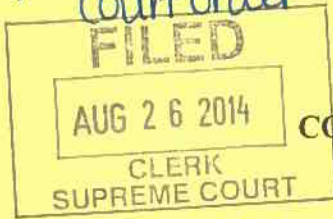
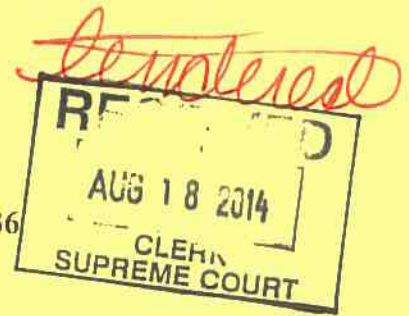


*Pursuant to  
Court order*



SUPREME COURT OF KENTUCKY  
DOCKET NO: 2013-SC-000108  
COURT OF APPEALS CASE NO: 2011-CA-001436  
2013-SC-778



MARY BANKER  
AND BRYAN CASSIS

APPELLANTS/CROSS-APPELLEES

v.

UNIVERSITY OF LOUISVILLE  
ATHLETIC ASSOCIATION, INC.

APPELLEE/CROSS-APPELLANT

\* \* \* \*

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REPLY BRIEF FOR APPELLANTS/CROSS-APPELLEES

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Brief for the Appellants/Cross-Appellees has been served via United States mail, postage prepaid, this the 13th day of August, 2014, upon the following: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Craig C. Dilger and Jeffrey A. Calabrese, Stoll Keenon Ogden PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202; and Hon. Charles L. Cunningham, Jefferson Circuit Court Judge, Division Four (4), Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202.

*Counsel for Appellants/Cross-Appellees*

## ARGUMENT

The only real reason that Banker was fired was that she tried to bring change to an athletic department that she believed was riddled with gender discrimination. When she went outside of Hermann's chain-of-command and made a complaint to the University HR Department she was retaliated against and promptly fired for no legitimate reason.

She had no write-ups and no disciplinary action at any time prior to her discharge, and the circumstances surrounding the termination were so obviously and blatantly related to her complaint of discrimination, that only the twisted and mischaracterizing arguments in ULAA's appeal briefs could even articulate a different reason.

Given the circumstances surrounding Banker's discharge, coupled with the timing of her complaint and her firing, and the addition evidence of Hermann's statements about the complaint, the evidence in this case was overwhelming that Banker was retaliated against in violation of KRS 344.280.

At the end of this case, there can only be one of two outcomes: either a defendant that actually violated Kentucky's retaliation statute, KRS 344.280, will avoid liability by a decade of denial and appellate manipulation, or, a plaintiff who successfully prevailed at trial before a jury will get the relief afforded to her by the statute.

It has long been unchallenged black-letter employment law that where an employee complains in good faith about gender discrimination or what she perceives to be a hostile work environment based on gender, and her employer then retaliates against her and discharges her, it is a violation of the law. That is exactly what happened in this case.

And all of the factual arguments that ULAA now makes on appeal to the contrary were all made to a jury, who simply didn't believe them. The Court of Appeals, however, substituted itself for the jury, and re-decided the facts based on its differing view of the evidence. The Court of Appeals' decision runs contrary to the Kentucky jury system, which allows members of the community to decide the facts and judge the credibility of witnesses.

Here, the jury found that Banker and not ULAA's witnesses was telling the truth and that Banker was, in fact, fired because she complained about gender discrimination. The Court of Appeals flatly ignored that finding and improperly decided the case in favor of ULAA. The jury's verdict should be reinstated and the Court of Appeals' decision should be set aside.

ULAA argues in its appeal brief that it was 'unchallenged' at trial that Banker was fired because she was a subpar coach. It is unclear what trial ULAA is referring to, because the entire point of the trial was for the jury to decide whether or not Banker was fired for performance reasons or because of her HR complaint. ULAA's arguments refuse to acknowledge that a jury heard and considered its claimed reasons for firing Banker but simply did not believe those reasons.

There has to be some component in these appeals that there were credibility determinations made by the triers of fact, and that even if a defendant *articulates* a legitimate and nondiscriminatory reason for a discharge, that does not mean that that articulated reason was the real reason for the termination. So simply because ULAA *articulated* at trial that it secretly 'contemplated' discharging Banker prior to her formal HR complaint, for which there was no evidence or proof other than the witness

testimony, that does not make it true. The jury heard that reason at trial, and did not believe it was the real reason or that it was true at all.

Had the jury believed that testimony, they would have found in favor of ULAA, but they did not. So to now analyze the case and the facts as if that claimed reason *were true* would be an analysis based on pure fantasy and a faulty factual premise.

With respect to ULAA's arguments that Banker filed a 'bogus' HR complaint, it should be noted that ULAA specifically requested the jury instructions to include a finding by the jury that Banker's complaint was made 'in good faith.' And contrary to ULAA's instant arguments, the jury did find that Banker complained in good faith. So just like the Court of Appeals' opinion, ULAA continues to make arguments based on untrue facts.

ULAA's reliance on *Breeden* is unpersuasive because in that case, there was no evidence of a causal connection, whereas in this case there was ample evidence of causation. Hermann's admissions and statements indicating her displeasure that Banker had complained, coupled with the 3 week temporal proximity between the complaint and the termination, as well as the lack of any write-ups, disciplinary action or even verbal counseling, all make *Breeden* inapplicable and distinguishable from the instant case. Unlike the facts and evidence in *Breeden*, the facts and evidence in this case are such that it would appear to anyone who looked at them that Banker's HR complaint was the sole motivating factor in her termination.

As to ULAA's arguments that the *McDonnell Douglas* burden-shifting analysis is the proper standard, it should be noted that the trial court applied the burden-shifting standard at the pre-trial summary judgment phase of the case, and correctly applied it to

the facts and evidence. Now that the trial has taken place and the jury has found in favor of Banker, it is even more apparent that the trial court correctly applied that standard and determined that Banker's case should have proceeded.

With respect to ULAA's argument that Jurich and not Hermann was the 'decisionmaker' in this case, that argument is absurd. Hermann testified that she fired Banker. Given the long list of Hermann's statements to Banker indicating her displeasure with the HR complaint, it is not surprising that ULAA now tries to move the ball and convince this Court that she was somehow not the decisionmaker. Again, many of ULAA's arguments are not based in reality or fact.

As to ULAA's arguments that the attorney fee award was unreasonable, it should be noted that the attorney fee award was properly decided based on the trial court's *Lodestar* analysis, and there was no error in that application. For a solo-practitioner representing a plaintiff on a purely contingent basis in a litigation that has spanned more than half a decade, the attorney fee award was hardly a windfall. It was most certainly less than the attorney fees paid to the defendant's attorneys incurred in the same case.

### CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be reversed, and the jury's verdict and the judgment of the trial court should be reinstated.

Respectfully submitted,



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