COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2008-SC-000907

COURT OF APPEALS
NO. 2006-CA-000919

KIMBERLY LIKINS — APPELLANT

v.

Appeal from the Oldham Circuit Court
Action No. 03-CI-00399

OLDHAM COUNTY FISCAL COURT, et al. — APPELLEES

BRIEF FOR APPELLEES

Submitted By:

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CERTIFICATE OF SERVICE

I hereby certify that true copies of this Brief for Appellees were delivered via Federal Express this 9th day of July, 2009 to Susan Stokley Clary, Office of the Clerk, Kentucky Supreme Court, Room 235, State Capitol, 700 Capitol Avenue, Frankfort, Kentucky 40601-3415, and via First Class mail to the following: Clerk for the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601-9230; Judge Karen Conrad, Oldham Circuit Court, 100 West Main Street, LaGrange, Kentucky, 40031; and Thomas E. Clay and Garry R. Adams, Esq., Clay Kenealy Wagner & Adams, PLLC, 462 South Fourth Avenue, 1730 Meidinger Tower, Louisville, Kentucky, 40202.

I further certify that I have not withdrawn the record on appeal.

ROBERT T. WATSON
CHRIS J. GADANSKY

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STATEMENT CONCERNING ORAL ARGUMENT

Appellees, Oldham County Fiscal Court and Oldham County Judge Executive Mary Ellen Kinser, individually and in her official capacity, do not believe that oral argument is necessary. This case presents simple and undisputed facts. Under Kentucky law, the ruling of the trial court and Kentucky Court of Appeals should be affirmed. (See March 30, 2006 Order of Oldham Circuit Court, attached hereto as Exhibit A; Transcript of Record, hereinafter "T.R.," 297-300; September 5, 2008 Opinion Affirming, Case No. 2006-CA-000919, attached as Exhibit B). However, Appellees stand ready to present oral argument if the Court deems it appropriate.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellees do not agree with Appellant's statement of the case.

This action stems from an alleged violation of the Kentucky Civil Rights Act, KRS §344.010, et seq., in which Appellant Kimberly Likins (hereinafter "the Appellant") claimed the Appellees discriminated against her on the basis of an alleged disability and gender. Further, the Appellant claimed the Appellees violated Kentucky's whistleblower statute, KRS §61.101, et seq., that she was wrongfully and/or constructively discharged, that she suffered retaliation in violation of KRS §344.280, and that her free speech rights were violated as those rights are guaranteed by the Kentucky Constitution. Lastly, the Appellant made claims against Oldham County Judge Executive Mary Ellen Kinser (hereinafter "Judge Kinser") in her official and individual capacities, and also made a claim seeking declaratory relief requesting this Court to declare as unconstitutional Oldham County Fiscal Court Code Section 3.7A(9). The Appellant sought compensatory and punitive damages, the above-mentioned declaratory relief, reinstatement, and attorney's fees.

In January of 1995, the Appellant became employed with the Oldham County Animal Control Department (hereinafter "the Department") as an Animal Control Officer. (See Deposition of Plaintiff, Vol. I, p. 37). Almost a month later, the Appellant became Director of Animal Control. (Id.). As Director of Animal Control, the Appellant was responsible for organizing, directing, and planning for the efficient and effective operation of the Department, including the ability to work with and supervise others. (Id. at pp. 44-46). Additionally, when hired by Oldham County the Appellant signed for and received a copy of the Oldham County Employee Handbook. (Id.).

In June 2002, Oldham County Animal Control seized approximately sixty-one dogs and seven cats from Suzanne Coke. The animals were held at the shelter until the Oldham County

District Court disposed of the criminal charges placed against Suzanne Coke. According to the Appellant, her workload increased upon the Coke animals being placed in her care. (Id. at p. 56). The Appellant claims taking care of so many animals became difficult, and admits in January or February of 2003 a kennel worker was hired by Oldham County Fiscal Court to help. (Id. at pp. 56-57).

On March 13, 2003, the Appellant was interviewed by Tracy Combs Kitten, a newspaper reporter with the Oldham County Era. (Id. at pp. 66-70). In the article, the Appellant complains of not having enough volunteers for the shelter, while claiming that she came close to resigning or threatening to resign if certain issues were not dealt with. (See March 13, 2003 Oldham County Era article, attached as Exhibit A to Defendants' Motion for Summary Judgment, T.R. 206-240; Deposition of Plaintiff, Vol. I, pp. 67-68). The Appellant also admits to stating that her "guys are the lowest paid in the County," and that her employees do not receive hazardous duty benefits like other officers, but that they put themselves in hazardous situations. (Id.). Prior to voicing these complaints with the Oldham County Era, the Appellant admits that she did not consult with or seek approval from Judge Kinser. (See Deposition of Plaintiff, Vol. I, pp. 71-72).

On March 16, 2003, the Appellant met with Judge Kinser to discuss her interview with the Oldham County Era. (Id. at pp. 73-74). At that meeting, the Appellant claims Judge Kinser asked her to apologize to the maintenance department since the article was critical of that department, and made the County and the Appellant look bad. (Id. at pp. 77-80). Judge Kinser was upset by the fact that the Appellant minimized the work of her shelter volunteers, was attempting to denigrate other County employees, and was complaining about hazardous pay without first discussing with Kinser any of these issues, thus showing a complete lack of loyalty and teamwork. (See Deposition of Mary

Ellen Kinser, Vol. I, pp. 39-40). The very next day, specifically March 17, 2003, the Appellant claims she began five weeks of sick leave related to stress, anxiety and depression. (See Deposition of Plaintiff, Vol. I, pp. 82-83). The Appellant admits she was put on sick leave by a nurse practitioner, not a doctor, and has never seen a psychiatrist or psychologist. (Id. at pp. 27-28). Further, the Appellant never called her supervisor to notify the County she was being placed on sick leave. The County only received a nurse's note faxed from a doctor's office. (See Deposition of Mary Ellen Kinser, Vol. I, pp. 57-58, 60). Appellant further admits that this five week sick leave was solely related to her alleged stress, anxiety and depression, and not a pre-existing liver condition. (See Deposition of Plaintiff, Vol. I, at pp. 82-85).

The Appellant returned to work on April 21, 2003. (Id. at p. 87). On April 22, 2003, the Appellant met with Judge Kinser, Director of Administrative Services Chris Hovan, and Deputy Judge Executive Jim Morse. (Id. at pp. 90-91). At this meeting, the Appellant claims Judge Kinser demoted her to Animal Control Officer and that she was told she was being demoted for medical reasons. (Id. at pp. 90, 94). In response, on April 22, 2003 the Appellant wrote a letter to Jim Morse requesting her right to a hearing before Fiscal Court regarding the offered position of Animal Control Officer. (Id. at p. 103; See April 22, 2003 Correspondence from Kimberly Likins to Jim Morse, attached as Exhibit B to Defendants' Motion for Summary Judgment, T.R. 206-240). On April 24, 2003, Judge Kinser responded to the Appellant's letter informing her that upon review of the Employee Handbook, no provision existed for such an appeal, but granted the Appellant an extension to accept the newly offered position of Animal Control Officer or resign from her current employment. (See April 24, 2003 Correspondence from Judge Kinser to Kimberly Likins, attached as Exhibit C to Defendants' Motion for Summary Judgment, T.R. 206-240). On May 2, 2003, Judge

Kinser wrote another letter to the Appellant indicating her intent to discharge the Appellant for refusing to accept her work assignment, and failure to provide notice to Judge Kinser of absence. (See May 2, 2003 Correspondence from Judge Kinser to Kimberly Likins, attached as Exhibit D to Defendants' Motion for Summary Judgment, T.R. 206-240). That letter also indicates that this recommendation would then be presented to a closed session of Oldham County Fiscal Court on May 6, 2003, and advised the Appellant she would have an opportunity to make a statement as it pertained to that issue. (Id.). According to the Appellant, at the May 6, 2003 Fiscal Court meeting, she was told either to accept the demotion or be terminated for abandoning her job, and was given until May 9, 2003 to begin work. (See Deposition of Plaintiff, Vol. I, pp. 117-118). The Appellant claims she was being demoted for disciplinary reasons related to her medical condition of stress, anxiety and depression. (Id. at p. 123).

On May 8, 2003, the Plaintiff then received a memorandum from Jim Morse regarding the May 6, 2003 Fiscal Court meeting which confirmed her appointment as Animal Control Officer and new rate of salary effective immediately. (See May 8, 2003 Memorandum from Jim Morse to Kimberly Likins, attached as Exhibit E to Defendants' Motion for Summary Judgment, T.R. 206-240). The memorandum also indicated that this appointment as Animal Control Officer was subject to the Appellant reporting to duty no later than May 9, 2003, and that failure to report to duty by the date and time specified would result in termination. (Id.). The Appellant reported to work on May 9, 2003. (See Deposition of Plaintiff, Vol. I, p. 126). After this one day of employment as Animal Control Officer, the Appellant never reported back to work despite her being scheduled to do so. (Id. at pp. 132-133).

On May 12, 2003, the Appellant then wrote Judge Kinser, Jim Morse and Chris Hovan, expressing her contention that she felt the administration was attempting to force her into resigning by demoting her to Animal Control Officer, and that such a demotion served no purpose other than to place the Appellant in a humiliating position. (See May 12, 2003 Correspondence from Kimberly Likins to Judge Kinser, Jim Morse and Chris Hovan, attached as Exhibit F to Defendants' Motion for Summary Judgment, T.R. 206-240). The Appellant then declined the demotion. (Id.). On or about May 20, 2003, the Appellant was informed by Magistrate Bob Leslie that she was being terminated from her position at the Oldham County Animal Control Department. (See Deposition of Plaintiff, Vol. I, p. 137). This lawsuit then followed.

With respect to the disability discrimination claim under KRS §344.010, et seq , the only issue presently before this Court, the Appellant claims the Appellees discriminated against her on the basis of an alleged disability including stress, anxiety and depression. (See Deposition of Plaintiff, Vol. II, p. 59). The Appellant is not making a claim of disability relative to her liver condition. (Id.). Importantly, at no time did the Appellant *ever* request an accommodation for this alleged disability of stress, anxiety and depression. (See Deposition of Plaintiff, Vol. I, p. 157; Vol. II, p. 61). Despite this alleged disability, the Appellant is able to work and to find work. (Id. at Vol. I, pp. 13-14). The Appellant testified she is able to work and to find work as evidenced by her other employment with Roderer Corrections following her employment with Oldham County, and her current employment with Wayside Christian Mission where she is employed on a full time basis as a store manager. (Id. at Vol. I, pp. 13-15). The Appellant was never considered disabled by the County, her personnel file does not list any disabilities, and again, the Appellant never requested any

accommodations for any alleged disabilities or medical conditions. (See Deposition of Mary Ellen Kinser, Vol. II, pp. 29, 33).

On September 27, 2005, the Appellees moved the Oldham County Circuit Court for summary judgment on all of the Appellant's claims. The Appellant filed her Response on October 26, 2005, and Appellees filed a Reply on November 4, 2005. In its Order dated March 30, 2006, the Oldham Circuit Court granted in part and denied in part the Appellees' Motion for Summary Judgment. (See Exhibit A, T.R. 297-300). Specifically, the Oldham Circuit Court dismissed all but three of the Appellant's claims, but allowed her claim for violation of Kentucky's whistleblower statute, KRS §61.101, et seq., to proceed to trial, as well as Appellant's wrongful discharge claim. (Id.). The wrongful discharge claim was dismissed by the Court prior to trial as duplicative of her whistleblower claim under controlling Kentucky law. Appellant's claim for injunctive relief was reserved, and ultimately abandoned by Appellant. Appellant's whistleblower claim was tried before a jury in Oldham Circuit Court on April 10-12, 2006. At the close of all evidence, the jury returned a unanimous verdict in favor of the Appellees, and on April 19, 2006, the Oldham Circuit Court entered its Judgment on the jury's verdict. (See Judgment, T.R. 382-384). Appellant then appealed challenging only the Oldham Circuit Court's grant of summary judgment to the Appellees on the claims of disability discrimination under KRS §344.010 and retaliation under KRS §344.280. (See Notice of Appeal, T.R. 394-395).

On September 5, 2008, the Court of Appeals affirmed the Judgment of the Oldham Circuit Court, ruling that the Appellant could not establish a prima facie case of disability discrimination under the Kentucky Civil Rights Act as there existed no evidence Appellees perceived Likins as unable to perform a class of jobs or a broad range of jobs. (See Exhibit B, pp. 7-8). The Court of

Appeals also ruled that the Oldham Circuit Court properly granted summary judgment on Appellant's retaliation claim as there existed no evidence Likins disclosed any discriminatory act, or even assuming she did, the evidence showed the decision to demote Appellant was made *before* Appellees were informed of her intent to retain counsel. Thus, no retaliation could be established for a demotion decided upon before counsel was retained and a complaint of discrimination made. (Id. at pp. 8-9).

On October 6, 2008, Appellant filed a Petition for Rehearing with the Court of Appeals under CR 76.32 suggesting the Court erred when analyzing her disability claim, arguing the "regarded as" prong of the analysis could not be subject to questions of intent or motive, and thus summary judgment was improper. Appellees submitted, as they do so now, that the analysis employed has little to do with intent and motive, and more to do with Appellant's complete absence of proof that her employer perceived her as unable to perform a class of jobs or a broad range of jobs. This "intent and motive" argument is but a veiled attempt to avoid summary judgment, when the reality is Appellant could not offer such evidence to the Court of Appeals, nor offer it now before the Supreme Court. The Appellant also claimed, as she does so now, that while the decision to demote occurred before she retained counsel, the actual "voted upon" demotion itself occurred after representation of counsel, and thus that should be enough to establish a prima facie case of retaliation. This analysis is flawed. The Appellees submit Appellant's convenient version of the facts amounts to an unworkable, illogical red herring in the face of clear, undisputed record evidence that the *decision* to demote Appellant, regardless of when it was finalized, was made *before* she sought advice of counsel. No causal link was established, summary judgment was proper, and on November 12, 2008 the Court of Appeals denied Appellant's Petition for Rehearing. (See November 12, 2008 Order

Denying, attached as Exhibit C). On December 17, 2008, Appellant filed a Motion for Discretionary Review with this Court. On March 11, 2009 this Court granted Discretionary Review limiting review to the issue of Appellant's disability discrimination claim. (See March 11, 2009 Order Granting Discretionary Review, attached as Exhibit D).

The Court of Appeals should be affirmed in every respect. As a threshold matter, the Appellant can present no evidence establishing a *prima facie* case of disability discrimination under the Kentucky Civil Rights Act. The Appellant is not disabled within the meaning of the Act, and even assuming that she is, the undisputed facts establish the Appellant failed to request *any* reasonable accommodation within the meaning of the Act.

ARGUMENTS

I. Standard of Review and Summary Judgment Standard in Kentucky.

The standard of review on appeal of summary judgment is whether the trial court correctly ruled that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Pearson v. National Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with the affidavits, if any, show that there is no material issue of fact and that the moving party is entitled to summary judgment as a matter of law." C.R. 56.03. Summary judgment should only be used when, as a matter of law, it is impossible for the non-movant to produce evidence warranting a judgment in his favor at trial. Steelvest v. Scansteel, 807 S.W.2d 476, 483 (Ky. 1991). However, "Steelvest did not repeal C.R. 56." Welch v. American Publishing Co. of Ky., 3 S.W.3d 724, 729 (Ky. 1999). The proper inquiry is whether evidence in the record establishes facts sufficient for a respondent to prevail. Id.

II. The Oldham Circuit Court Properly Granted Summary Judgment on Appellant's Claim of Disability Discrimination Under KRS § 344.010, et seq., and the Kentucky Court of Appeals Properly Affirmed That Judgment.

As stated above, summary judgment was properly granted on Appellant's claim of disability discrimination under KRS §344.010, et seq as the Appellant could not establish a *prima facie* case of disability discrimination. Pursuant to KRS §344.040(1), it is unlawful for an employer to discharge or otherwise discriminate against an employee because the person is a qualified individual with a disability. The Appellant bears the ultimate burden, however, of establishing a *prima facie* case of disability discrimination against the Appellees. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 706 (Ky. App. 2004). The Kentucky Court of Appeals has held:

> In order to establish a *prima facie* case of discrimination based on a disability, the plaintiff must show: (1) that he had a disability as that term is used under the statute (i.e., the Kentucky Civil Rights Act in this case); (2) that he was "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation; and (3) that he suffered an adverse employment decision because of the disability.

Id. (citing Henderson v. Ardco, Inc., 247 F.3d 645, 649 (6th Cir. 2001)(copy attached to Defendants' Motion for Summary Judgment)). In construing the Kentucky Civil Rights Act, Kentucky courts are permitted to refer to decisions interpreting the similar federal laws. Noel v. Elk Brand Manufacturing Co., 53 S.W.3d 95, 106 (Ky. App. 2000)("Since the purpose of the Kentucky Civil Rights Act with respect to individuals with disabilities is to adopt the polices of the ADA at the state level and safeguard those individuals from discrimination, the interpretations of the ADA which place the initial burden of proposing reasonable accommodations on the employee should also apply to KRS 344.030(1)."). See also Hash v. University of Kentucky, 138 S.W.3d 123, 125 (Ky. App.

2004); Hallahan v. The Courier-Journal, supra at 705-06 (state courts may look to federal case law in interpreting the Kentucky Civil Rights Act with respect to claims of disability discrimination).

Examining each element of the *prima facie* case, using the analysis employed in both state and federal case law, the Appellant failed to meet her burden of sustaining a claim of discrimination under KRS §344.010, et seq. Based upon the undisputed facts and law of this case, the Appellant could not establish she was an otherwise qualified individual with a disability.

Appellant was not disabled within the meaning of the Kentucky Civil Rights Act. Under KRS §344.010(4), a "disability" is defined as:

(a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;

(b) A record of such impairment; or

(c) Being regarded as having such an impairment.

It is insufficient for individuals attempting to prove disability status under the ADA to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999)(copy attached to Defendants' Motion for Summary Judgment, T.R. 206-240). Additionally, in Hallahan v. The Courier-Journal, supra at 707, the Kentucky Court of Appeals ruled that: "As 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." Relying on the United States Supreme Court case of Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999)(copy attached to Defendants' Motion for Summary Judgment, T.R.

206-240), the Court also held that 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 v. United Air Lines, Inc., supra at 489).

As this Court is aware, having an impairment alone does not make one disabled for purposes of the Kentucky Civil Rights Act. Howard Baer, Inc. v. Schave, 127 S.W.3d 589, 592 (Ky. 2003). Instead, the employee must prove that the impairment limits a major life activity and that such limitation is substantial. Id. "Major life activities include, among other things, walking, seeing, hearing, performing manual task, caring for oneself, speaking, breathing, learning, and working." Id. However, to claim that an impairment substantially limits the major life activity of working, the employee must show that his impairment "significantly restricts his ability to perform either a class of jobs or a broad range of jobs, and not just his current or a single job." Hallahan v. The Courier-Journal, supra at 709 (citing Sutton v. United Air Lines, Inc., supra at 491-92).

As applied here, the undisputed facts of this case establish the Appellant was not disabled within the meaning of the Kentucky Civil Rights Act. To begin, in Howard Baer, Inc. v. Schave, supra at 592, the Supreme Court of Kentucky listed those major life activities which a disability must substantially limit to satisfy KRS §344.010(4)(c), including walking, seeing, hearing, performing manual task, caring for oneself, speaking, breathing, learning, and working.[1] Focusing solely on whether the Appellees mistakenly perceived the Appellant as substantially limited in the major life

[1]While the Appellant's Complaint does not specify what major life activity is substantially limited, for the purposes of this brief the Appellees make the reasonable inference the relevant life activity at issue here is working.

activity of working, the Appellant, *not* the Appellees, bears the ultimate burden of establishing that her impairment substantially limits the major life activity of working. Hallahan v. The Courier-Journal, supra at 708-09 (again, as with actual impairments, the perceived impairment under the "regarded as" prong must be one that, if real, would substantially limit the life activity of the individual). However, a review of the undisputed facts and deposition testimony of the Appellant clearly establishes she has failed to meet this burden. In her deposition, the Plaintiff testified that shortly after leaving the Oldham County Animal Control Department she was employed as a security guard at Roderer Corrections, and was then employed with Wayside Christian Mission in a full time capacity. (See Deposition of Plaintiff, Vol. I, pp. 13-14). Appellant was able to work and to find work. The record is void of any evidence the Appellant, by virtue of her alleged disability, was significantly restricted to perform either a class of jobs or a broad range of jobs. Further, to satisfy such a burden, the Appellant must present such proof since the inability to perform a single job, or only her prior position with the Department, is inadequate. Hallahan v. The Courier-Journal, supra at p. 709 (citing Sutton v. United Air Lines, Inc., supra at 491-92). There exists no evidence that the Appellees regarded the Appellant as substantially impaired in either a class of jobs or broad range of jobs. In fact, the Appellees believed Appellant was fully capable of working, and made repeated efforts to encourage Appellant to return to work. Appellant was not disabled within the meaning of the Kentucky Civil Rights Act, and summary judgment was therefore proper on this claim as a matter of law.

The Appellant claims that Judge Kinser demoted her due to medical reasons, that she was concerned about her health, and felt that the pressure associated with the Appellant's job was too much for her to handle. (See Appellant's Brief, p. 11). However, this argument completely ignores

the legal analysis applicable to disability discrimination claims. To claim that an impairment substantially limits the major life activity of working, the employee must show that her impairment "significantly restricts [her] ability to perform either a class of jobs or a broad range of jobs, and not just [her] current or a single job." Hallahan v. The Courier-Journal, supra at 709 (citing Sutton v. United Airlines, Inc., supra at 491-92). Therefore, even assuming Judge Kinser made this statement, the reality is the Appellees never perceived or regarded the Appellant as being unable to perform a class of jobs or a broad range of jobs, while the Appellant has failed to point to any evidence which would establish otherwise. The fact that the Appellant may or may not have been able to perform *this* job, even if by a mistaken belief, is insufficient to sustain a disability discrimination claim and fails to satisfy the burden of a substantial limitation in the major life activity of working. Moreover, the undisputed facts establish that the Appellant was demoted to Animal Control Officer, a position in the same organization and very much in the same broad range of jobs as the Appellant had been employed. Additionally, the Appellant readily admits and agrees with the Appellees' assertion that she is able to work and to find work, as evidenced by her employment as a security guard at Roderer Corrections after leaving the Oldham County Animal Control Department, and her current employment with Wayside Christian Mission in a full time capacity. Put simply, there exists no evidence the Appellees regarded the Appellant, or perceived the Appellant, as substantially impaired in either a class of jobs or a broad range of jobs, thus she is not disabled within the meaning of the Kentucky Civil Rights Act. The Kentucky Court of Appeals correctly held:

> We believe that the Appellees' attempt to keep her in their employment and her ability to find employment after she left the Animal Control Department demonstrate that she was not unable to perform a broad range of jobs. Of particular importance is the fact that there is no evidence that Appellant was unable to perform the job of Animal Control Officer, as opposed to her original position as Director. Her own

> testimony was that she felt humiliated, not that she was unable to do the work. Because she was able to perform a broad range of jobs, she was not disabled as defined by KRS 344.010(4).

(See Exhibit B, p. 8).

The Appellant now claims before this Court that an employer's "motive and intent" is a question of fact that cannot be decided at the summary judgment stage, and thus summary judgment in this matter was improper. (See Appellant's Brief, p. 9). Appellant goes on to cite three or four federal decisions in support of this argument, yet fails to point out for this Court one very glaring difference between those cited cases and the case at bar. As will be more fully set out below, each decision cited by the Appellant deals with at least some presented evidence showing an employer *perceived* its employee as substantially limited in the major life activity of working. Unlike the present matter, in each of these decisions, the employee was capable of producing at least a shred of evidence that the employer perceived its employee as unable to perform a class of jobs or a broad range of jobs. This is a crucial distinction that the Appellant has simply ignored.

For instance, Appellant cites Wysong v. Dow Chemical Co., 503 F.3d 441 (6th Cir. 2007). In Wysong, the District Court found the employee failed to meet her prima facie case since her physician did not make a specific finding she was unable to perform a broad class of jobs due to her drug dependency. Id. at p. 452. Instead, and this is something the Appellant conveniently leaves out of her analysis, and is perhaps the most important part of the analysis, the Sixth Circuit held that a prima facie showing of disability requires *some* evidence of the employer's perception of the disability. In Wysong, the employee presented evidence that she was not permitted back to work at Dow until she was completely off all pain medications. Id. at p. 453. The Sixth Circuit Court of Appeals clearly held:

> The letter sent by Dow, stating that she was unfit to return to work because of her "condition," is the type of evidence that "gives an indication of the employer's perception about her suitability for a class of relevantly similar employment." (Internal citations omitted). Further, *Dow did not offer Wysong any other position within the Hanging Rock facility.* A reasonable fact finder could conclude that, under the facts presented, Dow perceived Wysong as being unable to work anywhere at the plant, and thus, unable to perform the same broad class of work anywhere else. *Because there was sufficient evidence put forth by Wysong that could lead a reasonable fact finder to conclude that Dow regarded her as disabled,* we conclude that the district court erred in granting summary judgment to Dow with respect to Wysong's disability claim based on drug dependency.

Id. (emphasis added).

This is a far cry from the case at bar. The undisputed facts of this case show Appellees believed Appellant was fully capable of working, and in fact made repeated efforts to encourage Appellant to return to work. The undisputed facts establish Likins was demoted to Animal Control Officer, a position in the *same* organization and very much in the same broad range of jobs as the Appellant had been employed. Additionally, the Appellant readily admitted and agreed that she is able to work and to find work, as evidenced by her employment as a security guard after leaving the Oldham County Animal Control Department, and her current employment with Wayside Christian Mission in a full time capacity. Thus, based upon the record evidence, the Court of Appeals was correct when it stated, "Of particular importance is the fact that there is no evidence that Appellant was unable to perform the job of Animal Control Officer, as opposed to her original position as Director." (See Exhibit B, p. 8). The crucial distinction between Wysong and this case lies in the evidence presented. In Wysong, the employee was able to demonstrate Dow's "perception" of her inability to perform a class of jobs or a broad range of jobs, with Dow's letter forbidding her from returning to work. Id. Yet in this matter, the evidence shows Appellees encouraged Appellant to

return to work. Dow did not offer any other position with its organization. Id. Appellees offered Appellant another similar position with the same organization. "Because there was sufficient evidence . . . that Dow regarded her as disabled," summary judgment was improper in that case. Because there was *no* such evidence offered in the present case, summary judgment was proper.

The other cases cited in Appellant's Brief are equally distinguishable on their face for the very same reason. In Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2000), the employee brought forth "substantial evidence" that his employer perceived him as unable to perform a "broad class of jobs." In Henderson v. Ardco, Inc., 247 F.3d 645, 654 (6th Cir. 2001), the employee "brought forward evidence that the defendant [employer] perceived there was no job for her at the Ardco plant, and this gives an indication of the employer's perception about her suitability for a class of relevantly similar employment." In Moorer v. Baptist Memorial Health Care, 398 F.3d 469, 484 (6th Cir. 2005), the employer perceived the employee "as unable to perform any job that would be appropriate for him given his training, knowledge, skills and abilities." Again, these cases, like Wysong, are clearly distinguishable from the case at bar. The Appellant has not come forward with any evidence the Appellees perceived her as unable to work in *any* relevant position at their place of business. In fact, the complete opposite of this is true, and the Appellees perceived her as *able* to work as an Animal Control Officer.

Relying on Moorer v. Baptist Memorial Health Care, supra, the Appellant then suggests that the Sixth Circuit "goes a step further" arguing that the Appellees perceived her as incapable of performing a "broad class of work" since she was not asked to perform "managerial work." (See Appellant's Brief, p. 10). That is not what the Appellees did in this case, that is not what the evidence shows, and frankly, this is not what Moorer even holds. Whether or not the Appellant was

"disqualified from managing her former employees" in the Animal Control office is not the test. (See Appellant's Brief, p. 11). Simply because an employee is demoted to a non-managerial position is not proof of an employer perceiving that person as unable to perform in all managerial positions. To the contrary, the test is whether, based on the skills, knowledge and experience of the employee, the employer perceives the employee as unable to perform *any* job that is skill, knowledge and experience appropriate. Moorer, supra at p. 484. Clearly the Appellees did not perceive Appellant as unable to perform all jobs that were skill, knowledge and experience appropriate, as the undisputed facts and evidence show she was *offered* such a position. Whether or not "manager" is in her job description is a red herring, and completely misses the point. The fact that the Appellant may or may not have been able to perform a particular, specific job is not the test. Again, to claim an impairment substantially limits the major life activity of working, the employee must show that his impairment "significantly restricts his ability to perform either a class or jobs or a broad range of jobs, and not just his current or a single job." Hallahan v. The Courier-Journal, 138 S.W.3d 699, 709 (Ky. App. 2004).

With respect to Appellant's disability claim, none of the cases cited in her Brief are applicable, much less relevant, to the present matter. Unlike those decisions, Appellant has failed to present any evidence Appellees perceived her as unable to perform a class of jobs or a broad range of jobs. The Court of Appeals did not overlook a material fact in the record, a controlling statute or decision, misconceive the issues presented on appeal, nor misapply the applicable law. Unlike the decisions cited by the Appellant, Appellees provided Likins employment within the same organization, and in the same broad range of jobs as she had been employed previously. Appellees believed Appellant was fully capable of working, and they made repeated efforts to encourage

Appellant to return to work. The Appellant was not disabled within the meaning of the Kentucky Civil Rights Act, summary judgment was therefore proper, and thus the decision of the Kentucky Court of Appeals should be affirmed.

III. The Oldham Circuit Court Properly Granted Summary Judgment on Appellant's Claim of Retaliation Under KRS §344.280, and the Kentucky Court of Appeals Properly Affirmed That Judgment.

As stated above, when this Court granted Discretionary Review, it did so limiting review to the issue of Appellant's disability discrimination claim. In the March 11, 2009 Order Granting Discretionary Review, the Court plainly stated, "The issue is limited as to whether Summary Judgment was appropriate as to the disability discrimination claim." (See Exhibit D). Instead of limiting the briefing of this matter to her disability discrimination claim as the Court ordered, the Appellant presents a full discussion in her Brief of her remaining claim for retaliation under KRS § 344.280. (See Appellant's Brief, pp. 13-17). As a threshold matter, review of Appellant's retaliation claim was not granted, and thus summary judgment on that claim stands affirmed. However, as the Appellant has again raised the issue before this Court, and assuming further discussion is warranted, the Appellees are therefore compelled to respond to the same.

In support of the retaliation claim asserted under KRS § 344.280, the Appellant claims the Appellees conspired and retaliated against her because of her disability and/or gender. (See Plaintiff's Complaint, ¶40, T.R. 1-12). As a threshold matter, the Kentucky Civil Rights Act may protect against retaliation for the reporting or disclosing of the discrimination itself, but KRS §344.280 does not provide a mechanism in which to support a private cause of action for an employee merely informing his or her employer of an alleged disability. In other words, KRS §344.280(1) provides that it is unlawful to retaliate or discriminate in any manner against a person

"because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter." Kentucky Center for the Arts v. Handley, 827 S.W.2d 697 (Ky. App. 1991)(where an employer articulates a legitimate, non-retaliatory reason for the decision not to promote an employee, the employee's failure to show that "but for" her filing of an earlier discrimination action her non-promotion would not have occurred, the reasons remain unrefuted and an intent to discriminate is not proven); Driggers v. City of Owensboro, 2004 W.L. 1922182 (6th Cir. 2004)(copy attached to Defendants' Motion for Summary Judgment, T.R. 206-240)(a city's threat to discipline a female police officer for her misconduct in connection with the disciplinary investigation of a co-worker was not in retaliation for the officer's prior employment discrimination complaints).

The claim of retaliation finds its basis in the actual disclosure of the Kentucky Civil Rights Act violation. The record here is void of any evidence that the Appellant made any type of claim of discrimination against the Oldham County Fiscal Court which was then the *cause* of her alleged demotion and/or termination. See Driggers v. City of Owensboro, supra (an employee must present evidence of a causal connection between her complaints about discrimination and the end of her employment to sustain a claim for violation of the Kentucky Civil Rights Act). Therefore, Appellant's claim of retaliation under KRS §344.280 fails as a matter of law and the Court of Appeals properly affirmed summary judgment.

Even assuming the Appellant sufficiently stated a claim under KRS §344.280, to sustain a *prima facie* case of retaliation, it must be shown that (1) the Appellant 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. Kentucky Center for Arts v. Handley, supra at 701; Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 804 (Ky. 2004)(there must exist a causal connection between a former employee's formal discrimination *complaint* and former employer's alleged adverse employment action). Again, the record is completely void of any evidence the Appellant made any claim of discrimination against the Appellees which was then the cause of her termination.

Originally, in response to the Appellee's Motion for Summary Judgment, the most the Appellant could present in this regard is that she informed the Appellees of her alleged disability, and that because the Appellees regarded and/or perceived her as having a disability, she was subjected to termination. As the Kentucky Civil Rights Act may protect against retaliation for the reporting or disclosing of the discrimination itself, there simply does not exist a private cause of action for a claim of retaliation as asserted here under KRS §344.280. On appeal, and now before this Court, similar to her switching legal gears in support of her disability discrimination claim the Appellant has abandoned this original argument, and *now* claims she satisfied KRS §344.280(1) since "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. " (See Appellant's Brief, p. 14).

There are a number of things wrong with this assertion. First, Appellant claims Appellees "knew" she had retained counsel when "she expressly told" them so during that very meeting. (Id.). This is confusing and contradictory. There exists no evidence Appellees "knew" she had an attorney prior to her telling them *at that very meeting*, so contrary to Appellant's suggestion, the Appellees were not aware of her retaining counsel prior to their decision to demote her. Second, merely

expressing to an employer of a desire to consult with an attorney, by itself, does not qualify as opposing a practice declared unlawful by the Kentucky Civil Rights Act. KRS §344.280(1). Third, stating a desire to consult with an attorney does not qualify as making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the Kentucky Civil Rights Act. Id. Fourth, conveniently Appellant has failed to cite *any* law that expressing a desire to consult with an attorney qualifies as a protected activity under KRS § 344.280. Lastly, and maybe most importantly, the retaliation Appellant claims to have suffered (i.e. her demotion on April 22, 2003) occurred *prior* to her expressed desire to consult an attorney and letter to Jim Morse requesting her right to a hearing before Fiscal Court regarding the offered position of Animal Control Officer. This certainly begs the question: How can the Appellant have been retaliated against for consulting with an attorney and writing a letter to Jim Morse, when the employment action had already occurred? Put another way, how could Appellant's conduct have *caused* a demotion when the demotion had already been decided? The answer is that Appellant's desire to consult with an attorney and her letter to Jim Morse had nothing to do with the employment action, and absent Appellant's unsupported legal theories, no evidence of retaliation under KRS §344.280 exists in this case.

KRS §344.280 does not provide a mechanism in which to support a private cause of action for an employee merely informing his or her employer of an alleged disability. Despite the Appellant's assertion that she sought legal counsel in connection with her employment, there exists no evidence of any kind that the Appellant made *any* type of claim of discrimination against the Oldham County Fiscal Court which was then the cause of her alleged demotion and/or termination. See Driggers v. City of Owensboro, supra (an employee must present evidence of a causal

connection between her *complaints* about discrimination and the end of her employment). Summary judgment was therefore proper on Appellant's retaliation claim.

Finally, Appellant's other stated argument in support of this claim is that the Court of Appeals "discounted or even ignored several important dates and facts" in support of her claim for retaliation under KRS § 344.280. (See Appellant's Brief, p. 15). In a somewhat novel manipulation of the undisputed record evidence and deposition testimony, the Appellant now claims the April 22, 2003 decision to demote her should basically be ignored, and that because she indicated her intent to seek advice of counsel before the Fiscal Court's meeting on May 6, 2003, the retaliation claim should therefore survive. This unworkable, illogical time line not only ignores the undisputed record, but is equally unsupported by any valid legal authority. In other words, taking Appellant's argument to its unsupported conclusion, County Judge Executive Mary Ellen Kinser informed the Appellant on April 22, 2003 that the decision had been made to demote her, but in the Appellant's mind, that decision either does not exist or does not count. Instead, Appellant would have this Court believe she sought legal advice, and then on May 6, 2003 the Fiscal Court voted to demote her *because* she sought legal advice. This is a convenient interpretation of the undisputed facts since, in one breath the Appellant freely admits and acknowledges that she sought legal counsel to protest Judge Kinser's decision to demote her, and in the next breath seems to suggest that that decision had nothing to do with her retaining counsel. The Fiscal Court meeting did not occur because Appellant sought legal advice. The Fiscal Court meeting occurred because the decision had been made to demote the Appellant. Appellant's attempt to spin the time line to her favor should be ignored. This is a novel argument, but an illogical one.

It must not be forgotten that to establish a prima facie case of retaliation requires Appellant to demonstrate (1) that she engaged in a protected activity; (2) that this protected activity was known

by the Appellees; (3) that the Appellees then took an adverse employment action; and (4) that there is a causal connection between the protected activity and the adverse employment action. Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 803 (Ky. 2004). This requires proof that the Appellees were "aware of the protected activity at the time that the adverse decision was made," and "there is a close temporal relationship between the protected activity and the adverse action." Id. at p. 804. Appellant's argument cannot satisfy this burden. Appellant's protected activity was not "known" by the Appellees, since the decision to demote her was made *before* she engaged in the protected activity. More importantly, there simply is no causal connection between Appellant retaining counsel and the April 22, 2003 decision to demote her, or for that matter, the May 6, 2003 Fiscal Court meeting. The Appellant may not rely on the mere fact that an adverse employment action simply followed a protected activity. Instead, the Appellant must link her seeking legal advice to Appellees' decision to demote her. Appellant simply cannot do this.

The evidence in this case shows the decision to demote Appellant was made before Appellees were ever informed of her intent to retain counsel. The Court of Appeals was correct when it ruled, "there can be no retaliation if a demotion is decided upon before an employee can retain counsel or make a complaint about discrimination." (See Exhibit B, p. 10). Whether the Fiscal Court did not make the demotion "official" until May 6, 2003 is largely irrelevant. The decision to demote her, even if not as "official" as Appellant would like, was made before she retained counsel. Further, Appellant readily concedes her reason for seeking legal advice was *because* of this decision to demote her and to protest the same. She cannot simply ignore the undisputed facts of the case now in an effort to create a factually and legally unsupported claim of retaliation. Summary judgment was proper, the Court of Appeals' Opinion was rendered correctly, and thus, even assuming

Appellant's retaliation claim is properly before this Court for review, this Court should affirm that ruling.

CONCLUSION

The Appellant has failed to establish the Kentucky Court of Appeals improperly affirmed summary judgment to the Appellees on the claim of disability discrimination under KRS §344.010. Appellant's claim of disability discrimination fails as a matter of law as the *prima facie* burden can not be satisfied. Further, as this Court limited review to Appellant's disability discrimination claim, summary judgment on Appellant's retaliation claim under KRS § 344.280 should therefore stand. Assuming that claim is properly before this Court for review, KRS § 344.280 does not provide a mechanism in which to support a private cause of action for an employee merely informing his or her employer of an alleged disability, while there does not exist evidence of any kind that the Appellant made a claim of discrimination against the Oldham County Fiscal Court which was then the cause of her alleged demotion and/or termination.

WHEREFORE, the Appellees respectfully request that this Court affirm the decision of the Kentucky Court of Appeals.

Respectfully submitted,

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