

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



**ADMINISTRATIVE OFFICE OF THE
COURTS**

APPELLANT/CROSS-APPELLEE

v.

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

BEVERLY MILLER

APPELLEE/CROSS-APPELLANT

**BRIEF OF APPELLANT/CROSS-APPELLEE
ADMINISTRATIVE OFFICE OF THE COURTS**

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of this **Brief of Appellant/Cross Appellee Administrative Office of the Courts** was served by first class U.S. mail, postage prepaid, this 25th day of November, 2013 upon the following: Thomas E. Clay, CLAY FREDERICK ADAMS, PLC, Meidinger Tower, Suite 101, 462 South Fourth Street, Louisville, Kentucky 40202; Clerk of Jefferson Circuit Court, Louis D. Brandeis Hall of Justice, 600 W. Jefferson Street, Louisville, Kentucky 40202; Honorable Karen A. Conrad, Special Judge, Oldham County Courthouse, 100 W. Main Street, LaGrange, Kentucky 40031-1116. The undersigned further certifies that the Appellant/Cross-Appellee has not withdrawn the record on appeal.


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INTRODUCTION

In this due process case originally filed in November 2001, Appellant/Cross-Appellee, the Administrative Office of the Courts (“AOC”) appeals from the trial court’s December 3, 2012 Order which, by adopting an unduly literal definition of the term “trial court administrator,” found that the position of “Jury Administrator” or “Jury Pool Manager” is not excepted from the tenure provisions under the Court of Justice (“COJ”) personnel policies. As a result, despite its recognition that the AOC clearly “intended her position to be non-tenured and included in the term ‘trial court administrators,’” the trial court erroneously concluded that Appellee/Cross-Appellant, Beverly L. Miller (“Miller”) was nevertheless a tenured employee entitled to due process protections at the time of her termination more than 12 years ago.

STATEMENT CONCERNING ORAL ARGUMENT

The AOC requests oral argument as it believes such argument will assist the Court in reaching a full understanding of the lengthy procedural history, underlying facts and important legal issues presented in this case.

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I. STATEMENT OF THE CASE

A. Procedural History

In April 2001, Miller was fired from her job as the Jefferson County Jury Pool Manager, a position she held for more than 24 years. Shortly thereafter, Miller filed an action in the United States District Court for the Western District of Kentucky against the AOC, then Jefferson Circuit Court Chief Judge, Thomas Wine ("Judge Wine") (in his official and individual capacity), and then Jefferson County Chief Court Administrator, Tim Vize ("Vize") (in his official and individual capacity), asserting claims for violation of her constitutional due process rights and the Kentucky Whistleblower Act, as well as alleged violation of her free speech rights under the First Amendment. The District Court dismissed Miller's claims against the AOC based on 11th Amendment immunity (*see Miller v. Admin. Office of the Courts*, Case No. 3:01 CV-339-S, 2001 WL 1792453, *1-2 (W.D. Ky. Sept. 11, 2001), Apx. Tab 3), requiring Miller to refile her claims against the AOC in Jefferson Circuit Court.¹ Miller's state court action was then held in abeyance pending resolution of Miller's claims against Judge Wine and Vize in the federal District Court.

The District Court granted summary judgment to Judge Wine and Vize on Miller's First Amendment, Due Process and Whistleblower claims, a decision affirmed on appeal by the Sixth Circuit. *See* Memorandum Opinion, *Miller v. Admin. Office of the Courts*, Case No. 3:01 CV-339-S (W.D. Ky. Jun. 24, 2004), Apx. Tab 4; *Miller v. Admin.*

¹ Because Judge Wine, as well as Hon. James Shake (Judge Wine's successor as Jefferson Circuit Court Chief Judge) were named Defendants in Miller's companion Federal Court action and because other members of the Jefferson County Judiciary had personal knowledge of the disputed facts underlying Miller's Complaint, Jefferson Circuit Court Judge Stephen K. Mershon was disqualified from presiding over the case and the Commonwealth of Kentucky Metro Region of Judicial Circuits assigned Hon. Judge Karen A. Conrad as Special Judge. [R. Vol. 1, pp. 61-62, Assignment of Special Judge dated February 25, 2002].

Office of the Courts, Case No. 3:01 CV-339-S, 2005 WL 1244988, *2-3 (W.D. Ky. May 23, 2005), Apx. Tab 5; *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 899 (6th Cir. 2006), Apx. Tab 6. The District Court found that Miller's Whistleblower claim failed because she could not "establish that she reported the type of information which is protected by the statute." *Miller*, 2005 WL 1244988 at *2, Apx. Tab 5. With respect to Miller's due process claims, the court assumed, without deciding, that Miller had a protected property interest in her job, but granted summary judgment to Judge Wine and Vize on the basis of qualified immunity, finding that their decision to terminate Miller was reasonable given the advice they received when they investigated whether she could be terminated as an at-will employee. *Miller*, Mem. Opin., Apx. Tab 4.

On appeal, the Sixth Circuit affirmed summary judgment on both claims, but on bases different from those relied upon by the District Court. As to Miller's due process claims, the Sixth Circuit acknowledged conflicting evidence regarding Miller's status as a tenured employee with a property interest in her job. *Miller*, 448 F.3d at 896, Apx. Tab 6. Nevertheless, the Court upheld summary judgment on the basis of qualified immunity, holding that Judge Wine and Vize both acted reasonably in concluding Miller was not tenured and that their decision to terminate Miller "was simply not 'objectively unreasonable' based on the information Vize and [Judge] Wine had received in their pre-termination investigation." *Id.* at 897.

As to Miller's Whistleblower claim, the Sixth Circuit held that under *Cabinet for Families & Children v. Cummings*, 163 S.W.3d 425, 434 (Ky. 2005), which this Court decides during the pendency of Miller's federal appeal, there is no individual liability under the Act. *Miller*, 448 F.3d at 897, Apx. Tab 6. Because Miller's individual capacity

claims against Judge Wine and Vize failed as a matter of law, there was no need for the Sixth Circuit to review the District Court's conclusion that Miller's claim failed because she could not "establish that she reported the type of information which is protected by the statute." *Id.*

Once Miller's federal court claims became final, the AOC filed a motion to dismiss Miller's state court claims based on res judicata. The trial court granted the AOC's motion to dismiss, a decision this Court² reversed on appeal, remanding to determine:

Miller's status as a tenured employee entitled to due process protection afforded by the administrative policies of the AOC, and if she was a tenured employee, a finding of whether those policies were followed in regard to Miller's termination, and in regard to whether Miller reported information that would entitle her to protection under the Kentucky whistleblower statute.

Id. at 877.

On remand to the trial court, the parties filed cross motions for summary judgment on the issue of Miller's tenure status. The AOC argued that Miller was an at-will, non-tenured employee who did not have a property interest in her job and, therefore, possessed no procedural due process rights as a matter of law. Miller argued that she was a tenured employee entitled to due process. On December 3, 2012, the trial court issued an Order granting Miller's Motion for Summary Judgment and denying the AOC's Motion for Summary Judgment on her tenure claim. *See* December 3, 2012 Order, Apx. Tab 1. The AOC filed a Motion to Alter or Amend the Court's December 3, 2012 Order seeking clarification that Miller's claim for monetary damages is barred under the law of

² Although Miller's appeal was originally filed in the Court of Appeals, the case was transferred to this Court because it involves an action against an agency of the Court of Justice which can only properly be decided by this Court. [R. Vol. 5, pp. 653-654, August 21, 2008 Supreme Court Order Granting Transfer.]

the case doctrine and *Ellison v. Commonwealth*, 994 S.W.2d 939 (Ky. 1999). On January 10, 2013, the trial court entered a final and appealable Order granting the AOC's Motion and amending its December 3, 2012 Order to state that Miller's "relief herein is limited to a due process hearing on her termination under Section 6 of the April 19, 1999 COJ Personnel Policies, and that Miller is precluded from recovering any back pay or wages from the date of her termination under Section 6.04(c) of the COJ Personnel Policies." See January 10, 2013 Order, Apx. Tab 2. On February 4, 2013, the AOC filed a timely Notice of Appeal of that portion of the Court's December 3, 2012 Order granting summary judgment on Miller's claim that she is a tenured employee entitled to due process protections under the undisputed facts of this case.³

B. Factual Background

For over 20 years, Miller was the Jury Pool Manager for the Jefferson Circuit Court hired to "serve at the pleasure of the Court." [R. Vol. 5, p. 743, Miller Appointment Letter.] Miller's jury pool position initially started as an 18-month government funded project to develop a more efficient jury management system. [R. Vols. 5-6, pp. 745-768, Davis Affidavit, ¶ 6.] COJ later budgeted money to maintain the project after its expiration, renaming Miller's position from "Aide Coordinator" to "Jury Pool Manager." [*Id.*; see also R. Vol. 6, p. 778, Request for Personnel Action ("PAR") from Miller's Personnel File.]

³ The AOC did not appeal that portion of the trial court's December 3, 2012 Order granting summary judgment in its favor on Miller's Whistleblower claim. Miller, however, filed a Notice of Cross-Appeal [R. Vol. 7, pp. 1030-1031, February 7, 2013 Notice of Cross-Appeal] seeking appellate review of that issue. [See also Cross-Appellant's Prehearing Statement, filed February 21, 2013]. In accordance with CR 76.12(2), the AOC will address only the tenure issue in its Appellant's Brief and will respond to any issues raised by Miller concerning the dismissal of her Whistleblower claim in its combined Reply/Response brief.

As explained by William E. Davis ("Davis"), AOC Director at the time of Miller's temporary appointment and subsequent permanent appointment as Jury Pool Manager:

Throughout Kentucky, the management and administration of the trial court's jury needs was the responsibility of the trial court administrator in each county. Due to its size and the larger number of jury cases handled per year, Jefferson Circuit Court was identified as having a particular need for the separate administration of its jury pool system. As a result, an initial study was conducted and in August 1976, the AOC, with the approval of the Chief Justice, applied for and received a grant from the United States Department of Justice Law Enforcement Assistance Administration (LEAA) to create the Jefferson County Jury Management Project. The project was designed to develop and implement a less expensive and more efficient jury management system in Jefferson County with potential future state-wide application. Under this program, the Chief Judge of the Jefferson Circuit Court was given the discretion to hire a small jury management staff who reported directly to him. The funds obtained from the LEAA were used to defray the start up costs of the program. The grant was funded for a period of approximately eighteen months, after which time the Court of Justice budgeted money for the permanent continuation of the project. The jury management staff who worked on this project both before and after the expiration of the LEAA grant, held unclassified positions and reported to and served at the discretion of their appointing authority, the Chief Judge of the Jefferson Circuit Court.

[R. Vols. 5-6, pp. 745-768, Davis Aff., ¶ 6.]

The COJ Personnel Policies adopted by this Court pursuant to Sections 110(5)(b) and 116 of the Kentucky Constitution reflect that COJ employees, like Miller, who serve at the pleasure of their appointing authority are all non-tenured, at-will employees. [R. Vol. 6, pp. 826-866 at Section (1)(3)(a, b, f, g, h, l and m) (listing the non-tenured positions in the COJ as including: secretaries for the judges; law clerks and staff attorneys; principal administrative officials of the Supreme Court, Court of Appeals, and Administrative Office of the Courts; trial commissioners; master commissioners; trial

court administrators; and federally funded time-limited positions).]⁴ As Davis explained, Miller's position as Jury Pool Manager for Jefferson County encompassed the jury management duties that were handled by the trial court administrators in other counties. As such, the position was never intended to be tenured, and no approval was ever given for the position to become tenured during the time he was AOC Director, from 1975 to 1979. [R. Vols. 5-6, pp. 745-768 at ¶¶ 3, 5-6, 8.] Consistently, Miller's personnel file reflects that she was an unclassified, non-merit and, therefore, non-tenured employee and that her status never changed throughout her 20-plus years of employment. [R. Vol. 6, pp. 770-795.]

When a change in state law permitted employees to simultaneously draw both retirement and salary, Miller retired to take advantage of the new law and was subsequently rehired as the "Jury Pool Manager" in April 1999. Eventually, Miller's position as "Jury Pool Manager" was reclassified as a "Professional Services Supervisor," but she maintained the working title of "Jury Pool Manager." [R. Vol. 6, p. 791.] Importantly, when rehired in 1999, Miller was still not a "merit" employee. [R. Vol. 6, p. 797.] At all relevant times, Vize, the then Chief Jefferson Circuit Court Administrator, and the Chief Judge of the Jefferson Circuit Court supervised Miller.

In 2000, Judge Wine became Chief Circuit Court Judge and began working with Vize to supervise Miller's work with the jury pool. Miller's post-retirement rehire, however, was not going well and she was not performing her job as she should. In fact, things were so bad that in the early part of 2001, Judge Wine, Vize, the AOC, and the COJ began discussing Miller's termination. According to Judge Wine, there were "some

⁴ The pre-termination procedures are outlined in Section 6 of the 1999 COJ Personnel Policies and in Section 5 of the 1989 COJ Personnel Policies. The relevant provisions of Section 5 and 6 are virtually identical with the exception of the numbering.

discussions about problems that I was having in working with Ms. Miller, the fact that I could not seem to meet her each and every demand satisfactorily, and that it was creating a problem for me to work with her.” [R. Vol. 6, p. 804, Wine depo.]⁵ Judge Wine summed up by saying that he found Miller to be a hindrance, and not a help to him as Chief Judge. [R. Vol. 6, pp. 812-813, Cont. Wine depo.⁶ at pp. 24-26.]

Bombarded with complaints from Miller about her workload, Judge Wine and Vize began cross-training other personnel to assist with the jury pool, provided a full-time, temporary position to cover absences, and obtained new computer software. [R. Vol. 6, pp. 815-818.] Judge Wine responded to Miller’s repeated concerns in a memo dated March 13, 2001, encouraging her “to look for solutions ‘outside the box’” since “more funding from the AOC for new positions in the jury office . . . was not available.” [*Id.*] Judge Wine’s and Vize’s efforts, however, did not satisfy Miller.

On April 19, 2001, Miller sent an email with yet more complaints. But this time she did not limit the message to her supervisors, Judge Wine and Vize. Instead, she broadcast the email to AOC Director Cicely Lambert (“Lambert”), AOC General Manager of Accounting and Purchasing Lee Guice, and 30 judges throughout the Commonwealth of Kentucky, including then Kentucky Supreme Court Justice Martin Johnstone. [R. Vol. 6, pp. 820-821.] Miller’s email complained that her allegedly excessive workload prevented her from using grant money from the Louisville and Kentucky Bar Foundations to update a jury orientation video and that the jury pool was “critically understaffed.” *Id.*

⁵ July 18, 2002 Deposition of Judge Wine is referred to herein as “Wine depo.”

⁶ March 1, 2003 Continued Deposition of Judge Wine is referred to herein as “Cont. Wine depo.”

Miller's complaint of her alleged workload/staffing problems was a veiled attempt to excuse her office's failure to produce the jury orientation video, which failure resulted in a request for a refund of the grant. Judge Wine considered Miller's actions in broadcasting her complaint to judges throughout the Commonwealth as an act of insubordination that certainly "didn't help her cause" when combined with her failing job performance. *See Miller*, 448 F.3d at 892, Ap. Tab 6; *see also* R. Vol. 6, p. 808, Wine depo. As Judge Wine testified, "[w]e were in the process of working with AOC, COJ, to determine what needed to be said, how the letter needed to read [to effectuate Miller's termination], and those discussions had finished a week prior [to receiving her email]." *Id.* More specifically,

Judge Wine asked Vize to contact the AOC to determine the procedures necessary to terminate Miller. Vize contacted the AOC Director, Cicely Jaracz Lambert; the AOC Personnel Director, Rita Cobb; and an attorney with the AOC, Kevin Smalley. All three advised that Miller was a non-tenured, at will employee. Judge Wine then spoke with all three directly, confirming their information. He also spoke with Kentucky Supreme Court Justice Martin Johnstone, who told Judge Wine that Kentucky's Chief Justice, Joseph Lambert, had also indicated that Miller was a non-tenured, at-will employee.

Miller, Mem. Opin., Apx. Tab 4.

After researching the proper procedures to follow, Judge Wine met with Miller, Vize, and Miller's assistant and asked Miller to resign. When she refused, Judge Wine terminated Miller's employment. In his termination letter, Judge Wine:

[F]irst recognized that Miller had raised concerns about staffing issues in the jury-pool office, but reiterated his disagreement with her assessment that they truly needed more staff. Several corrective measures had already been implemented, even some suggested by Miller herself, but to the extent that any further workforce issues remained, Wine concluded that better time management by Miller herself would have solved the problem.

Miller, 448 F.3d at 892, Apx. Tab 6. [See also R. Vol. 6, pp. 823-824, Termination letter.] Judge Wine further expressed dismay that “[a]fter our repeated attempts to help, you have continued to display conduct that is unprofessional and inappropriate You have been hostile and argumentative and displayed insubordinate behavior to your immediate supervisor, Mr. Vize.” [R. Vol. 6, pp. 823-824.] Following her termination, Miller filed her federal and state court complaints alleging violation of her due process rights.

C. The Trial Court’s Order

Despite the evidence concerning Miller’s non-tenured status, the trial court determined that Miller was a tenured employee entitled to due process. In reaching its conclusion, the trial court found that the COJ Personnel Policies in effect at the time of Miller’s most recent employment created an implied contract which governed her status as a tenured or non-tenured employee. December 3, 2012 Order, p. 10, Apx. Tab 1. The court held that a contract must be construed according to its plain language and that the words and phrases used therein must be given their “usual meaning” to determine the parties’ intent. *Id.* As the interpretation of a contract is an issue of law, the determination of whether Miller is tenured or non-tenured under the policies is a question to be determined by the court. *Id.*

The trial court found that Miller was re-hired on April 1, 1999 as “Jury Pool Manager” and her position was reclassified to “Professional Services Supervisor” with the working title “Jury Pool Manager” on July 1, 1999. *Id.* at pp. 13-14. The April 19, 1999 COJ Personnel Policies in effect at the time of Miller’s rehire state that they apply to all appointed employees and appointed officials in the Court of Justice unless specific

exceptions are “clearly indicated.” *Id.* at p. 15. The policies add that the tenure provisions:

. . . are not applicable to the following persons:

- (a) secretaries for judges in all courts;
- (b) law clerks and staff attorneys (acting in the capacity of law clerks) for judges in all courts;
- (c) one chief deputy clerk for each Circuit Court Clerk as designated by the Circuit Clerk;
- (d) one additional deputy clerk for each 15 deputy clerks employed by each Circuit Court Clerk as designated by the Circuit Clerk;
- (e) a member of the family (by blood or marriage) of the appointing authority within the third degree of kinship hired after February 24, 1989;
- (f) principal administrative officials of the Supreme Court; Court of Appeals; and Administrative Offices of the Courts as follows: the director, deputy director, assistant director, general managers, managers, executive assistants, and other individuals so designated upon appointment;
- (g) trial commissioners;
- (h) master commissioners;
- (i) temporary employees;
- (j) court reporter/secretaries;
- k) court reporters hired after February 24, 1989;
- (l) trial court administrators; and
- (m) federally funded time-limited positions.

These exceptions mean that the employees and officials listed above *do not have tenure and do not have a right of appeal of grievances. Such employees shall not serve a probationary period.*

Id. at p. 6 (emphasis in original).

The court recognized that *“[i]t is clear to the Court from a review of the record that AOC intended [Miller’s] position to be non-tenured and included in the term ‘trial court administrators.’”* *Id.* at p. 16 (emphasis added). Nevertheless, the court concluded that because neither the dictionary definition of “trial court” nor “administrator” “included the concept of jury pool management” or “any allusion to the job title ‘Professional Services Supervisor,’” Miller’s position did not fall within the exemption for trial court administrators under the COJ Personnel Policies. *Id.* In explaining its conclusion, the trial court reasoned:

By its plain and unambiguous terms, Miller’s position as Professional Services Supervisor with the working title Jury Pool Manager is not included or “clearly indicated” in the list of exemptions. Nowhere does Ms. Miller’s position appear on the list or anywhere in the personnel policies. The language chosen by the AOC itself leaves no room for interpretation. The policies are clear, if one is not expressly exempted under Section 1(2) and Section 1(3), then one is a tenured employee.

Moreover, Miller was given a probationary increment on March 7, 2000 applicable only to tenured employees under Sections 5.04(1) of the personnel policies. This increment was given six months after her status change from part-time to permanent full-time employment.

Accordingly, Miller, as a tenured employee is entitled to the due process protections afforded her under the April 19, 1999 COJ personnel policies.

Id.

ARGUMENT

I. STANDARD OF REVIEW.

The sole issue to be decided in this appeal is whether Miller is a tenured employee under the COJ Personnel Policies as adopted by this Court pursuant to Sections 110(5)(b) and 116 of the Kentucky Constitution. Typically, because summary judgment involves only legal questions and the determination of disputed issues of material fact, this Court need not defer to the trial court’s decision and reviews the decision *de novo*. *West v. KKI*,

LLC, 300 S.W.3d 184, 188 (Ky. App. 2008). However, this case presents a unique position on appeal.

As this Court held in *Jones v. Admin. Office of the Courts*, 171 S.W.3d 53 (Ky. 2005):

Except for matters in which the United States Supreme Court has the right of review over the judgments of this court, the jurisdiction to hear and determine any cause that has as its ultimate objective a judgment declaring what this court must do or not do is vested exclusively in this court, for the very simple reason that our Constitution makes it the highest court of the state and gives it the authority to “exercise control of the Court of Justice.”

quoting *Ex Parte Farley*, 570 S.W.2d 617, 622 (Ky. 1978). See also *Martin v. Admin. Office of the Courts*, 107 S.W.3d 212, 214 (Ky. 2003). Accordingly, as the Court recently held in *Travis v. Minton*, 2013 Ky. Unpub. LEXIS 47 *3 (Ky. Aug. 29, 2013),⁷ neither the circuit court nor Court of Appeals has subject matter jurisdiction to decide challenges to the termination of a non-tenured employee under the provisions of the COJ Personnel Policies. It stands to reason then that only this Court has the authority to determine the tenured or non-tenured status of an employee under those Policies.

“It is well-established that a judgment entered by a court without subject matter jurisdiction is void. ... In addition, since subject matter jurisdiction concerns the very nature and origins of a court’s power ‘to do anything at all[,]’ it “cannot be born of waiver, consent or estoppel[,]” and may be raised at any time.” *Hisle v. Lexington-Fayette Urban County Gov’t*, 258 S.W.3d 422, 430 (Ky. App. 2008) (citations omitted). See also, *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010) (“The issue of subject matter jurisdiction cannot be waived because it goes to the very heart of a court’s ability to determine an issue in controversy”). For these reasons, the trial court lacked subject

⁷ In accordance with CR 76.28(4)(c), a copy of this case is included in the attached Appendix.

matter jurisdiction to decide the issue of Miller's tenure status and its judgment is *void ab initio*. *Hisle*, 258 S.W.2d at 431. As a result, the trial court's decision has no effect and this Court must make its own decision regarding the interpretation of the COJ Personnel Policies and Miller's tenure status.

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

The trial court concluded that because the dictionary definitions of "trial court" and "administrator" did not include the concept of jury pool management, Miller was not a "trial court administrator" under the COJ Personnel Policies and, therefore, was a tenured employee entitled to a due process hearing. *See* December 3, 2012 Order, Apx. Tab 1; January 10, 2013 Order; Apx. Tab 2. The trial court's conclusion is erroneous for a number of reasons.

A. By Definition, A "Jury Pool Manager" Is A "Trial Court Administrator" And Thus Non-Tenured Under The COJ Personnel Policies.

First, in adopting this unduly literal definition of the term "trial court administrator," the trial court ignored the very essence of the trial court and jury systems. Although the Black's Law Dictionary definition of "trial court" does not include the concept of the jury pool, it defines "trial court" as "[t]he court of original jurisdiction *where all evidence is first received and considered.*" BLACK'S LAW DICTIONARY 1506 (6th ed. 1990) (emphasis added). "Jury" is defined as "[a] certain number of men and women selected according to law, and sworn to inquire of certain matters of fact, and *declare the truth upon evidence to be laid before them.*" *Id.* at 855 (emphasis added). Thus, juries exist in the trial court to consider the evidence and determine the facts.

Indeed, juries exist only at the trial court level and serve no function in the appellate courts.

As the trial court recognized, an “administrator” is one “‘who administers especially business, school, or governmental affairs.’ ‘Administer’ is defined as a transitive verb meaning ‘to manage or supervise the execution, use or conduct of.’” December 3, 2012 Order, Apx. Tab 1. Therefore, by definition, as “Jury Pool Administrator” or “Jury Pool Manager,” it was Miller’s job to administer or manage the trial court’s jury needs. Accordingly, to say that the definition of “trial court administrator” does not encompass the concept of jury pool management defies logic.

While it is true that words and phrases of a contract are to be given “their ordinary meaning when nothing appears to show that they are used in a different sense[,] ... it is equally as well settled that words are to be narrowed or broadened, as the case may be, by the purpose made evident by the whole writing and where it is shown by the whole context of the writing that they were employed in a certain sense, they can only be given such definition as satisfies that sense.” *Sparks Milling Co. v. Powell*, 283 Ky. 669, 673, 143 S.W.2d 75, 77 (Ky. 1940) (citations omitted). Here, although the trial court recognized that it was “clear . . . from a review of the record that AOC intended [Miller’s] position to be non-tenured and included in the term ‘trial court administrators’” (December 3, 2012 Order, p. 16, Apx. Tab 1), it nevertheless employed an unduly literal definition of the term “trial court administrator” to thwart what it recognized was the COJ’s clear intent.

B. Trial Court Administrators Throughout Kentucky Perform Jury Management Functions.

In addition, the trial court's determination that Miller's position as Jury Pool Manager falls outside the definition of "trial court administrator" completely ignores the fact that the management and administration of the trial court's jury needs in every county in Kentucky, *except* Jefferson County, is the responsibility of the trial court administrator. If this Court were to accept the trial court's determination, every other individual in the state of Kentucky who is responsible for managing the trial court's jury needs is non-tenured, *except* Miller. There is simply no justification for carving out a unique exception exclusively for Miller, nor is there any indication in the COJ Personnel Policies that this was the COJ's intent. Indeed, the evidence demonstrates just the opposite.

A review of the COJ Personnel Policies reveals that Section 1(3)'s list of non-tenured COJ employees describes general categories or classifications of employees and does not denominate every non-tenured COJ employee by name or specific job title. [R. Vol. 6, pp. 800-803, Wine depo.; R. Vol. 6, pp. 869-870, Lambert depo.] In 1997, the University of Kentucky analyzed the COJ's pay structure. [R. Vols. 6-7, pp. 881-909, UK Plan.] The resulting report included a job title plan for the COJ, recommending that the COJ "reduce[] its number of job titles" by "combining job titles that [it] found to perform essentially similar types of work." [*Id.*, pp. 885-898.] These combined job titles would group persons that "engag[ed] in similar types of interpersonal interactions, decision-making activities, mechanical and physical duties, and in comparable work contexts." [*Id.*, p. 893.]

One of the University's suggested new job titles was "court administrator." [*Id.*, p. 897.] "Court administrator" combined four "old" job titles into one. One of those four old job titles was "Jury Pool Manager." Under the UK Plan, "Jury Pool Manager" became "court administrator." *Id.* Miller, formerly a Jury Pool Manager, thus became a "court administrator" under the new plan. [*Id.*; R. Vol. 6, p. 879, Lambert depo.] Furthermore, as Miller clearly worked for the trial courts (the Jefferson Circuit and District Courts), she became a "trial court administrator." [R. Vol. 7, pp. 912-914, Miller depo. at pp. 38, 73-78.] Notably, as early as 1983 and consistently thereafter, Miller referred to herself as "Jury Administrator," rather than "Jury Pool Manager," thus acknowledging the fact that she functioned as an "administrator" for the trial courts. [See, e.g., R. Vol. 7, pp. 917-921, Miller Letter to Chief Judge Higgins and Miller's Application for Reappointment.]

C. The COJ Personnel Policies Reflect The Chief Justice's Intent That Employees Working With Local Elected Judicial Officials Be Non-Tenured.

The trial court's conclusion that Miller's position as Jury Pool Manager is tenured is also contrary to this Court's recognition that local appointing is the Supreme Court's authority, *i.e.*, courts are generally best able to make local employment decisions. In *Nance v. Ky. Admin. Office of the Courts*, 336 S.W.3d 70, 71 (Ky. 2011), this Court was called upon to determine whether the Chief Justice can terminate the employment of a Family Court Administrator found to have created a hostile work environment when the local appointing official refuses to do so. In deciding the issue, the Court noted that:

The AOC Personnel Policy specifically at issue here, Section 1.03(1), says that the elected official is the appointing authority for employees in his or her office. *The personnel policy has been duly approved by the Supreme Court, and sets forth policy in making local employment decisions: the elected official should decide who works directly with him or her on a*

daily basis. This includes choosing the person to be hired, and firing whoever does not work out successfully. This is a sound policy for many reasons: the Chief Justice cannot reasonably travel the state to all 120 counties with elected judicial officials to handle local employment decisions; the cost would be exorbitant; and in the long run, the elected officials and employees would possibly be incompatible.

Nonetheless, Section 110 of the Kentucky Constitution makes the Chief Justice the Chief Executive Officer of the Court of Justice. As such, he has participated in creating various employment positions, has approved the job descriptions, and has asked the legislature for the money to fund them, including the Administrator's position in the 43rd Judicial Circuit. Additionally, as Chief Executive Officer, he must oversee the employment of Court of Justice personnel, even those in local offices, and act when a local official refuses to act, if it is in the best interests of the Court of Justice.

336 S.W.3d at 72 (emphasis added). As a result, the Court held that "the power of local officials to appoint the personnel in their offices exists through policy of the Supreme Court. This policy in no way prevents the Chief Justice from acting as the executive head of the Court of Justice when those to whom any power is delegated are not acting in the best interests of the Court of Justice." *Id.* at 74.

In accordance with this Court's *Nance* decision, by approving the COJ Personnel Policies, the Chief Justice intended that those who work directly with local elected judicial officials hold non-tenured positions, so that the elected official retains the ability to choose who he or she works with on a daily basis and to terminate incompatible employees. Here, there is no question that Miller worked directly with Judge Wine on a daily basis and that Judge Wine found Miller to be a hindrance to him as Chief Judge. [R. Vol. 6, pp. 812-813, Cont. Wine depo. at pp. 24-26.] Similarly, although Miller's job *title* of Jury Pool Manager was unique to her and Jefferson County, her job *duties* were not; elsewhere in the state, management of the trial court's jury needs was a function of the trial court administrator.

This Court has expressly noted how closely Jefferson County's jury pool administrators – including Miller – have worked with the Chief Judge of the Jefferson Circuit Court, who reposed those administrators with the responsibility of “determin[ing] which jurors should be excused, postponed or disqualified from jury service.” *Com. v. Nelson*, 841 S.W.2d 628, 630 (Ky. 1992) (per curiam). Although the delegation at issue there was held to violate state law, it reflects the fact of the close working relationship the Chief Judge has had with the jury pool administrators and the enormous responsibility and confidence reposed in them in the performance of their duties. *Id.* at 631. It is absurd that the COJ's policies could be construed to deny the Chief Judge the discretion to determine who should perform jury administration duties for the trial courts in Jefferson County. Therefore, contrary to the trial court's conclusion, under the COJ Personnel Policies and *Nance*, Miller's position as Jury Pool Manager falls within the definition of trial court administrator and she is non-tenured.

The trial court cited *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005) for the proposition that employment policies may create an implied contract of employment. The trial court construed the COJ Personnel Policies to constitute just such a contract, concluding that Miller is tenured under the Policies, despite the court's concurrent conclusion that the AOC never intended that result. The court rested its holding upon an unduly constrained reading of the term “trial court administrators” – who are not entitled to tenure – concluding that jury pool managers are not trial court administrators. This holding, however, ignores this Court's admonition that “[g]enerally, in the absence of a specific contractual provision to the contrary, employment in Kentucky is terminable at-will....” *Miracle v. Bell Cty. Emerg. Med. Serv.*, 237 S.W.3d

555, 558 (Ky. App. 2007) (citing *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983)). And that presumption applies to public employees. See *Miracle*, 237 S.W.3d at 559-59; see also *Tackett v. Mountain Comprehensive Care Ctr.*, 2009 Ky. App. Unpub. LEXIS 76, at * 15-18 (Ky. App. April 17, 2009).⁸

The COJ Personnel Policies categorically exempt “trial court administrators” from tenure and the basis for that policy is to allow the appointing authority (here the Chief Circuit Judge) the discretion to determine those with whom he or she must work in administering the daily business of the trial courts. As set forth above, the Jefferson County jury administrator unquestionably works closely with the Chief Judge in managing the trial court’s jury needs – a function performed by the trial court administrator in every other county in the state. Thus, nothing in the COJ Personnel Policies or the intent behind them permits any conclusion other than that Miller served in the capacity of a trial court administrator and was thus not tenured.

III. MILLER’S RECEIPT OF A PROBATIONARY INCREMENT DID NOT MAKE HER TENURED.

Section 5.04 of the 1999 COJ Personnel Policies provides that tenured employees “shall be given a probationary increment . . . following the completion of the probationary period.” [R. Vol. 6, p. 859.] The 1999 COJ Personnel Policies do not, however, provide for a probationary increment for non-tenured employees. In concluding that Miller was tenured, the trial court noted that Miller received a probationary increment six months after her status change from part-time to permanent

⁸ In accordance with CR 76.28(4)(c), a copy of this case is included in the attached Appendix.

full-time upon her return from retirement. However, even if Miller was given a probationary increment, her receipt of that increment cannot make her tenured.

Miller was re-hired on April 1, 1999 following her "retirement" under an earlier set of COJ Personnel Policies. [R. Vol. 6, p. 797, Reappointment Memo.; R. Vol. 6, pp. 871-874, Lambert depo.] The "new" COJ Personnel Policies did not take effect until April 19, 1999. [R. Vol. 6, p. 851.] Thus, Miller was re-hired under the previous policies. Under the previous policies, both tenured and non-tenured employees received probationary increments after six months of service. [R. Vol. 6, p. 859.] As such, Miller's receipt of the probationary increment does not mean she was tenured.

In any event, the mere act of granting Miller a probationary increment could not have made her a tenured employee. Although the new COJ Personnel Policies provide that only tenured employees are supposed to receive probationary increments, they do not provide that a probationary increment will transform a non-tenured employee into a tenured employee. As Lambert testified, if Miller received a probationary increment under the new policies, it was simply a mistake. [R. Vol. 6, pp. 876-877, Lambert depo.] The AOC cannot unintentionally confer tenure upon Miller by mistakenly paying her a probationary increment to which she was not entitled. Rather, a property interest such as tenure must be acquired either by contract or by law. *Bailey v. Floyd County Board of Educ.*, 106 F.3d 135, 141 (6th Cir. 1997). In other words, one cannot acquire tenure by accident. Therefore, contrary to the trial court's finding, Miller's receipt of a probationary increment could not make her tenured.

In addition, every other relevant paper in Miller's personnel file shows that she was always a non-tenured, unclassified, at-will employee. [R. Vol. 6, pp. 770-795.]

From the start, Judge McDonald appointed Miller to serve “at the pleasure of the Court” (R. Vol. 5, p. 743) which meant that she was an unclassified, non-merit employee incapable of attaining tenure. R. Vols. 5-6, pp. 745-768, Davis Aff., ¶¶ 3, 5-6; *see also Bennett v. Jones*, 851 S.W.2d 494, 494-95 (Ky. App. 1993). And Kentucky law defines the phrase “serve[] at the pleasure . . . of” to mean “at-will” employment. *Bennett*, 851 S.W.2d at 495.

Further, Miller’s personnel records unequivocally show that her non-tenured status never changed. A few months after Judge McDonald appointed her to serve “at the pleasure of the Court,” Miller’s job division and payroll number changed for the first time. [R. Vol. 6, p. 774, Miller’s October 1, 1976 PAR.] But her personnel records show that this did not change her unclassified, non-merit standing. *Id.* On March 1, 1977, Miller was promoted to Jury Pool Manager. [R. Vol. 6, p. 775, Miller’s PAR.] Her promotion paperwork shows that “Jury Pool Manager” was an unclassified, non-merit position, and that Miller did not have “status” as Jury Pool Manager. *Id.* Moreover, the balance of Miller’s records reflects that her unclassified, non-merit standing never changed during her 20-plus years of pre-retirement employment. [R. Vol. 6, pp. 770-795.]

Miller’s non-tenured status did not change when she “unretired” either. Miller was reappointed effective April 1, 1999. [R. Vol. 6, p. 797.] Her reappointment memorandum provided that she was “not-covered” under the judicial merit system. *Id.* The memorandum confirms that Miller’s “new” Jury Pool Manager job was the same untenured, non-merit position that it had been before she “retired.” Consequently, regardless of whether Miller received a probationary increment within six months

following her reappointment, she remained an unclassified, non-merit, non-tenured, at-will employee who “served at the pleasure of the Court.” [R. Vols. 5-6, pp. 743, 770-795.]

IV. MILLER WAS NOT A TENURED EMPLOYEE ACCORDING TO AOC PERSONNEL EXPERTS.

In addition to all of the above, not a single AOC personnel expert concluded that Miller was anything other than a non-tenured, at-will employee. Before Judge Wine fired Miller, both he and Vize sought advice from a number of AOC personnel experts. For example, Judge Wine asked Vize to contact the AOC to determine the procedures necessary to fire Miller. [R. Vol. 7, pp. 924-925, Vize depo.] Vize contacted AOC attorney Kevin Smalley, AOC Director and former General Counsel Lambert, and AOC Personnel Director Rita Cobb. *Id.*, pp. 925-927. All three told Vize that Miller was a non-tenured, at-will employee who was not entitled to pre-termination process. *Id.*

Judge Wine subsequently spoke to Smalley, Cobb, and Lambert, each of whom confirmed that Miller was an at-will employee. [R. Vol. 6, pp. 805-806, Wine depo.] In addition, Judge Wine spoke with Supreme Court Justice Martin Johnstone about Miller. *Id.*, p. 807. Justice Johnstone told Wine that then Supreme Court Chief Justice Joseph Lambert was aware of the Miller situation and that Chief Justice Lambert’s opinion was that Miller was an at-will employee. *Id.* Thus, during the relevant time period, the AOC’s Director, Personnel Director, and Attorney, as well as two Justices from the Supreme Court, including the Chief Justice who is the executive head of the Court of Justice, all concluded that Miller was an at-will, non-tenured employee.

V. UNDER KENTUCKY'S PERSONNEL CLASSIFICATION SCHEME, MILLER WAS AN AT-WILL EMPLOYEE AND, THEREFORE, DID NOT HAVE A RIGHT TO CONTINUED EMPLOYMENT.

In addition to being non-tenured under the COJ's Personnel Policies, Kentucky's Personnel classification scheme under KRS Chapter 18A also supports the conclusion that Miller was non-tenured. Although Miller was not a merit or "classified" employee under KRS Chapter 18A, which excludes Court of Justice employees from "classified" service, a review of KRS Chapter 18A's personnel classification scheme is instructive to debunk the idea that Miller was tenured under the COJ Personnel Policy.

KRS Chapter 18A and KAR Title 101 divide state employees into two groups – classified and unclassified. "Classified" employees are referred to as "merit," "status," or "tenured" employees because Kentucky's classification scheme is "based on merit principles and scientific methods" where employees attain status or tenure when they complete probation. KRS 18A.040; KRS 18A.010 (amended by the 2012 Kentucky Laws Ch. 146 (HB 485) on other grounds). *See, e.g.*, KRS 18A.005(37) (a "classified" employee gains "status" after completing probation); *Williams v. Commonwealth of Kentucky*, 24 F.3d 1526, 1538 n. 4 (6th Cir. 1994). Classified employees who attain status or tenure have a right to continued employment, protected property interests in their jobs, and cannot be dismissed without cause. KRS 18A.095; *Williams*, 24 F.3d at 1538.

In contrast, unclassified, non-merit employees can never attain status or tenure. KRS 18A.005(37) (by definition only employees in the classified service can gain status); *Martin v. Corrections Cabinet of Commonwealth*, 822 S.W.2d 858, 860 (Ky. 1991) (holding that unclassified employees are political employees, not "merit" employees); *Bennett*, 851 S.W.2d at 495 (same). Like Miller, these employees serve at the pleasure of

their appointing authorities and are terminable at will. *Martin*, 822 S.W.2d at 860; *Bennett*, 851 S.W.2d at 495. Because they are terminable at will, these employees do not have a right to continued employment and do not have protected property interests in their jobs: “[a]n unclassified employee is a political employee, not a merit employee, and may be discharged for any reason, including a bad reason, no reason or for political reasons so long as there is no statutory authority for a protest.” *Martin*, 822 S.W.2d at 860.

KRS 18A.115 designates the state-government positions that are classified by identifying a list of exceptions to classified service, including “the judicial department.” KRS 18A.115(1)(1) (amended by the 2012 Kentucky Laws Ch. 146 (HB 485) on other grounds). Judicial department employees are not in the classified service and KRS 18A.005 through KRS 18A.200 do not apply to them. *Id.* There is no question here that Miller was a judicial department (COJ) employee. Thus, KRS 18A.115(1)(1) exempted her from classified service. *Id.* Under the statute, Miller was an unclassified, non-merit, non-status, non-tenured employee. In other words, her employment was terminable at will.

Miller’s personnel records support this assessment. [R. Vols. 6, pp. 770-795.] Miller’s records confirm that she was an unclassified, non-merit employee without tenure or “status.” As the then appointing authority, Chief Jefferson Circuit Court Judge Michael McDonald (“Judge McDonald”) appointed Miller “coordinator for the Jefferson Circuit Court” in 1976 to serve “at the pleasure of the Court.” [R. Vol. 5, p. 743.] Under Kentucky law, “at the pleasure of the Court” means that Judge McDonald appointed


Miller to be an unclassified, non-merit employee incapable of attaining status. *Bennett*, 851 S.W.2d at 495.

Although former Judge McDonald testified, 27 years after the fact, that when he appointed Miller to her position in 1976, he arranged through AOC Director Davis for her position to be tenured, no other facts support his testimony. Indeed, Judge McDonald's deposition testimony diametrically contradicts his 1976 letter appointing Miller [R. Vol. 5, p. 743], and is in direct conflict with Miller's personnel records [R. Vol. 6, pp. 770-795], and Davis' statement denying Miller's position was ever intended to be tenured or that approval was ever given for the position to become tenured during the time he was AOC Director. [R. Vols. 5-6, pp. 745-768, Davis Aff.] Thus, whatever Judge McDonald's intentions may have been 27-plus years ago, the best evidence as to Miller's status throughout her employment is her personnel file, which unequivocally proves that she was an at-will, non-tenured employee. [R. Vol. 6, pp. 770-795.]

CONCLUSION

For the foregoing reasons, the AOC respectfully requests that this Court vacate as void the trial court's Order finding that Miller is a tenured employee entitled to due process and enter its own judgment holding that as Jury Pool Manager, Miller was a "trial court administrator" under the COJ Personnel Policies, and therefore not tenured and not entitled to due process as a matter of law.

Respectfully submitted,

A handwritten signature in cursive script, reading "Melissa Norman Bork", written over a horizontal line.

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