such damages must result "directly and naturally" from Powell's alleged injury – retaliation for making gender discrimination complaints. "[E]vidence of [retaliation] alone is not the standard by which to evaluate damages: there must be evidence of actual humiliation and embarrassment." *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

Powell's only evidence purporting to substantiate her claim is testimony that Powell cried, and that one of the ministers at her church has observed a lingering sadness in her. [VR No. 1: 2/1/12; 1:42:32; 1:46:08; 1:48:00]. After Asbury ended her employment, Powell made job-searching her full-time employment, she continued to travel, and was heavily involved in her church. [VR No. 2: 1/30/12; 4:13:34]. She still attended paid summer basketball camps at Georgetown College and at UK. [VR No. 2: 1/30/12; 5:56:01]. Powell further admitted that she willingly shared the details of Asbury's investigation of her conduct with many people. [VR No. 2: 1/30/12; 4:21:06; VR No. 1: 2/1/12; 1:42:32; 1:45:27]. Against this evidentiary background, passion and prejudice are the only explanation for a jury verdict awarding $300,000 in damages for Powell's alleged emotional distress, humiliation, and embarrassment.

Furthermore, the jury apparently wanted to compensate Powell for her attorney's fees, despite the trial court's instructions that damages could be awarded only for lost wages and embarrassment, humiliation and emotional distress. The jury's only question to the trial court during its deliberations was whether it could require Asbury to pay Powell's attorney's fees. [VR No. 2: 2/2/12; 7:39:25]. The

jury's desire to punish Asbury in this way indicates that passion and prejudice, rather than reason and the law, were the driving forces behind the jury's verdict. Finally, after trial, Juror Morgan stated that all of the people who were in Asbury's administration at the time Powell left the school should have been fired, with the exception of Glenn Hamilton and the addition of former men's basketball coach Jim Aller. [Dean Affidavit, ¶ 4 (RA 803-804)]. Morgan said that she really identified with Powell and wept for her several times during the trial. [Id.] Morgan's overwrought emotional response to the evidence further establishes the passion and prejudice that tainted the verdict.

E. Attorney's Fees and Costs Awards.

The trial court awarded Plaintiff's attorneys, Debra Doss and Bryan Daley, attorneys' fees amounting to over $200,000, an unreasonably large sum considering that Asbury successfully defeated two out of three of Plaintiff's claims. Daley, a personal injury lawyer, is not entitled to any fees in this case because he did not actively participate in the litigation. He never said a word at depositions, hearings, or at trial.

Moreover, because Asbury is entitled to judgment on the Plaintiff's third claim, retaliation, Asbury is not required to pay any of Plaintiff's attorneys' fees. Upon reversal of the judgment in Powell's favor, the trial court's order awarding Powell her attorneys' fees and court costs must be vacated. KRS 344 allows for an award of attorneys' fees only to a victorious plaintiff. Likewise, CR 54.04 provides for an award of costs only to a prevailing party. Reversal of the judgment in Powell's favor eliminates the legal basis for any costs and fees the trial court awarded.

CONCLUSION

The judgment in Powell's favor must be reversed with instructions to enter judgment in Asbury's favor and to vacate the supplemental judgment. The law does not recognize a mixed-motive retaliation claim, yet the trial court instructed the jury to consider Powell's mixed-motive theory. The trial court adopted the components of state and federal law favorable to Powell's claim, including law that was repealed more than twenty years ago, while discarding all the current authority that would support Asbury's defenses.

Powell's retaliation claim failed as a matter of law, under any theory, in the absence of an underlying KCRA violation. Once the jury determined that Asbury had not discriminated against Powell, her retaliation claim could not succeed under *Parker*. Further, there was no evidence that Provost Kulaga terminated Powell's employment *because* she had complained about discrimination. Kulaga had no history with Powell. She never made a single complaint to Kulaga. Powell made her picayune gripes only to Gary Kempf, and those trivialities did not amount to protected activity. Neither Powell's petty grievances nor Rita Pritchett's "quasi-expert" testimony countermanding the provost's decision should have been permitted into evidence. These errors were compounded by the trial court's refusal of an at-will employment instruction. Finally, the damages awarded by the jury are excessive and resulted from juror misconduct and improper passion and prejudice. This Court should clarify the causation standard for retaliation claims, vacate the judgment below, and grant judgment as a matter of law to Asbury University.

Respectfully submitted,

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