UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 09-5119
ELECTRONICALLY FILED

MELVIN KINDLE, BRADLEY SILVERIA, DIEDRA ADKINS

Plaintiffs-Appellants

v.

CITY OF JEFFERSONTOWN, KENTUCKY; CLAY FOREMAN, Mayor, individually and in his Official capacity; JEFFERSONTOWN CIVIL SERVICE COMMISSION

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Kentucky at Louisville
Civil Action No. 07-158
Hon. Charles R. Simpson

REPLY BRIEF FOR APPELLANTS

ROBERT L. ABELL
271 W. Short Street, Suite 200
P.O. Box 983
Lexington, KY 40588-0983
859-254-7076
859-231-0691 Fax
Robert@RobertAbellLaw.com
COUNSEL FOR APPELLANTS

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REPLY STATEMENT OF FACTS

Plaintiffs' Work Records

The record indicates that Kindle, Silveria and Adkins each performed well their jobs for the Jeffersontown police department. Fred Roemele, the police chief, attested to this. (RE 45-1, Fred Roemele depo. at pp. 6-7). Although a hostile witness, assistant police Kim Weber admitted that Kindle, Silveria and Adkins all performed their jobs well. (RE 41, Kim Weber depo. at pp. 7-8, 12-13). Gary Hayden, a police officer who worked with all three, said the same. (RE 50, Gary Hayden depo. at p. 10). There has been no prior claim by appellees that poor job performance caused or contributed to any of the plaintiffs' terminations; nonetheless, appellees disparage plaintiffs in their brief.

Emington's Lawsuit Against Jeffersontown, Jeffersontown Councilmembers & Plaintiffs

Peggy Emington filed a lawsuit in Kentucky state court on December 15, 2006, against Jeffersontown, three Jeffersontown city councilmembers and plaintiffs. (RE 42-3, Complaint; *Emington v. City of Jeffersontown, et al*, Jefferson Circuit Court No. 06-CI-11340). Contrary to appellees' assertion that it sought

only a declaratory judgment, Emington's complaint, in fact, sought the full panoply of legal remedies including "compensatory damages against the defendants and each of them individually," and "punitive damages against the defendants individually[.]" (*Id.* at p. 7). Emington was represented by Thomas E. Clay, who Foreman had illegally caused to be paid by Jeffersontown to represent her and it in response to the report plaintiffs tendered on October 27, 2006. (*Id.; see also* RE 31-8, Foreman depo. at pp. 71-73, ex. 8; RE 31-9, Fred Fischer depo. at pp. 34, 37-38). Clay, according to Foreman, represented both Emington and Jeffersontown simultaneously, including during the time that Emington had pending a lawsuit against Jeffersontown and three of its councilmembers seeking compensatory and punitive damages. (RE 36-2, Foreman depo. at pp. 75-77).

Plaintiffs initially filed with the state court a motion to dismiss Emington's complaint. Emington never responded to that motion. The Jefferson Circuit Court entered an Order on August 21, 2008, granting the plaintiffs' motion to dismiss Emington's complaint against them. The same order granted plaintiffs' motion

for leave to file a counterclaims against Emington. That suit remains pending.

The Jeffersontown Civil Service Commission

The record indicates that the proceedings at the Jeffersontown Civil Service Commission ending in termination of plaintiffs' employment were initiated by Jeffersontown, not by Emington in her individual capacity. On or about January 16, 2007, the civil service commission issued an order requesting clarification as to whether the complaint against plaintiffs was in Emington's official or individual capacity. (RE 48-2, Third Prehearing Memorandum & Order). If the former, the commission advised that it would adjudicate plaintiffs' claims under the Kentucky Whistleblower Act (and necessarily also plaintiffs' First Amendment claims) at a hearing. (*Id.*). Foreman affirmed that he had understood "from the beginning" that the complaint against plaintiffs was in Emington's official capacity and on behalf of the City of Jeffersontown. (RE 36-2, Foreman depo. at pp. 108-110, ex. 18).

According to Fred Fischer, the Jeffersontown city attorney, the Jeffersontown civil service commission had no authority to adjudicate plaintiffs' rights and claims under either the Kentucky Whistleblower Act or the First Amendment:

> Q: Do you know of anywhere in Chapter 35 [of the Jeffersontown city ordinances] where the Civil Service Commission is granted authority to adjudicate whether the rights of a Jeffersontown employee provided by the First Amendment of the United States Constitution have been violated?
>
> [objection by defense counsel]
>
> A: No, and I wouldn't think that would be an adjudication it would make.
>
> Q: And is there anywhere in Chapter 35 of the Jeffersontown codified ordinances that grants the Civil Service Commission authority to adjudicate whether the rights of a Jeffersontown employee secured by KRS Chapter 61 have been violated?
>
> [defense counsel objects again]
>
> A: I'm confident it's not in there. No, that issue is not in there.

(RE 38, Fischer depo. at pp. 8-9).

Given the illegality of the proceedings and actions of the civil service commission, plaintiffs appeared before it and advised it that they would not be submitting their claims to

its adjudication, as appellees report. Brief for Appellees at pp. 13-14. Nonetheless and undeterred, the civil service commission proceeded purportedly to adjudicate plaintiffs' entitlement to protection under either the Whistleblower Act or the First Amendment. (*See* RE 1-2, Complaint, Ex. A). Interestingly and most unusually, Foreman has himself condemned the commission's actions by admitting that plaintiffs would not have been terminated had they waived their rights and submitted to the commission's illegal proceeding. (RE 36-2, Foreman depo. at pp. 115-121; RE 31-12, Jeffersontown's Supplemental Discovery Responses at p. 3).

Appellees made much in the court below of the commission's actions, claiming that plaintiffs' had waived their rights to bring their claims in federal court. The district court rejected those contentions. (RE 62, Memorandum Opinion at p. 10). Appellees have not renewed them to this Court, despite their extended discussion of the commission proceedings in their brief.

The Fiction of the Ethics Commission's "Exclusive Jurisdiction"

Appellees' assertion regarding the "exclusive jurisdiction" of the Jeffersontown ethics commission repeats a fiction and is contrary to the record. Appellees cite to section 32.74 of the Jeffersontown ordinances. Brief for Appellees at pp. 26-27. However, Fischer, the city attorney, admitted that no language in chapter 32 of the city's ordinances supported that position. (RE 38-2, Fischer depo. at pp. 28-29). So it is an admitted fiction.

ARGUMENT

1. The City of Jeffersontown Is a "Political Subdivision" of Kentucky and an "Employer" Under the Kentucky Whistleblower Act (Replying To Point I.B. of the Brief for Appellees)[1]

As explained in appellants' principal brief, the Kentucky Supreme Court's decision regarding the Kentucky Whistleblower Act in *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008), strongly supports the conclusion that the City of Jeffersontown is a "political subdivision" and an "employer" under the Act. In *Gaines,* the court advised, *inter alia*, that the Kentucky

[1] Point I.A. of appellees' brief discusses a claim that plaintiffs never pleaded.

Whistleblower Act "should be liberally construed in favor of [its] remedial purpose … [which] is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." 276 S.W.3d at 792-93. The court further advised:

> The Act has a remedial purpose in protecting public employees who disclose wrongdoing. It serves to discourage wrongdoing in government, and to protect those who make it public. The purpose of the Whistleblower Act is clear, and it must be liberally construed to serve that purpose.

Gaines, 276 S.W.3d at 796.

Gaines surely teaches here that the Kentucky Whistleblower Act must be construed to include Jeffersontown, a municipality, as a "political subdivision" of Kentucky and as an "employer" within the meaning of the Act. As this Court has observed, "remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly." *Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 559 (6th. Cir. 2006).

Appellees fail to mention, acknowledge or discuss *Gaines* in any way. They fail to offer any counter to the argument following from *Gaines* that the combination of the Whistleblower Act's

purpose and the command that it be construed liberally to serve that purpose indicates that Jeffersontown should be deemed both a "political subdivision" of Kentucky and an "employer" under the Whistleblower Act. Instead, appellees advance an analysis obviated by *Gaines*.

Appellees' contention that Jeffersontown is excluded from the Whistleblower Act's reach ignores several canons of statutory construction, as appellants' explained in their principal brief. Brief for Appellants at pp. 19-29. First and as noted above, remedial statutes like the Whistleblower Act are liberally construed and their exclusions construed narrowly. *Gaines, supra; Cobb v. Contract Transport, supra.* Appellees' position urges incorrectly that exceptions to remedial statutes should be broadly construed even to the extent that they undermine the Act's central purpose.

Second, legislatures in enacting statutes are presumed knowledgeable of the legal gloss applied to the terms incorporated into the statute. Kentucky law recognizes this principle. *T.M. Crutcher Dental Depot v. Miller*, 64 S.W.2d 466, 467 (Ky. 1933)("It is presumed the Legislature enacted this amendment with a full

knowledge of the existing conditions of the common law and of statutes with respect to the subject-matter."); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952)("when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'"). Municipalities have been historically regarded and described as political subdivisions of their states both in Kentucky and elsewhere, as appellants noted in their principal brief. Brief for Appellants at pp. 23-25, *citing and quoting City of Pineville v. Meeks,* 71 S.W.2d 33, 35 (Ky. 1934); *Mansbach Scrap Iron Co. v. City of Ashland,* 30 S.W.2d 968, 969 (Ky. 1930); *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 215 (1984); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185–86 (1923);

Smith v. Board of Education of Ludlow, Ky., 111 F.2d 573 (6th Cir. 1940). The Kentucky General Assembly is presumed knowledgeable of this jurisprudence and to have relied on it. This conclusion is especially apt and urgent since exempting a municipality from the Act's reach would undermine its purpose: protecting public employees who disclose violations of statutes, ordinances, abuses of authority, mismanagement and other wrongdoing. *Gaines, supra.*

Third, as appellants also discussed in their principal brief, Brief for Appellants at p. 27, the inclusion in the Whistleblower Act of protection for those public employees that disclose violation of an "ordinance" supports the conclusion that Jeffersontown, a municipality, is included within the scope of the Act. Again, this is true because "[i]n its most common meaning, the term [ordinance] is used to designate the enactments of the legislative body of a municipal corporation," *Black's Law Dictionary* at 989 (5th Ed.), and because terms in Kentucky statutes are to be given their common legal meaning. Ky.Rev.Stat. § 446.080(4). Furthermore, as the Kentucky Supreme Court very recently advised in *Gaines*,

the ameliorative purpose of the Whistleblower Act is to protect employees who disclose wrongdoing including violations of, *inter alia*, an "ordinance." This purpose is evaded and frustrated by a construction that would exclude from the Act's protections those persons best situated to publicly disclose an ordinance's violation: municipal employees such as Kindle, Silveria and Adkins.

Appellees' assertion that the foregoing conclusion "defies logic" and leads to the conclusion that federal government employees are likewise covered by the Whistleblower Act is without merit. Municipalities like Jeffersontown are subject to federal statutes and regulations in a host of areas. Two obvious examples are the Clean Water Act and the Americans With Disabilities Act. The purpose of the Whistleblower Act is served by protecting municipal employees who disclose wrongdoing arising from violation of these statutes. That being true does not lead to the conclusion that the Kentucky General Assembly sought to subordinate the entirety of the federal workforce to the Kentucky Whistleblower Act. Appellees' argument and the

assertion by the court below simply fail in their consideration of the Act's purpose.

Appellees' discussion, Brief for Appellees at pp. 23-25, of *Davis v. Powell's Valley Water District*, 920 S.W.2d 75 (Ky. App. 1995) and *Calvert Investments, Inc. v. Louisville and Jefferson County Metropolitan Sewer Dist.,* 805 S.W.2d 133, 136-37 (Ky. 1991), misses the mark. The special districts involved in both had materially indistinguishable duties and authority: to perform government or public functions within a limited and local area. *Compare Davis*, 920 S.W.2d at 78 (describing the special district therein as "organized for the purpose of performing governmental or other prescribed functions within limited boundaries."); *Calvert*, 805 S.W.2d at 135 (describing the special districts therein as "established and structured by statutes enacted by the General Assembly to carry out a limited public purpose in a local area."). Furthermore, the Kentucky Supreme Court states the issue in *Calvert* as whether the acts at issue therein "should be classified as the activities of a municipal corporation," *Id.,* and then proceeds to conclude in the affirmative on the issue. *Id.* at 136.

Appellees' confuse the similar but separate analyses of what is a "political subdivision" for purposes of state sovereign immunity under Kentucky law, the point which *Calvert* directly involves, and the related but separate question of what entities are considered a "political subdivision" of the state for purposes of the Whistleblower Act, which *Davis* involves. These jurisprudential strands intersect here as follows.

First, *Calvert* instructs that a public entity performing government or public functions within a limited and local area is properly considered a municipal corporation. 805 S.W.2d at 135-36. Second, *Davis* teaches that a public entity performing government or public functions within a limited and local area is properly considered a "political subdivision" of the state and hence an "employer" under the Whistleblower Act. 920 S.W.2d at 77-78. Third, it follows from these propositions that a municipal corporation is properly considered a "political subdivision" of the state and hence an "employer" under the Whistleblower Act, especially given the Kentucky Supreme Court's admonition in *Gaines* and the statutory canons of construction discussed above.

Fourth and accordingly, it follows that Jeffersontown, a municipality, is both a "political subdivision" of the state and an "employer" for purposes of the Whistleblower Act.

The case, *Baker v. McDaniel,* 2008 WL 215241 (E.D. Ky. 2008), on which appellees and the court below rely cannot support the opposite conclusion. First, *Baker* precedes the Kentucky Supreme Court's decision in *Gaines* and does not include any discussion or consideration of the Whistleblower Act's purpose, the direction that it is to be liberally construed to achieve that purpose or the canon that exceptions to remedial statutes are to be narrowly construed. Second, *Baker*, like the court below, concludes that the unavailability of state sovereign immunity is also determinative of whether a city or other public entity is covered by the Act. 2008 WL at 4. This is flawed analysis since, as discussed above, the availability of state sovereign immunity is not determinative of whether a city or other public entity is covered by the Act.

Third, *Baker* fails to consider this Court's recognition in *Smith v. Board of Education of Ludlow, Ky.,* 111 F.2d 572 (6th

Cir. 1940), following from prior pronouncements by Kentucky courts in *City of Pineville v. Meeks,* 71 S.W.2d 33, 35 (Ky. 1934); *Mansbach Scrap Iron Co. v. City of Ashland,* 30 S.W.2d 968, 969 (Ky. 1930), that "the appears to be well-settled in Kentucky that a municipality is a political subdivision of the State." The *Baker* court like the court below disregarded the canon of statutory construction that these judicial descriptions, which the Supreme Court's decisions in *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 215 (1984) and *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185–86 (1923) show to be historical and axiomatic, of municipalities as political subdivisions of their state is presumed to have been included in the statute. That canon is all the more compelling in view of the Kentucky Supreme Court's discussion of the Whistleblower Act that it is remedial and should be broadly construed to protect public employees that disclose wrongdoing and other misconduct including violations.

Both *Baker* and the court below offer a mode of statutory construction both illogical and undermining the Act's purpose;

these courts suppose erroneously that the Kentucky legislature enacted a remedial statute intended to protect public employees that disclose misconduct, violations of law and other wrongdoing but, in doing so, disregarded historical and entrenched jurisprudence recognizing Kentucky municipalities as political subdivisions of the state while paradoxically providing protection for employees that disclose violations of ordinances, the one type of disclosure that municipal employees such as Kindle, Silveria and Adkins are best situated to report. Accordingly, as *Baker* is contrary to *Gaines*, it cannot support the court below's ruling and represents a misreading and misapplication of both the Whistleblower Act and Kentucky law.

2. *Garcetti v. Ceballos* Does Not Bar Plaintiffs' First Amendment Claims (Replying To Point II.A of the Brief for Appellees)

The district court correctly rejected appellees' reliance on *Garcetti v. Ceballos,* 547 U.S. 410 (2006). The record does not support appellees' argument that plaintiffs' report was made within the scope of their official duties.

Appellees simply ignore testimony directly contrary to their argument. Both former police chief Fred Roemele and Jeffersontown city attorney Fred Fischer testified that plaintiffs' report was not within the scope of their official duties. Roemele's pertinent testimony was as follows:

> Q: Did Officer Kindle's job duties for the Jeffersontown Police Department require him to make this type of report that's styled Report Pursuant to KRS 61.102?
>
> A: Require him to?
>
> Q: Yes, sir.
>
> A: No, sir
>
> Q: Okay. Did Mr. Silveria's job duties with the Jeffersontown Police Department require him to make this type of report styled Report Pursuant to KRS 61.102?
>
> A: No, sir.
>
> Q: Did Ms. Adkins' job duties with the Jeffersontown Police Department require her to make this type of reported styled Report Pursuant –
>
> A: No, sir.
>
> Q: To KRS 61.102?
>
> A: No, sir.

(RE 45-2, Roemele depo. at p. 61).

Fischer testified likewise:

> Q: Well, do you think Mr. Kindle then was acting within the scope of his employment duties with the City of Jeffersontown and signing and having tendered the protected report we have marked as Exhibit 3 [to Fischer's deposition]?
>
> A: In the manner that he did?
>
> Q: Yes.
>
> A: No.
>
> Q: Do you think Mr. Silveria was acting within the scope of his employment responsibilities in signing and having tendered the protected report that we have marked as Exhibit 3?
>
> A: In the manner in which – you know, we are saying in the manner in which it was done?
>
> Q: Yes, sir.
>
> A: No.
>
> Q: Do you think that Ms. Adkins was acting within the scope of her responsibilities as an employee of the Jeffersontown Police Department in signing and having tendered the protected report we have marked as Exhibit 3?
>
> A: In the manner in which it was done, no.

(RE 38-2, Fischer depo. at pp. 75-76).

The record, accordingly, does not support appellees' argument that Kindle, Silveria or Adkins acted within the scope of their official duties in making any of the protected speech.

Appellees overstate *Garcetti*'s holding. *Garcetti* addressed "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties" and its "controlling factor" was that the speech at issue was "made pursuant to [the plaintiff's] duties as a calendar deputy." 547 U.S. at 413, 421. This point the Court repeatedly emphasized, advising that "the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline." *Id.* at 421. The Court added that the "significant point is that [Ceballos'] memo was written pursuant to [his] official duties" and "part of what he … was employed to do." *Id.*

Appellees' reliance on a trio of Seventh Circuit cases applying *Garcetti*'s holding is similarly misplaced. In *Vose v.*

Kliment, 506 F.3d 565 (7th Cir. 2007), the court held that a police narcotics supervisor was not entitled to First Amendment protection for statements "pursuant to his official duties as supervisor of the narcotics unit," and emphasized that the plaintiff's job duties included assuring the "security and propriety" operations conducted by the unit he supervised. 506 F.3d at 570, 572.

The other two Seventh Circuit cases cited by appellees, *Morales v. Jones,* 494 F. 3d 590 (7th Cir. 2007) and *Sigsworth v. City of Aurora, Illinois,* 487 F. 3d 506 (7th Cir. 2007), are unhelpful for the same reasons as *Vose.* The speech deemed unprotected in *Morales* was, in one instance, information from one police officer to another where the disclosing officer had been recruited to assist in the investigation that his speech concerned; the other speech was by a police officer to a prosecutor and the disclosing officer's "duty [was] to assist [the prosecutor] in the proper presentation of charges by providing him with the reports and details of his investigation." *Id.* Accordingly, the court held that both police officers made their disclosures pursuant to their official duties.

Sigsworth involved an investigator assigned to a multi-jurisdictional task force who alerted his supervisors of suspicions that targets of the task force had been tipped off by some of the task force's members. 487 F. 3d at 507. This disclosure, the court remarked was "what was expected of [the plaintiff] as a member of the task force[.]" *Id*. at 511. Accordingly, the court held that the speech "was part of the member of the tasks [plaintiff] was employed to perform and therefore not entitled to First Amendment protection." *Id*.

Again, the evidence here is to the contrary: plaintiffs' speech was not pursuant to their official duties. Neither *Garcetti* nor the Seventh Circuit cases support defendants' argument. To be sure *Garcetti* altered the landscape of public employee First Amendment litigation but it does not reach this case.

3. Plaintiffs' Speech Addressed A Matter of Public Concern (Replying To Point II.B. of the Brief for Appellees)

Appellees' argument that plaintiffs' speech did not address a matter of public concern fails for several reasons. First, appellees ignore the admissions in the record by Foreman, Fischer and Roemele supporting the conclusion that plaintiffs' speech

addressed a matter of public concern. Second, appellees offer no substantive analysis regarding the alignment of particular elements of plaintiffs' speech with that involved in cases which this Court has recognized to address matters of public concern.

As appellants noted in their principal brief, Brief for Appellants at pp. 7-8, Foreman, the Jeffersontown mayor, agreed that the operations and procedures of the Jeffersontown police department as well as the misconduct of its employees were matters of public concern. (RE 36, Foreman depo. at pp. 9-10). As appellants also noted in their principal brief, Brief for Appellants at pp. 8-9, Fischer asserted that the appellants' report concerned not just Emington but the entirety of the police department:

> ... Not only was Lieutenant Colonel Emington a subject of [plaintiffs' report] the entire police department was, the Jeffersontown Police Department.

(RE 31-9, Fred Fischer depo. at p. 35).

Fischer further acknowledged that appellants reported possible misconduct and wasteful practices in the police department. (RE 31-9, Fischer depo. at pp. 40-41). In addition, as appellees note, Brief for Appellees at p. 38, Fischer viewed plaintiffs' report as so

grave that he urged an independent counsel be retained to investigate it, a recommendation surely unreasonable if, as appellees contend, plaintiffs' report concerned merely personal grievances.

Roemele, the police chief, requested that plaintiffs' report be investigated by the department's criminal investigators or intelligence and narcotic units. (RE 45, Fred Roemele depo. at p. 41; RE 45-4, Roemele depo. ex. 9). It is unreasonable to urge that such a measure would have been sought if plaintiffs' report concerned only personal grievances.

As appellants explained in their principal brief, Brief for Appellants at pp. 30-31, their report included numerous particular elements of the type that this Court has recognized to be matters of public concern. These particular elements included unlawful employment practices (violation of wage and hour laws) and excessive use of overtime and waste of taxpayers' monies. These have been recognized as matters are of public concern by this Court. *Mahronic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986); *Chappel v. Montgomery Co. Fire Prot. Dist No. 1,* 131 F.3d 564,

576-577 (6th Cir. 1997); *Rookard v. Health & Hosps. Corp.,* 710 F.2d 41, 46 (2d Cir. 1983)[2]; *Graham v. City of Mentor,* 118 Fed.Appx. 27, 30 (6th Cir. 2004). Plaintiffs reported favoritism and its possible impact on public safety, a type of report that this Court recognized in *Chappel, supra* to address a matter of public concern. Plaintiffs reported Emington's lack of firearms qualifications, a report that this Court held in *Graham* addressed a matter of public concern. Plaintiffs' report of Emington's improper use and access of the KASPAR database also addressed a matter of public concern. *City of Elyria, supra.* Finally, this Court's decision in *Chappel* indicates that plaintiffs' report of various and miscellaneous acts of mismanagement and abuse of authority that undermined the department's standing and respect in the community also embraced a matter of public concern.

Appellees' assertion that plaintiffs' should be denied First Amendment protection because of their motives in making their report, Brief for Appellees at p. 34, is contrary to this Court's decision in *Chappel* and to the Supreme Court's holding in

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[2] This Court cited both *O'Brien* and *Rookard* in *See v. City of Elyria,* 502 F.3d 484, 493 (6th Cir. 2007).

Connick v. Myers, 461 U.S. 138 (1983). In *Chappel,* the defendants argued that the plaintiff's "speech was fundamentally and predominantly motivated by his self-interest in obtaining a position as a paramedic with the ambulance district" and urged he should be denied First Amendment protection. 131 F.3d at 574. This Court rejected that argument, observing that it "is in direct conflict with the Supreme Court's holding in *Connick*." *Id.* The Court further observed that "the argument that an individual's *personal* motives for speaking may dispositively determine whether that individual's speech addresses a matter of *public* concern is plainly illogical and contrary to the broader purposes of the First Amendment." *Id* (emphasis in original). Finally, the Court asserted that "the fundamental distinction recognized in *Connick* is the distinction between *matters* of public concern and *matters* only of personal interest, not civic-minded motives and self-serving motives." *Id* (emphasis in original). Accordingly, appellees' argument is without merit.

4. Foreman Is Not Entitled To Qualified Immunity (Replying To Point II.B of the Brief for Appellees)

Appellees' principal argument that Foreman is entitled to qualified immunity is that plaintiffs' have not and cannot establish a violation of their clearly-established constitutional rights. This argument has been addressed in the Brief for Appellants at pp. 29-34 and above at Points 2 and 3 and appellants therefore rely on same.

Appellees' secondary argument – that plaintiffs cannot present sufficient evidence for a jury to find Foreman acted with an unlawful retaliatory motive – is without merit. The record here on review of a summary judgment must be viewed in the light most favorable to plaintiffs. *Nat'l Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir. 1997). Summary judgment is inappropriate on the issue of qualified immunity where there exist factual questions which must be resolved by a fact finder at trial. *See Johnson v. Jones,* 515 U.S. 304, 313-315 (1995). The determinative question is whether plaintiffs can present evidence at trial that Foreman's actions were improperly motivated strong enough to support a jury verdict in their favor. *Hull v. Cuyahoga*

Valley Joint Vocational School Dist. Bd. of Educ., 926 F.2d 505, 512 (6th Cir.), *cert. denied,* 501 U.S. 1261 (1991).

Appellants have discussed the proof supporting a jury's finding in their favor in the Brief for Appellants at pp. 40-42 and rely on same. A few points raised in appellees' brief do warrant discussion, however.

The record does not support appellees' assertion that Foreman was required by ordinance to forward Emington's complaint to the civil service commission. First, the complaint was not Emington's; it was, as Foreman admitted he knew "from the beginning,"[3] the City of Jeffersontown's. Whatever the ordinance may require when a complaint is made by a "person" in their individual capacity, it does not require Foreman, the Mayor and chief executive officer, to mobilize the city's machinery in furtherance of unlawful retaliation. Foreman's action was not a ministerial act he was required to do; since the complaint was on behalf of the City of Jeffersontown, it was a substantive act to

[3] (RE 36-2, Foreman depo. at p. 110).

retaliate against Kindle, Silveria and Adkins. A jury can make this finding.

A reasonable jury can also find a pattern of irregular, if not unlawful, practices and deviations from long-standing practice aimed indicating a retaliatory purpose against plaintiffs. This Court has recognized that such deviations and irregularities do support an inference of retaliation and unlawful purpose. *Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F.3d 414, 422 (6th Cir. 1999)(jury could find unlawful discriminatory purpose from deviation from normal procedures); *Birch Run Welding & Fabricating, Inc. v. NLRB,* 761 F.2d 1175, 1181 (6th Cir. 1985)(recognizing deviation from past practice as indicia of unlawful purpose); *see also Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 267 (1977)("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

Furthermore, where there is evidence supporting a finding that Foreman's explanations for his actions are unsupported by fact or that they did not actually motivate his actions, such a finding of pretext can further support the inference of retaliation. *See Kline v. Tennessee Valley Auth.,* 128 F.3d 337, 347 (6th Cir.1997). We turn to Foreman's contentions.

Foreman claims first that he barred Roemele from investigating the plaintiffs' report because the ethics commission had exclusive jurisdiction over it. Brief for Appellees at 27, 38. This, Fischer, the city attorney, was compelled to admit under oath was a fiction. (RE 38-2, Fischer depo. at pp. 28-29). A jury can find that such an invented fiction is indicative of retaliatory purpose. Second, the alteration of the long-standing practice of donating leave time immediately upon plaintiffs' tendering their protected report is the type of deviation from long-standing practice that this Court has ruled may properly be considered proof of retaliatory intent. *Skalka, supra; Birch Run, supra.* Appellees' explanation that there existed a dispute between Jeffersontown and the police union may or may not be true but

neither is said to have an interest in the transfer from one employee of his individual benefits to another employee in accordance with long-standing policy. A jury can properly reject appellees' contention.

Third, a jury can properly find that a fiction was conceived that Foreman used to cause Jeffersontown to illegally hire and pay a lawyer to represent Emington, including prosecution of the lawsuit filed against plaintiffs in Jefferson Circuit Court by Emington. Fischer admitted under oath that the ordinance cited as supporting this illegal action provides no such authorization. (RE 31-9, Fischer depo. at pp. 34, 37-38). Foreman testified that the lawyer hired and paid to purportedly to represent Emington was actually simultaneously representing the City of Jeffersontown. (RE 36-2, Foreman depo. at pp. 75-77). A jury can properly find that a fiction was invented to have Jeffersontown illegally pay a lawyer to represent Emington and to retaliate against plaintiffs.

Roemele, Jeffersontown's police chief, testified to the political alliance between Emington and Foreman. Roemele

advised both advised Silveria and Adkins that he could not act to curb Emington, because his hands were "politically tied." (RE 31-4, Silveria depo. at p. 27; RE 31-5, Adkins depo. II at p. 43). Roemele advised both to seek legal counsel. (*Id.*) Roemele confirmed telling Silveria that his hands were "politically tied" regarding Emington and that his past efforts to curb her misconduct had been stymied by Foreman. (RE 31-3, Roemele depo. at pp. 13-15). It would be reasonable for a jury to find based on this testimony and other evidence that Emington and Foreman were political allies. While appellees ignore Roemele's testimony, they assert that the foregoing is "frivolous" and "not supported by the facts." Brief for Appellees at 40. These assertions are not well-taken and are contrary to the record.

Plaintiffs' view of the facts must be accepted at this stage; they can present evidence of a pattern of irregularities, illegalities and retaliation strong enough for a jury to find that Foreman acted with unlawful retaliatory intent.

5. The Jeffersontown Civil Service Commission Is A Necessary Party (Replying to Point II.D of Appellees' Brief)

As we explained in our principal brief (and to the court below), the Jeffersontown Civil Service Commission "is a necessary and indispensable party for purposes of affording complete relief, as plaintiffs seek reinstatement to employment." Brief for Appellants at 42-43. Appellees take no issue with appellants' citation to *Christophel v. Kukulinsky*, 61 F.3d 479 (6th Cir.1995). Likewise, appellees take no issue with appellants' contention that action by the civil service commission is necessary, in accordance with *Christophel*, for plaintiffs to each regain their civil service status and attain complete and full relief.

Appellees do take issue with whether appellants are entitled to any relief at all. It is true that if appellants have no claims, as a matter of law, under either the Kentucky Whistleblower Act or the First Amendment, whether the JCSC is a necessary party for purposes of relief becomes moot. However, it is respectfully submitted that the court below erred in granting appellees summary judgment. Accordingly, for the reasons set forth above

and set forth in appellants' principal brief, the summary judgment order dismissing the JCSC should be reversed.

CONCLUSION

For all the foregoing reasons and for those set forth in the Brief for Appellants, this Court should reverse the court below and remand this case for further proceedings.

Respectfully submitted,

/s/ Robert L. Abell
ROBERT L. ABELL
271 W. Short Street, Suite 200
P.O. Box 983
Lexington, KY 40588-0983
859.254.7076 Phone
859.231.0691 Fax
robert@robertabelllaw.com
COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Sixth Circuit's electronic filing system this 9th day of June 2009, that notice will be sent electronically by that system to All Counsel of Record.

/s/ Robert L. Abell
COUNSEL FOR APPELLANTS

CERTIFICATION OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(B)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this reply brief contains 5,696 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

/s/ Robert L. Abell
COUNSEL FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 09-5119

MELVIN KINDLE, BRADLEY SILVERIA,
DIEDRA ADKINS

Plaintiffs-Appellants

v.

CITY OF JEFFERSONTOWN, KENTUCKY;
CLAY FOREMAN, Mayor, individually and in his
Official capacity; JEFFERSONTOWN CIVIL
SERVICE COMMISSION

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Kentucky at Louisville
Civil Action No. 07-158
Hon. Charles R. Simpson

SUPPLEMENTAL DESIGNATION OF DISTRICT COURT DOCUMENTS PURSUANT TO 6 CIR. R. 30

Description of Documents	Record Entry #
Clay Foreman deposition (pp. 75-77, 108-110)	36-2
Fred Fischer deposition (pp. 8-9)	38

Fred Fischer deposition (pp. 75-76)	38-2
Kim Weber deposition (pp. 7-8, 12-13)	41
Complaint; Emington v. City of Jeffersontown, et al, Jefferson Circuit Court No. 06-CI-11340	42-3
Fred Roemele deposition (pp. 6-7)	45-1
Fred Roemele deposition (p. 61)	45-2
Third Prehearing Memorandum & Order	48-2
Gary Hayden deposition (p.10)	50

Counsel's Certification

I hereby certify that the foregoing documents are included in the district court's electronic record.

/s/ Robert L. Abell
Counsel for Appellants