COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-907-DG

KIMBERLY LIKINS — APPELLANT

VS.

APPEAL FROM COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY
CASE NO. 2006-CA-919-MR

MARY ELLEN KINSER, ET. AL. — APPELLEE

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BRIEF FOR APPELLANT

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GARRY R. ADAMS
CLAY & ADAMS, PLLC
462 South Fourth Street
1730 Meidinger Tower
Louisville, KY 40202
(502) 561-2005
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing was forwarded via U.S. Mail, postage pre-paid on this 11th day of May 2009, to Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 New Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601; Hon. George E. Fowler, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Chris Gadansky, Esq., Landrum & Shouse, 220 West Main Street, Suite 1900, Louisville, KY 40202, Hon. Karen A. Conrad, Oldham Circuit Judge, Oldham County Courthouse, 100 West Main Street, LaGrange, KY 40031. It is further certified that the record on appeal has not been removed from the Court of Appeals' Office.

GARRY R. ADAMS

INTRODUCTION

This is an appeal by Kimberly Likins from the Oldham County Circuit Court's May 30, 2006 Order granting Defendants' Motion for Summary Judgment, dismissing Plaintiff/Appellant's claims of Disability Discrimination under the Kentucky Civil Rights Act and claim for retaliation under KRS § 344.280. The Court of Appeals affirmed this decision and subsequently denied the Plaintiff/Appellant's Petition for Rehearing. This court has granted discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Plaintiff asserts that she will participate in oral arguments if the Court deems oral argument necessary.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Plaintiff/Appellant filed this action against Defendants/Appellees on June 17, 2003. (Complaint, R.A. 1-12). Appellees, Oldham County Fiscal Court and Mary Ellen Kinser, Individually and in her Official Capacity as Judge Executive of Oldham County, filed their Answers on July 8, 2003. (Answer, R.A. 17-22). Appellees filed their joint Motions for Summary Judgment and supporting Memorandum on September 27, 2005. (Defendants Motion for Summary Judgment, R.A. 204-205) (Memorandum in Support of Motion for Summary Judgment, R.R. 206-240). Plaintiff filed her response to Defendant's Motion for Summary Judgment on October 26, 2005. (Plaintiff's Response to Defendants' Motion for Summary Judgment, R.A. 241-272). Defendants filed a Reply to Plaintiff's Response on November 4, 2005. (Reply, R.A., 273-286). The trial court issued an Order denying Defendant's Motion for Summary Judgment as to Plaintiff's KRS 61.101 Whistleblower Claim, Wrongful or Constructive Discharge claim under KRS 344 et seq. and Plaintiff's request for declaratory relief as to the unconstitutionality of Oldham County Fiscal Court Rule 3.79[1] on March 30, 2006. The Court's Order sustained Defendants' Motion on Plaintiff's claims of Disability Discrimination under the Kentucky Civil Rights Act, Retaliatory Discharge under KRS § 344.280 and Plaintiff's claim for violation of her First Amendment rights to free speech under the Kentucky Constitution. (Order, R.A. 297-300).

This matter came before the Oldham Circuit Court, Division One, on April 10 - 12, 2006, for a jury trial. The Plaintiff/Appellant presented evidence of her wrongful discharge pursuant to the Kentucky's Whistleblower Act, KRS § 61.101 et seq. At the close of the evidence, the jury received instructions from the Court, deliberated and returned a verdict in favor of Defendants on

[1] Because this claim was in the form of a request for declaratory relief, the issue was not tried before a jury.

all claims presented. On April 19, 2006, the Court entered a Judgment dismissing Likins' claims. (Judgment, R.A. 382-384, Judgment attached hereto as Exhibit "A"). Appellees filed their Bill of Costs on April 21, 2006. (Plaintiff's Bill of Costs, R.A. 385-390). Likins filed her Notice of Appeal on May 1, 2006. (Notice of Appeal, R.A. 394-395). Ms. Likins then filed an appeal in the Kentucky Court of Appeals from the trial court's May 30, 2006 Order dismissing her disability discrimination and retaliation claims under KRS 344. The Court of Appeals, agreed with Appellant's argument regarding her disability argument, but then held summary judgment should have been granted on other grounds. Appellant filed a Petition for Rehearing in the Court of Appeals, which was denied. This Court granted Discretionary Review.

STATEMENT OF THE FACTS

Likins began working for the Appellees in January of 1995, as an Oldham County Animal Control officer. (Kimberly Likins deposition, Vol. I, p. 36). Within a month, Ms. Likins was promoted to Animal Control Director. (Id. at Vol. I, p. 37). On March 13, 2003, the Likins gave an interview to Tracy Kitten of the Oldham County Era newspaper regarding the Animal Control program in Oldham County. (Id. at Vol. I, pp. 66-67). In the interview, Ms. Likins reported the program was short on volunteer staff, that her staff was among the lowest paid and that they did not receive hazardous duty pay as other officers were, despite the fact they frequently were involved in hazardous situations. (Id. at Vol. I, pp. 67-69).

Likins' remarks to the Oldham Era were not the first time Plaintiff had voiced her concerns about the extremely inadequate conditions for the Animal Control program employees as well as the animals being housed there. Beginning in February and or March of 2003, the Appellant began reporting the unacceptable conditions occurring at the Animal Control Office. Likins gave the following testimony in her deposition as to the conditions:

> I reported that I needed help, I was working too many hours, and we had too many animals in a confined space. I reported that we had to basically be careful who we had at the shelter because of the litigation with these dogs, and a lawsuit pending with these dogs. We couldn't just have anybody go in with them. Some of them were aggressive, and we had to be cautious of that. They had - - the dogs were over crowded, and we had to have extra help just carrying them from the top outside so they could get some air. I reported that we were working a lot of hours, and I was very, very, tired. I was forgetting things from the hours I was putting in. I reported that the dogs' feet were bleeding because of the fact it was so confined they couldn't get them out. (Kimberly Likin's deposition, Vol. II, p. 63).

The Appellant reported these problems, as well as others, to Ms. Kinser, Magistrate Bob Leslie, Magistrate Duane Murner and Christine Hovan. (Id. at Vol. II, pp. 64-67, 69). Not only did Likins report the violations to these people, they themselves witnessed the conditions when visiting the kennels on several occasions. (Id. at Vol. II., pp. 65, 67, 69). Clearly, these reports were also made by the Appellant to reporters of the Oldham County Era newspaper.

On March 16, 2003, the Appellant was called into a meeting with Ms. Kinser to discuss the issues raised in the Oldham Era article. (Id. at Vol. I, pp. 72-73). During the meeting, Kinser asked Likins to apologize to Bob Tendall, head of the maintenance department in Oldham County for what the Defendants assert were disparaging remarks made by Likins about his department. (Id. at Vol. I, p. 78). Ms. Kinser also accused Appellant of making the remarks for the purpose of making Oldham County look bad and that Likins only made the remarks for the "publicity" and "sensationalism." (Id., Vol. I).

On or about March 17, 2003, Likins went to her doctor, was put on sick leave due to stress, anxiety and depression she was suffering as a result of her overwhelming workload, including being short-staffed at the kennel. (Id. at Vol. I, pp. 82-83). Appellant had been working in excess of forty-five to fifty-five hours per week, had requested help and not received it. (Id., Vol. I). Likins saw her doctor again on April 14, when he suggested an additional week

of sick leave time in order to test out a new medication. (Id. at Vol. I, p. 83). When the Appellant returned to work on April 21, 2003, she was told to see Appellee Kinser concerning her work schedule. (Id. Vol. I, at 87). When Likins arrived, she was told to go to the conference room where Ms. Kinser, Chris Hovan, and Jim Morse were present. (Id., Vol. I). Likins was then told by Defendant Kinser she was ***being demoted to Animal Control officer because of her stress condition***. (Id., Vol. I). The Appellant stated that this position was likely to cause her more stress and that she would have to get back to them about the offer of demotion. (Id. at Vol. I, pp. 87-88).

Likins was told her decision regarding acceptance of the demotion needed to be made immediately. (Id. at Vol. I, p. 88). Appellant stated she needed to speak with her attorney and, subsequently on April 22, Likins wrote a letter to Jim Morse requesting her right to a hearing before the Fiscal Court regarding the demotion. (Id. at Vol. I, 103). On April 24, this request was denied by Ms. Kinser. (Id. at Vol. I, 95-96). Ms. Kinser extended the period of time in which she wished the Appellant to either accept the demotion or resign. (Id., Vol. I) The Appellant ultimately declined this demotion.

On April 28, 2003, Likins received a letter from Ms. Kinser explaining, for the first time, the disciplinary action and the demotion to supervisor. This letter misstated the verbal communications made during the April 21st meeting, in which she was told she would be demoted to Animal Control officer. (Id. at Vol. I, 97-98). Nothing in this letter referenced the Likins' demotion for medical reasons and stated that Appellant would be considered to have abandoned her position if she did not respond until April 28, 2003. (Id., Vol. I). Likins did not receive this letter until April 28. (Id. at Vol. I, 98).

On May 1, 2003, the Appellant received a letter from Magistrate Robert F. Leslie. (Letter from Robert Leslie attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, R.A. 241-272, as Exhibit "A"). The letter stated that Appellee Kinser "is demoting you due to medical reasons. She was concerned about your health and felt that the pressure associated with your job was too much for you to handle." In his deposition testimony, Mr. Leslie stated he wrote this letter immediately after his meeting with Ms. Kinser, when she stated her reason for demoting Likins was based on health reasons. (Robert Leslie deposition, pp. 4-5).

On May 2, 2003, the Appellant received another letter from Ms. Kinser informing her of her intent to discharge Likins and that a closed session of the Fiscal Court would be held on May 6, 2003, where the Appellant would be allowed to give a statement, although she would not be allowed to have her attorney present with her. (See May 2, 2003, correspondence attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, R.A. 241-272, as Exhibit "B").

On May 8, 2003, Likins received correspondence from Jim Morse concerning the results of the May 6, 2003 Fiscal Court meeting which confirmed the decision to demote the Appellant to Animal Control Officer and her decreased rate of salary. (See May 8, 2003, correspondence attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, R.A. 241-272, as Exhibit "C"). The change in salary that Likins was asked to accept resulted in a decrease from approximately $38,000.00 a year to $29,000.00. (Plaintiff's depo., Vol. I, p. 126). This correspondence also stated that Appellant being reinstated (albeit in a demoted position and salary) was conditioned upon her reporting back to work no later than 8:00 a.m., May 9, 2003. Likins did in fact report back to work on May 9, 2003. (Id., Vol. I). The Appellant's first day of work as an Animal Control Officer was clearly designed to humiliate, degrade and undermine

any authority that Likins might have had over her direct reports. (Id., Vol. I, pp. 128-131). The Appellant did not return to work the following day, and, instead wrote a letter to Ms. Kinser, Jim Morse and Chris Hovan regarding the administration's attempt to force Appellant into resigning by demoting and humiliating her. (See May 12, 2003, correspondence attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, R.A. 241-272, as Exhibit "D").

On or about May 20, 2003, Likins received a call from Bob Leslie officially terminating her from her position. (Plaintiff's depo., Vol. I, p. 136). Appellant also learned from Mr. Leslie that her replacement was to be Barbara Rosenman, who was on a "light-duty" schedule as a result of a rotator cuff injury. (Id., Vol. I, p. 136-137). Although Ms. Kinser denied knowledge of Ms. Rosenman's limiting medical condition, Ms. Rosenman herself told Appellant she had indeed disclosed her condition to Ms. Kinser upon her hiring. (Id., Vol. I, p. 197). In his deposition testimony, Oldham County Magistrate Robert Leslie testified that when the Fiscal Court voted as to the decision to replace the Appellant with Ms. Rosenman, they were informed of Ms. Rosenman's limiting medical conditions and her need to be placed on light-duty because of her condition. (Robert Leslie deposition, p. 14). Appellee Kinser stated that as a result of Ms. Rosenman's condition, she would not be able to perform all of the duties formerly performed by the Plaintiff. (Id.). Although Kinser originally denied this in her deposition, she subsequently admits Ms. Rosenman described her shoulder injury as "life-altering" and that Ms. Rosenman was not allowed to carry a firearm. (Id. at pp. 119, 121).

Kinser's proffered reasons for demoting the Plaintiff included issues relating to the statements she gave to the Oldham Era, including what Kinser perceived to be disclosures of confidential information pertaining to the County without first getting permission from Kinser to speak with the press. Kinser testified the adverse employment action was taken against Likins

because she failed to "come into compliance" with several "performance issues." (Kinser deposition, Vol. II, p. 25). It was Kinser's belief the Appellant owed an apology to the maintenance department for the remarks made to the Oldham County Era, although it is undisputed the quotes given in the Oldham County Era regarding the wages of the maintenance department were made by Tom Smith, an employee of the Animal Control Office, and not the Appellant. (Kinser depo., Vol. I, at pp. 36, 37, 94, 97, 107-108). Kinser also admitted that county employees' salaries are not confidential information. (Id., Vol. I, p. 99). Kinser further admitted that although she believed Tom Smith violated Oldham County ordinances when he spoke to the media, he was not disciplined until after the Plaintiff was demoted. (Id. at p. 116). Furthermore, the Appellant often spoke to the media in her role as Animal Control Director and was never disciplined until after her comments made to the Oldham Era in March of 2003. (Plaintiff's depo., Vol. II, p. 78-80).

Kinser also listed the Appellant's failure to attend three or four staff meetings as a "performance issue" that contributed to Likins demotion and ultimate termination. (Kinser depo., Vol. II, pp. 25-26). Appellant's given reason for not attending these meetings was that she simply did not have time, and that leaving her post to attend a staff meeting would often leave the one other Animal Control Office employee by him or herself. (Plaintiff's depo., Vol. I, p. 88). Kinser testified that at least three other Animal Control Directors missed two or more directors' meetings and were not subject to discipline. (Kinser depo., Vol. II, p. 71). Kinser explained that these absences were "understandable" because those directors were either sick, on vacation, in training or had "been out the night before in working". (Id. at pp. 72-80).

ARGUMENT

I. Summary Judgment

Kentucky law dictates that summary judgments are to be granted cautiously and are appropriate only when it appears impossible for the non-movant to prove facts establishing a right to relief. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W. 2d 476 (Ky. 1991). See also *Deaton v. Connecticut General Life Ins. Co.*, 17 S.W.3d 896, 898 (Ky. App. 2000). Kentucky imposes the burden on the moving party to show the non-existence of any genuine issue of material fact. *Robert v. Davis*, 422 S.W.2d 890 (Ky. 1968). Accordingly, a party moving for summary judgment bears the burden of demonstrating entitlement to such relief. When a Court is required to draw inferences or find facts, summary judgment is not appropriate. *Murphy v. Bank One,* 52 S.W.3d 540 (Ky. 2001).

Employment discrimination cases are rarely subject to the grant of summary judgment. In considering a motion for summary judgment, Courts are "cautioned that 'summary judgment should seldom be granted in employment discrimination cases'" and that "[o]nly in rare cases when there is no dispute of fact and there exists only one conclusion should summary judgment be granted." *EEOC v. General Motors Corp.*, 11 F.Supp.2d 1077, 1080 (E.D.Mo. 1998), citing *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (emphasis added). *See also DiLaurenzio v. Atlantic Paratrans, Inc.*, 926 F. Supp. 310, 314 (E.D.N.Y. 1996) (holding that the severity and pervasiveness of harassing conduct "is the sort of issue that is often not susceptible of summary resolution"). The court in *EEOC v. General Motors Corp* relied on the Eighth Circuit's reasoning that "because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support ***any*** reasonable inference for the nonmovant." *Crawford,* 37 F.3d at 1341 (emphasis added).

II. Questions of Intent Or Motive Cannot Be Decided At The Summary Judgment Stage

The Court of Appeals, in its opinion rendered September 5, 2008, did not rely on precedent concerning its ruling that Plaintiff did not prove she was "regarded as" disabled, in light of the fact that the Trial Court ruled that she clearly was. It is commonly accepted that when interpreting the Kentucky Civil Rights Act, Kentucky courts will look to decisions interpreting federal law. *Noel v. Elk Brand Manufacturing Co.*, 53 S.W.3d 95, 106 (Ky. App., 2000). The Sixth Circuit has spoken clearly on several different occasions that summary judgment is inappropriate for cases in which motive and intent are at issue and in which one party is in control of the proof. *See Cooper v. North Olmstead*, 795 F.2d 1265, 1272 (6th Cir.1986); *see also Leonard v. Frankfort Electric and Water Plant Bd.*, 752 F.2d 189 (6th Cir. 1985).

Additionally, in a recently decided 2007 opinion, the 6th Circuit Court of Appeals reiterated that the question of an "employer's motive" in a "regarded as" claim is one rarely susceptible to resolution at the summary judgment stage." *See Wysong vs. Dow Chemical Co.*, 503 F.3d 441 at 451-452 (6th Cir. 2007), *citing Ross vs. Campbell Soup Co.*, 237 F.3d 701 at 706 (6th Cir. 2000). Unlike this case, it was the trial court in *Wysong* that initially held that the Plaintiff failed to make her prima facie case because although she had work restrictions from her physician, her physician did not state that she was unable to perform a "broad class of jobs." The Court went on to state, "[b]ut such specific evidence is not required to make a prima facie showing of a disability." *Wysong* at 452. The *Wysong* Court looked further into the issue about perception as it relates to a broad class of jobs. In *Ross vs. Campbell Soup Co.*, 237 F.3d 701 (6th Cir. 2001), the court clearly held that "Campbell's state of mind is more appropriate for a jury

than a judge." *Id.* at. 709. The Plaintiff Ross provided proof of a memo that he Ross was a "back case." In the case at bar, the Plaintiff testified and Magistrate Judge Leslie confirmed that the County Judge Executive told her that she was demoting her for "medical reasons." Like *Ross* the determination of whether or not Defendant Oldham County "perceived" or regarded Likins as having a disability is a question of fact for the jury.

The *Wysong* Court also looked at *Henderson vs. Ardco, Inc.,* 247 F.3d 645,654 (6th Cir.2001), where the Sixth Circuit Court of Appeals reversed a grant of summary judgment for the defendant where the Plaintiff brought forward evidence that the defendant perceived there was no job for the plaintiff at the plant. *Id.* at 453. In Henderson the Court believed that the issue of Ardco's perception was a "genuine issue for trial" and, therefore, reversed the district court's grant of summary judgment. *Id* at. 654.

The *Wysong* Court also discusses *Moorer vs. Baptist Memorial Health Care*, 398 F.3d 469 (6th Cir. 2005). *Moorer* also relied on *Henderson* in concluding that evidence that the employer perceived the plaintiff as unable to work in any relevant position at the defendants' place of business constituted competent evidence of the employer's perception about the plaintiff's ability to perform the same broad class of work anywhere else. *Id.* at 453. The *Moorer* case goes a step further and found that Baptist perceived him as incapable of performing a "broad class of work" by virtue of Baptist's perception of Moorer's inability to perform managerial work for Baptist. *See Moorer* at 484. Just like Moorer, Likins put forth proof that the County Judge Executive and magistrates demoted, then later fired her, for "medical reasons" from her position as the Animal Control Director of Oldham County. Likins demotion was an attempt to place her in a non-managerial position as an Animal Control Officer. This is consistent with the proof that Mary Ellen Kinser believed that Likins medical condition and

especially the stress that she was under somehow disqualified her from managing her former employees in the Animal Control office. If nothing else, like all of the cases cited to in this Petition, the Plaintiff has established an issue of disputed fact which is more properly decided by a jury.

Based upon the aforementioned arguments, the Court of Appeals improperly analyzed the law on Plaintiff's "regarded as" claim and improperly substituted its opinion for that of the trial court on an issue that should not be decided at the summary judgment stage.

III. The Appellant was "Regarded As" Disabled by her Employer

The Appellees have previously argued that there existed no evidence that they regarded the Appellant as having an impairment for purposes of the Kentucky Civil Rights Act. However, Likin's deposition as well as the deposition testimony of Magistrate Robert Leslie provides unambiguous evidence Ms. Kinser believed Likins to be disabled and as having an impairment that substantially limited her in the life activity of working. In fact, Magistrate Leslie quoted Ms. Kinser as having said "She is demoting you due to medical reasons. She was concerned about your health and felt that the pressure associated with your job was too much for you to handle." It is clear Ms. Kinser regarded Appellant as being unable to perform her job due to Defendants' perception her being disabled in the major life activity of working.

Appellees have relied heavily on *Hallahan v. The Courier-Journal*, 138 S.W.3d 699 (Ky. App., 2004), in their argument that Appellant's "regarded as" discrimination claim should fail. Specifically, the *Hallahan* court ruled "[a]s with actual impairments, the perceived impairment under the 'regarded as' prong must be one that, if real, would substantially limit a major life activity of an individual." *Id.* at 707. Citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489

(1999), the *Hallahan* court also held an individual may fall within the provision for being "regarded as" having a disability if: "(1) the employer mistakenly believes that the person has a physical impairment that substantially limits one or more major life activities, or (2) an employer mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Id.* (quoting *Sutton*, *supra* at 489). Again, the trial court explicitly held that "the Court agrees that Plaintiff Likins was 'regarded as' disabled by her employer..." The trial court was clearly in error to dismiss Plaintiff's "regarded as" claim because she did not request an accommodation.

In general, an employer's perception that an employee cannot perform a wide range of jobs suffices to make out a "regarded as" claim. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d at 188. More generally, if an impairment at a certain level of severity would constitute a disability, then it follows that an employer who perceives an employee as having such an impairment perceives the employee as disabled. *Id.*

In a "regarded as" case, it is necessary that the defendant "entertain misperceptions about the individual--it must believe that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often 'result from stereotypic assumptions not truly indicative of individual ability.'" *Sutton*, 527 U.S. at 489 (quoting 42 U.S.C. § 12101(7)); see also *Plant v. Morton Int'l Inc.*, 212 F.3d 929, 938 (6th Cir. 2000)(stating that a "regarded as" claim occurs when "an employee has an impairment that is not substantially limiting but is treated as substantially limiting"). *Henderson v. Ardo, Inc.*, *supra at* 650. The ADA is intended to ensure that people such as the Plaintiff are not victimized by stereotypical assumptions and unfounded fears regarding a medical condition, whether or not that condition is by itself substantially limiting. *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 338 (6th Cir.

2002). Plaintiff met her burden of showing a *prima facie* case of discrimination based on disability pursuant to the Kentucky Civil Rights Act, and Defendants' Motion for Summary Judgment was granted in error.

III. The Trial Court Erred In Granting Summary Judgment on Appellant's Retaliation Claim.

In its March 30, 2006 Order dismissing Likin's retaliation claim pursuant to KRS § 344.280, the trail court held that Ms. Likins had failed to establish that the cause of her discharge was based on Plaintiff having made a claim of discrimination. The trial court failed to expand on it's dismissal of Plaintiff's claim.

In order to make out a prima facie case of retaliation, a plaintiff must show that 1) he engaged in a protected activity, 2) he was disadvantaged by an act of his employer, and 3) there was a causal connection between the activity engaged in and the employer's act. *Kentucky Ctr. for Arts v. Handley*, 827 S.W.2d 697, 701 (Ky. App., 1991). The burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action. *Id.* An employee must also show that "but for" his filing of an earlier discrimination action, the adverse employment action would not have occurred. *Id.* The 'but for' test does not require the jury to find discrimination was the exclusive motive for the employee's discharge, but only that it was an essential ingredient. *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 187 (Ky. 1993), citing *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992).

A defendant is not entitled to judgment as a matter of law with regard to a claim of disability-based retaliation when (1) the plaintiff engaged in protected activity when she consults

with counsel concerning a disability suit, and the employer knew of the potential discrimination complaints, (2) the employer resented the claims of discrimination, viewed them as smoke screens to protect poor performance, and directly told the plaintiff to stop complaining about discrimination, and (3) the defendants' proffered explanation as to plaintiff's termination did not rebut the evidence of discrimination. *Lewis v. Quaker Chem. Corp.*, 229 F.3d 1152 (6th Cir. 2000); reported in Table Case Format at: 2000 U.S. App. LEXIS 28325. (overruled in part on other grounds) (copy was attached to Plaintiff's Response to Summary Judgment at Exhibit B).

Here, the Appellees knew Ms. Likins had retained counsel as she expressly told Ms. Kinser, Chris Hovan and Jim Morse during the April 22, 2003 meeting that she felt she needed to consult her attorney prior to making a decision as to their recommendation of demotion. (Plaintiff's deposition, Vol. I, pp. 91-92). Also, counsel for the Appellant sent a letter to Ms. Kinser on April 24, 2003, stating they had been retained by Appellant concerning her demotion following her return from medical leave. (April 24, 2003 correspondence attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, R.A. 241-272, as Exhibit E).

Appellant reported her conditions to Appellees and was granted medical leave. Immediately following her return from medical leave, the Appellees attempted to demote and/or terminate the Likins. On April 22, 2003, following the meeting at which Appellant learned of Appellees' intention to demote her, she wrote a letter to Jim Morse requesting a hearing concerning the actions being taken against her and informed Mr. Morse she wished her attorney to be present. (See April 22, 2003 correspondence attached to Plaintiff's Response to Defendants' Motion for Summary Judgment, R.A. 241-272, as Exhibit F). Despite this letter, the Appellees have argued that there is no evidence of Appellant's complaint that she was being discriminated against. It is undisputed Appellant's request for a hearing was denied and that she was told her decision as to

whether or not she was going to accept the demotion was needed immediately. Viewed in a light most favorable to the non moving party, Likins engaged in protected activity and was retaliated against as a result. The trial court therefore erred in granting Appellees' Motion for Summary Judgment on Appellant's claim of retaliation under KRS § 344.280.

IV. The Court of Appeals Ignored Important Facts Regarding The Chronology Of Appellant's Retaliation Claim, Which Unfortunately Altered The Court's Result

The Court of Appeals panel completely discounted or even ignored several important dates and facts regarding Plaintiff's retaliation claim and ignored statutory law when it held that "[t]here can be no retaliation if a demotion is decided upon before an employee can retain counsel or make a complaint about discrimination." COA Opinion pg. 10. The relevant and mostly undisputed facts are as follows:

April 22, 2003, Kim Likins was told she was being demoted by the County Judge Executive Mary Ellen Kinser.

April 22, 2003, Kim Likins informed Mary Ellen Kinser that she was protesting the demotion and was going to seek legal counsel.

April 22, 2003, Kim Likins wrote a letter to Jim Morse, Deputy County Judge, requesting a right to a hearing regarding her demotion for medical reasons. (Ex. B, Defendant's Motion for Summary Judgment.)

April 24, 2003, Mary Ellen Kinser by letter told Likins that after reviewing the employee handbook, Likins had no right to appeal the demotion. (Ex. C, Defendant's Motion for Summary Judgment.)

April 28, 2003, the first time it is stated in writing that Kimberly Likins is being demoted. The letter does not acknowledge any medical reasons.

May 1, 2003, a letter was sent from Magistrate Bob Leslie telling Likins that Kinser told him that she was demoting Likins for "medical reasons." (Ex. A, Plaintiff's Response to Defendant's Motion for Summary Judgment.)

May 2, 2003, Mary Ellen Kinser sent Likins a letter of her "intent" to discharge Likins for refusing to accept her work assignment (demotion) which would be heard by the magistrates on May 6, 2003.

May 6, 2003, LIKINS IS DEMOTED after a hearing in front of the magistrates which decide that Likins has until May 9, 2003 to take the job or she is terminated.

May 8, 2003, a letter is sent from Jim Morse confirming the decision of the magistrates and confirming the DEMOTION. (Ex. E, Defendant's Motion for Summary Judgment.)

May 9, 2003, Kim Likins shows up for work, but ultimately contests her demotion.

May 12, 2003, Kim Likins writes a letter to Kinser, Morse, Chovan protesting her demotion.

May 20, 2003, after a hearing in front of the magistrates, Likins is TERMINATED.

The Court of Appeals' Opinion misstates the law of Kentucky by declaring or assuming that Likins was demoted on April 22, 2003 and she did nothing to prior to that to be considered "protected activity." Pursuant to KRS 67.710(7), a County Judge Executive does not have the power to suspend or remove (demote) county personnel by herself. The County Judge Executive can only make a recommendation. These matters are not finalized until or unless it meets the approval of the fiscal court. While the facts indicate that Kinser notified Likins of her intent of demoting her, Likins was not demoted until May 6, 2003 and was not terminated until May 20,

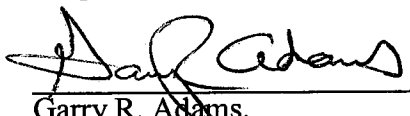
2003. Between April 22, 2003 and May 6, 2003, when Likins was actually demoted, Likins told Mary Ellen Kinser she was going to get legal counsel to challenge the perceived illegal action, she wrote a letter to Jim Morse requesting a right to a hearing, and she asked to appear at the fiscal court hearing. After her actual demotion and before her termination, she verbally protested her demotion once again on May 9, 2003. Therefore, she wrote the May 12, 2003 letter contesting her demotion. On May 20, 2003, Kim Likins was terminated.

Based upon the Court's analysis in *Handley*, the Plaintiff has shown that she engaged in several forms of "protected activity" prior to her adverse employment actions, i.e., her demotion and then her termination. The Court's determination that the Defendants made their decision to demote Plaintiff before she engaged in any protected activity is clearly erroneous. The Court's determination on Plaintiff's retaliation claim should likewise be reversed.

CONCLUSION

Based upon the foregoing, Appellant requests that the trial court's order granting Appellees' motions for summary judgment on the Appellant's claims of "regarded as" disabled and retaliation be vacated.

Respectfully Submitted,



Garry R. Adams.
Clay & Adams, PLLC
462 South Fourth Avenue, Suite 1730
Louisville, KY 40202
(502) 561-2005
Counsel for Appellant