Pursuant to Court Order

COMMONWEALTH OF KENTUCKY
SUPREME COURT

No. 2014-SC-000215-D

Emailed

John Charalambakis **Appellant**

On Review from Court of Appeals
Case No. 2012-CA-000242

v.

On Direct Appeal from
Jessamine Circuit Court No. 10-CI-00880

Asbury University, *et al.* **Appellees**

Appellant's Reply Brief

CR 5.03 & 76.12(6) CERTIFICATE

I hereby certify that on the 26th day of February, 2015, a true and accurate copy of this Brief has been served by hand-delivery or U.S. mail, postage prepaid, on: Debra H. Dawahare, Esq., Leila G. O'Carra, Esq., WYATT, TARRANT & COMBS, 250 West Main Street, Suite 200, Lexington, KY 40507-1726; the Hon. Hunter Daugherty, JESSAMINE CIRCUIT COURT, 101 North Main St., Nicholasville, KY 40356; and, Samuel P. Givens, Jr., Clerk of the COURT OF APPEALS, 360 Democrat Drive, Frankfort, KY 40601.

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STATEMENT of POINTS and AUTHORITIES

Defendant-Appellees' Brief ("Df.Brf.") does not answer Plaintiff-Appellant's initial brief and instead attempts to invert both the standard for summary judgment and the protective purpose of the KCRA anti-retaliation provision, KRS 344.280(1). Defendants simply ignore evidence and inferences in favor of Plaintiff's claims and present a stew of ill-supported contention, half-truth, characterization, supposition, and negative inference. Even if it were permissible as argument at trial, this skewed and warped view of the facts is fundamentally inappropriate to the summary judgment issues presented in this discretionary review. Defendants have not shown why evidence and inferences in Plaintiff's favor are not more than enough to have a trial on discrimination and retaliation claims. In addition, Defendants demand that every legal question be resolved in favor of giving employers safe harbor from liability for retaliating against their employees. Employers have control over their actual reason for taking adverse action against an employee, and it is incumbent on them to make sure that their decision would have been the same absent the employee's protected activity.

1. There is no immunity for taking adverse employment actions in retaliation for complaints about discrimination.

No precedent supports Defendants' assertion that a triable claim of discrimination is a required element of a KCRA retaliation claim. KRS 344.280(1) does not make a successful discrimination complaint a prerequisite for a retaliation claim, and such a requirement "serves no redeeming statutory or policy purposes of its own." *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980). Defendants do not acknowledge the thorough, long-standing state and federal consensus against such a limitation (*see* Pl. Brf. pp.11-15) and cite only three unpublished opinions — none of which involved a complaint to a governmental agency or any other recognizable protected activity or even

arguable retaliation therefor. In *Parker v. Pediatric Acute Care, P.S.C.*, 2008 WL 746677, *5 (Ky. App. Mar. 21, 2008) (unpublished; Df.Apx.23), the "protected activity" alleged by plaintiff Parker was her "employment free from sexual discrimination," but that does not fit within the opposition or participation category of KRS 344.280(1). The two federal district court decisions are similarly inapposite.[1]

Defendants present no reason consistent with KCRA's stated purposes for constricting KRS 344.280(1) protection by requiring that the discrimination complaint meet some after-the-fact assessment of its merits. Similarly, Defendants' entire argument for adding a "good faith, reasonable belief" limitation consists of an assertion that such an element is required for a federal Title VII claim (*id.* p.29). They address neither Plaintiff's substantive and prudential reasons that such a limitation should not be added in this case nor his discussion of a general caselaw consensus that (a) any "good faith" requirement applies only to opposition (but not participation) activity, (b) if "good faith" is not found, "an unreasonable mistake of law is generally the problem,"[2] and (c) the manner of opposition must be reasonable. (*See* Pl.Brf. pp.15-17)

Plaintiff also pointed to evidence of a contemporaneous good-faith basis for his complaints expressed through an internal Asbury grievance procedure, as well as for his discrimination and retaliation complaints to KCHR. (*See* Pl.Brf. pp.26-28) Defendants

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[1] *Himmelheber v. ev3, Inc.*, 2008 WL 360694 *2-3 & nn.2-4 (W.D.Ky. Feb. 8, 2008) (Df.Apx.24), held that KRS Ch. 344 did not jurisdictionally cover the allegedly discriminatory practices and thus any complaints (by the worker's attorney) could not have been about practices declared unlawful by Chapter 344. *Thompson v. Next-Tek Finishing*, 2010 WL 1744621 *2 (W.D.Ky. Apr. 28, 2010) (Df.Apx.25), found no factual allegations about pre-termination discrimination and held that any complaint by plaintiff about her termination could not have been the cause of that termination; thus she had no claim for retaliation.

[2] *Wasek v. Arrow Energy Services, Inc.*, 682 F.3d 463, 469 (6th Cir. 2012). This case discusses and applies the three aspects of the caselaw consensus listed here. *See id.* at 469-71.

do not address that evidence,[3] and instead present a slanted and incomplete version of the facts to characterize the discrimination claims as utterly baseless or in bad faith. An example is their portrayal of how Asbury knew by mid-November 2009 that Plaintiff had taken his discrimination complaint to KCHR:

> November 11, 2009 — Plaintiff directs Prof. Dave Coulliette to tell the Provost that Plaintiff has filed a charge of discrimination with the KCHR. ***This is a lie.*** Although Charalambakis had contacted the KCHR, he did not file a charge until February 2010. [Appx. 17,18].

(Df. Brief p.18 (emphasis original); *also id.* p.7) As the portion of the referenced email that is actually included in Defendants' Appendix 17 plainly shows, an 11/10/09 email from Plaintiff was passed along to Asbury administrators at Coulliette's initiative, not Plaintiff's direction. Defendants' Appendix deliberately leaves out the page with Plaintiff's 11/10/09 email, in which he states that he had no alternative but to "register a complaint" with KCHR. (R.1900-01; Pl.Apx.10 p.2) This is the truth. Plaintiff contacted KCHR with his complaint by early November 2009,[4] and then provided it with documents as requested.[5]

Similarly, Defendants repeat throughout their brief (*e.g.*, pp. 1, 8, 11, 17, 31, 34) an accusation that Plaintiff's sole purpose in voicing a discrimination complaint was to "circumvent" or "manipulate" the internal disciplinary process. They cite no evidence for

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[3] Defendants also do not mention the Court of Appeals finding of a *prima facie* case for national-origin discrimination about Plaintiff's termination. 1/31/14 Opinion p.11 (Pl.Apx.1).

[4] The initial contact with KCHR began his participation activity. *See Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (participation includes "a visit to a government agency to inquire about filing a charge"); *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 189 (Ky. 1993) (holding that worker's compensation anti-retaliation protection did not require a formal claim; "The protection afforded by the statute should not be denied by a technical, narrow or strict interpretation of its provisions.").

[5] *See* Pl. 1/19/11 depo. pp.42-43, 267-68. Charalambakis signed and sent the formal written Charge of Discrimination to KCHR in January 2010. (Df.Apx.18 / Pl.Apx.13, R.1918)

this accusation; it is merely their supposition about his motives. This supposition first appeared in Provost Kulaga's 11/24/09 probation decision letter (Pl. Apx.12 p.6) in which he denounces Charalambakis's invocation of internal procedures and "baseless accusations" of (*inter alia*) double standards and discrimination "which can have no reason other than to try to intimidate this administration," *i.e.*, "to discourage or intimated [*sic*] the Provost's office from conducting a proper investigation" (Pl. Apx. 12, p.6). These are among the "additional issues that have developed during the investigation process" (*id.*) — the only actions cited by Kulaga as involving the insubordination that "provided sufficient cause for termination." (*Id.* p.7). Far from "proving" bad faith on Charalambakis's part, this vitriolic view of a discrimination complaint provides additional evidence of Defendants' retaliatory animus.

KRS 344.280(1) prohibits adverse employment actions taken because of protected activity, even if the employer thinks the complaint is "baseless" or in bad faith. Allowing retaliation based on a one-sided determination by the employer "would chill the rights of all individuals protected by the anti-discrimination statutes."[6] Defendants may dispute Plaintiff's evidence of discrimination and the basis for his internal complaints and KCHR charges; however, even under Defendants' misconstruction of the law, a dispute about Plaintiff's good faith cannot support summary judgment.

2. An employer may have retaliated even with the existence of a sufficient, legitimate reason.

Even if Asbury had a sufficient and legitimate cause to sanction Plaintiff because he allegedly broke "the rules," that does not automatically or conclusively establish that it

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[6]EEOC Compliance Manual § 8-II.C.2, at 8-10 (R.1847). In the unique circumstances of *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 889 (7th Cir. 2004), it was admitted by the ex-employee that his complaint was baseless on its face, had been made in bad faith, and involved serious misconduct.

can have no liability under KRS Ch. 344. An employer may articulate a sufficient and legitimate reason for an adverse employment action yet still have unlawfully discriminated or retaliated. The basic inquiry remains whether the adverse action would have been taken absent discrimination or retaliation.[7] In Plaintiffs' case, there is evidence that the "legitimate" reasons were insufficient on their own[8] and were not the actual motivation for adverse actions. (*See* Pl.Brf. pp. 2-4, 20-25, 31-34)

Defendants nonetheless assert that the existence of a sufficient, legitimate reason "precludes a finding that, 'but for' retaliation," an adverse employment action would not be taken. They claim that this preclusion stems from *Univ. of Texas Southwestern Medical Center v. Nasser*, 133 S.Ct. 2517 (2013). (*See* Df.Brf. pp.15-16) This asserted preclusion is contrary to logic and caselaw, and is not supported by *Nasser.*

It should first be noted that the U.S. Supreme Court's decision in *Nasser* may be controlling and retroactive as to all pending Title VII retaliation claims in state and federal courts, but has no immediate effect on Plaintiff's KCRA claims.[9] Particularly given that *Nasser*'s holding relies in part on Title VII's legislative history, a different result might be reached when this Court decides the causation standard for KCRA retaliation

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[7] *See, e.g., Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134, 137 (Ky. 2000) (proffered reasons "were plausible, [but] not compelling"); *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 590-93 (6th Cir. 2009) (sufficiency of some of employer's asserted reasons genuinely disputed by showing others were not terminated); *Turner v. Sullivan U. Syst.*, 420 F.Supp.2d 773, 788-89 & nn.9-11 (W.D. Ky. 2006) (finding "sufficient evidence from which a reasonable juror could conclude that Sullivan's reason for terminating Turner was not her attitude and her failure to sign the Contract, but was instead in retaliation for engaging in protected [opposition] activity").

[8] That is, the "original violations" (Kulaga's phrase, *see* Pl.Apx.12, p.7) or reasons apart from Plaintiff's internal and external discrimination complaints were insufficient. A one-page memo (*see* Pl.Apx.15) provides the most succinct contemporaneous account of the insufficiency of the "original violations."

[9] The two decisions cited in Defendants' brief (p.15 fn.19) to show that the *Nasser* decision must apply to this case are both about the retroactive effect of U.S. Supreme Court interpretation or construction of federally created rights and claims.

claims. That issue is not raised in this case, however, because the record evidence meets whatever causation standard might be required at the summary judgment stage.[10]

More importantly, there is nothing in the "but-for" causation standard or *Nasser* that makes it impossible or even improbable for a reasonable jury to find that retaliation is a but-for cause of an adverse employment action despite the existence of other necessary or sufficient causes. "'[B]ut-for' causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive." *Zann Kwan v. Andalex Group*, 737 F.3d 834, 846 (2nd Cir. 2013) (reversing summary judgment against retaliation claim). The *Zann Kwan* court carefully examines the "traditional principles of but-for causation" coming from tort law, noting that "a plaintiff's injury can have multiple 'but-for' causes, each one of which may be sufficient to support liability." *Id.* at 846 n.5 (emphasis added). The possibility of a "but-for" retaliatory reason existing alongside a sufficient, legitimate reason has long been recognized by this Court. *See, e.g., Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 824 (Ky. 1992).[11]

In addition, the preclusion rule that Defendants advocate would require overturning other settled precedent relating to retaliation claims. For example, after-acquired

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[10] *See also Zann Kwan v. Andalex Group*, 737 F.3d 834, 847 n.7 (2nd Cir. 2013) ("Because the plaintiff's claims survive under the *Nassar* 'but-for' standard, we do not decide whether the [New York state law] claim is affected by *Nassar*...."). "For the sake of his argument" (Pl. Brf. p.20 fn.4), Plaintiff similarly uses the more stringent but-for standard.

[11] "The 'but for' test does not require that the jury find sex discrimination was the exclusive motive for the employee's discharge, but only that it was an essential ingredient." *See also Zarebidaki*, 867 S.W.2d at 188 (agreeing that employee's recovery under KRS 342.197 "requires neither 'an irreproachable employment record' or satisfying the jury 'the workers' compensation claim must be the sole reason for the termination'"; recommending instructions requiring "proof that the workers' compensation claim was 'a substantial and motivating factor but for which the employee would not have been discharged'").

evidence of employee wrongdoing does not bar recovery on a retaliation claim, even if the wrongdoing was plainly enough to have justified the adverse employment action if it had been known at the time. *Brooks v. LFUCHA*, 132 S.W.3d 790, 805-06 (Ky. 2004). Pretext is another example. KCRA cases do not end if employers proffer a legitimate reason for their adverse actions, because "the plaintiff must be afforded the opportunity to prove ... that the legitimate reasons offered by the defendant were not its true reasons but were pretext for [retaliation]." *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 916 (Ky. App. 2006) (internal quotation marks omitted; emphasis added). Among the methods Kentucky law recognizes for doing so are:

> (1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; and (3) the plaintiff could show that the reasons given were insufficient to motivate the decision.

Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492, 497 (Ky. 2005) (emphasis added). Thus, pretext may be shown even if the employer's asserted reasons are sufficient — particularly if they were not the actual reasons.

Again, the ultimate jury question for a retaliation claim is whether an adverse action would have been taken if the claimant had not engaged in opposition or participation activity — not whether there were other necessary or even sufficient causes for the adverse action. Defendants nonetheless insist that the KCRA claims are absolutely precluded by the jury finding in the November 2011 trial of Plaintiff's breach-of-contract claim that "Asbury had sufficient cause to terminate John Charalambakis' tenured faculty position" (R.1767; Interrogatory A). However, that jury was, of course, not asked to find whether impermissible discrimination or retaliation was an "essential ingredient" or "but-for" cause, nor whether any retaliatory or discriminatory motive was involved. Further-

more, the jury's finding indicates nothing about whether this "sufficient cause" was Asbury's actual or asserted reason or would have resulted in termination but-for retaliation or discrimination; it also makes no finding about the cause for earlier adverse actions, including probation. The interrogatory was to aid in deciding a contract claim; Defendants cannot repurpose it now to answer KCRA claims that were kept from going to trial at all.

3. Discriminatory or retaliatory use of neutral-sounding rules nonetheless violates the KCRA.

Defendants' brief (*e.g.*, pp.17-22, 28) also asserts that because Asbury began investigating Plaintiff before he complained of discrimination and cited alleged breaches of neutral faculty-conduct rules in sanctioning him, there can be no actionable retaliation or discrimination. This assertion is wrong for at least three reasons. First, it is based on the "sufficient cause" fallacy discussed in part 2 above. Second, an employer may "proceed[] along lines previously contemplated" to discipline or terminate an employee so long as there is no causal connection to the employee's protected opposition or participation activities. *Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (*per curiam*). Here, however, there is direct and indirect evidence that the decisions to put Plaintiff on probation and terminate his employment were not merely "proceeding along" to a not yet definitively determined action and were motivated by retaliation for the internal discrimination complaint and the complaints to KCHR. (*See* Pl. Brief pp. 19-25, 33-34)

Defendants, however, attempt to stretch and distort *Breeden* into a rule "that protected activity that comes after disciplinary action has begun cannot be the legal cause of the pre-existing disciplinary action." (Df.Brf. p.28) Such a rule could immunize retaliation in the usual situation in which an employee may not perceive (or even have) a discrimination claim until an adverse employment action has been taken or is pending. Fur-

thermore, *Breeden* does not support such a rule. It simply holds that temporal proximity alone cannot establish retaliatory causation when the evidence is that an internal transfer already disclosed to the employee's union representative had been "carried through" approximately one month after the employee filed suit on sexual harassment and retaliation charges. 532 U.S. at 271-72.[12]

Breeden is a reminder that an inference of retaliatory motive from temporal proximity alone is a thin thread from which to hang a retaliation claim. However, *Breeden* does not remove the inference from close temporal proximity in Plaintiff's case (*e.g.*, between Plaintiff's raising a complaint with KCHR and the initial probation decision or KCHR's filing the Charge submitted by Plaintiff and Defendant's finalizing that decision). Furthermore, unlike in *Breeden*, the causation element in Plaintiff's case is not wholly dependent on proximity between one protected activity and a single adverse action. Although Defendants dispute that statements by Asbury decision-makers are <u>direct</u> evidence of retaliatory motive, as <u>indirect</u> evidence such statements indisputably support an inference of retaliatory causation and — without temporal proximity — allow a reasonable jury to conclude that adverse actions were taken against Plaintiff because of his protected activity. In addition, the pattern of repeated, proximate negative reaction to Plaintiff's internal and external complaints goes beyond a single temporal coincidence and itself supports a finding that there was retaliation.[13]

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[12] The suit was at that point only the latest in a series of opposition and participation activities by the employee that began more than two years earlier —and that activity was too remote to support an inference of retaliation based solely on timing. *Id.* at 274. Defendants are simply wrong in asserting that the transfer was contemplated before Breeden complained about discrimination.

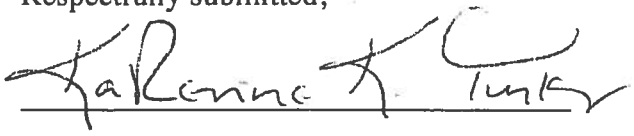
[13] *See McCullough*, 123 S.W.3d at 136 (finding nine non-promotions established pattern and practice of retaliation); *also Kachmar v. Sungard Data Sys.*, 109 F.3d 173, 178 (3rd Cir. 1997) (discussing use of "pattern of antagonism" circumstantial evidence); *Porter v. Calif. Dept. of Corrections*, 383 F.3d 1018, 1030 (9th Cir. 2004) (same).

Third, Plaintiff's complaints of national-origin discrimination alleged that Asbury was "treating me differently" and applying "double standards"; the specific examples given in his initial, express complaint to Kulaga were that other, U.S. born faculty members had violated faculty-conduct rules but not been disciplined.[14] As has been discussed before (*see, e.g.*, p.5 above; Pl.Brf. p.2), third parties noted that the conduct-rule breaches alleged against Plaintiff had not been interpreted or enforced to sanction faculty in the past.[15] Together with evidence of Kulaga's expression of nativist bias against Plaintiff and of such bias motivating earlier employment decisions (*see* Pl. Brief pp.18-20), the facts support a conclusion that the adverse actions, the decision to investigate in the first place, and the conduct of the investigation were due to double standards in the enforcement of the rules. Discriminatory application of facially-neutral rules is still impermissible discrimination.

CONCLUSION

WHEREFORE, for the reasons stated in his initial Brief and this Reply, Plaintiff-Appellant John Charalambakis respectfully requests that this Court vacate the summary judgment against his retaliation and national-origin discrimination claims and remand for further proceedings, including trial on the merits of those claims.

Respectfully submitted,



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[14] 9/28/09 letter (Pl.Apx.12) pp.1-2, R.1238-39; *see also* KCHR Charge (R.1918, Pl.Apx.13).

[15] *See* Pl.Brf. p.2; *see also* 1/22/10 "Suggested Action" memo (R.1080, Pl. Apx.19); 1/26/10 FAC Minutes (R.1252); 4/8/10 Coulliette email to Kulaga (PX 46).