COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2015-SC-000384

Kentucky Court of Appeals
Case Nos. 2012-CA-994, 2012-CA-1429

On Appeal from Fayette Circuit Court
Case No. 07-CI-04844

UNIVERSITY OF KENTUCKY, JOSEPH MONROE, KENNETH CLEVIDENCE — **APPELLANTS**

v.

BRIEF FOR APPELLEES

BOBBYE CARPENTER, TIUA CHILTON, LAURA MARCO — **APPELLEES**

SUBMITTED BY:

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Certificate of Service Required by CR 76.12(5)

It is hereby certified that a true copy of this Brief for Appellees was mailed, postage prepaid, this 23d day of August 2016, to the following: Hon. Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Ky 40601; Hon. Pamela Goodwine, Fayette Circuit Court, 120 N. Limestone Street, Lexington, KY 40507; Barbara Kriz, Kriz Jenkins Prewitt & Jones, PO Box 499, Lexington, KY 40588; William E. Thro, University of Kentucky, 301 Main Building, Lexington, KY 40506.

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COUNTERSTATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully concur with appellants that oral argument would likely be helpful to the Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

A counterstatement is necessary for a fair and adequate statement of the case.

Introduction

This case arises from discriminatory employment practices based on gender in the University of Kentucky Police Department (UKPD). It was filed initially by seven women, six of whom were employed as police officers.[1] The plaintiffs pleaded claims under the Kentucky Civil Rights Act and the Kentucky Whistleblower Act arising from a common core of facts. After initially overruling a motion for separate trials, the trial court judge ordered six separate trials.

Appellee Bobbye Carpenter's claims first went to trial. After making numerous and major errors on evidentiary rulings that excluded erroneously nearly the entirety of Carpenter's probative evidence, the trial court entered a directed verdict against her. Following Carpenter's trial, the circuit court judge asserted that the evidence regarding the claims of all the other plaintiffs was the same and granted defendants' renewed motions for summary judgment.

The Court of Appeals reversed and affirmed in part the circuit court. The Court of Appeals reversed the directed verdict and judgment against Carpenter and also reversed the summary judgment granted on the claims of two other plaintiffs, Tiua Chilton and Laura Marco. They were remanded for a single trial. The summary judgments as to the other three plaintiffs, Lisa Shuck,[2] Lori Creech and Gina Wilson were affirmed; they did not seek review by this Court.

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[1] The claims of the seventh plaintiff, Brenda Palmer, were dismissed by summary judgment and were not appealed; those claims were not at issue before the Court of Appeals or now before this Court.

[2] During the time the case has been pending, the former Lisa Blankenship, who joined in filing the suit, has divorced and is now known as Lisa Shuck. Accordingly, Shuck is used for any and all references.

Counterstatement of Facts

Plaintiffs' Complaint

Carpenter, Chilton and Marco, along with other original plaintiffs, pleaded the following causes of action against appellants University of Kentucky, Joseph Monroe and Kenneth Clevidence: (1) gender discrimination; (2) unlawful retaliation in violation of KRS 344.280; (3) reprisal and retaliation in violation of the Kentucky Whistleblower Act, KRS 61.102; and, (4) aiding and abetting discrimination and retaliation by Clevidence. (Complaint, RA 6-33).[3]

The Evidence of Discriminatory and/or Retaliatory Practices by Defendants

Plaintiffs' complaint arose from long-standing, institutionalized gender discrimination in the UKPD, which even an internal investigation acknowledged. The record evidence includes the following:

(1) Discriminatory Work Atmosphere. A discriminatory atmosphere in the UKPD was identified in interviews of UKPD personnel in July 2006 and summarized in a report given then-UK President Lee Todd. (MEx. 1; Todd depo., ex. 3 at p. 10).[4] This report was admitted at Carpenter's trial as Plaintiff's Ex. 39 (tab 1 appendix); the data on which it was based was excluded by the trial court; that data is in the record as Court Ex. 1 (tab 2 appendix).

(2) Deviation from University policy in failing to respond to the reports of gender discrimination. According to Todd, the university's policies require that reports of discrimination be referred to its Office of Institutional Equity. (MEx. 2 - Todd depo. at

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[3] The prefix "RA" indicates a citation to the appeal record certified by the Fayette Circuit Clerk and page numbers are those used therein. The complaint also pleaded three causes of action specific to plaintiff Lisa Shuck.

[4] The prefix "MEx" indicates depositions or other exhibits filed on CD in the record.

14-17, 20-21; MEx. 5 – Todd depo. ex. 2). This did not occur, according to Terry Allen, head of the office. (MEx. 6 - Allen depo. at 31-32).

(3) Ratification of Retaliation and Attempted Witness Intimidation. After Plaintiffs filed the gender discrimination complaint with the UK Office of Institutional Equity,[5] defendant Monroe incited Alexandra McConnell to threaten plaintiffs with legal action. (Complaint ex. D, RA 33). McConnell identified Monroe as the instigator of this action both in discovery and at trial. (MEx. 8 - McConnell's Interrogatory Answer No. 2 at p. 1-2; CD A-3 4/24/12 at 11:51:10-58:10). Monroe denied it.

McConnell informed numerous senior UK officials that she had threatened plaintiffs. (MEx. 7 – McConnell's Answer to Interrogatory No. 9). Although UK policy prohibits "retaliating in any manner against any individual who reports discrimination or who participates in an investigation of a discrimination report," (MEx. 5 - Todd depo. ex. 2), no remedial action was taken.

(4) Training Opportunities. Both Laura Marco and Lori Creech requested and were denied training opportunities by which to advance their careers. (Marco depo. at 29; Creech depo. at 74).

(5) Disparities in Disciplinary Action. Laura Marco and Gina Wilson were suspended over an act of negligence that harmed no one and no thing. (Marco depo. at 32-40; Wilson depo. at 35-47). On the other hand, Robbie Turner, a male police officer, committed what the UKPD Internal Affairs officer described as "an act of criminal mischief" and was untruthful in the course of the related investigation, yet received no discipline whatsoever. (Greg Hall depo. at 25-26; Robbie Turner depo. at 11). Joe

[5] The report is Ex. A to plaintiffs' complaint. (Complaint, RA 6-33). The report was excluded from evidence by the trial judge, because it related to all the other evidence of discrimination that was likewise excluded.

Monroe himself, now the chief of UKPD, negligently discharged a firearm in the parking lot of the UKPD and received a lesser penalty than did Marco and Wilson. (Monroe depo. at 34-35, ex. 1).

(6) Sexual Harassment and Retaliation. Laura Marco became the subject of outrageous rumors, spread apparently by two colleagues, John Costigan and TJ Doyle, that she had been having sexual relations in her patrol car. Marco reported her concerns to Monroe, who chuckled and asked if the rumors were true. (Marco depo. at 60 – 61).

Marco suffered retaliation for raising her concerns: she began experiencing a failure to receive timely and proper backup. (*Id.* at 62 – 65). Chastened and fearful, she did not press the matter further: "I felt like I had already gone to somebody more than once and it hadn't gotten better; it gotten worse, and the last thing that I needed is to work third shift and not have anybody have my back." (*Id.* at 70). But three colleagues, David Alessi, David Campbell and Wesley Tyler, recognized the problem and told Marco to leave the department because she had no future there. (*Id.* at 73 – 74).

Marco's tenure at UKPD was further complicated by her rejection of Monroe's romantic overtures, as she observed "it was just kind of odd how it was so nice to me and then so not nice to me." (*Id.* at 105).

Near the end of Marco's tenure at UKPD, she had made arrangements with another officer, David Alessi, to switch shifts the day before football game, a shift that would enable her to work over, and earn extra monies. (*Id.* at 110-111). Monroe refused to approve this alteration of Marco schedule, although he approved it for another officer, Andrea Eilertson, at around the same time. (*Id.* at 109 – 112).

Internet pornography and its viewing was a frequent if not regular practice at UKPD. (MEx. 10 - Marco depo. at 144-146; MEx. 16 - Robert McKinley depo. at 4-5). Although this is a gross and obvious violation of university policy and one whose toleration can reasonably be viewed as discriminatory, there was no effort to identify the persons responsible, which could have been done by examining the computer logins, and instead a memo restating established policy prohibiting the viewing of pornography was circulated. (MEx. 16 - McKinley depo. at 5-12).

Another regular feature in topic of discussion in the UKPD workplace was discussion by various officers of their trips to strip clubs with their commander Joe Monroe. (Complaint, ex. A).

(7) Other Discriminatory Acts. Different standards were applied to Tiua Chilton's numerous requests for a shift change than were applicable to male police officers. While on pregnancy leave in the first quarter 2006, she was reassigned from first to second shift. (Chilton depo. at 40 – 44). Chilton's replacement on first shift was John Costigan, a male officer with less seniority, which was a departure from the standard practice of generally assigned shift in order of seniority and preference, for which no explanation was given. (*Id.* at 44 – 46, 49).

Subsequently, in January 2007, Costigan left UKPD and another male officer with less seniority, Bill Webb, was assigned to the first shift position that Chilton desired. (*Id.* at 50). A few months later, in May 2007 and following the filing of the discrimination report, Chilton again requested first shift and was denied. (*Id.* at 50 – 51). This scenario repeated itself in January 2008 and Chilton was again denied her request for first shift. (*Id.* at 52). No explanation was given her then or before.

In September 2007, Chilton filed a disciplinary report against officer Robbie Turner for defying her direct order and for instructing a recruit to do the same. (*Id.* at 86 – 87). The university squashed any disciplinary action against Turner in January 2008 (after the filing of this lawsuit), a move that eroded her command authority in the department. (*Id.* at 90 – 92).

In August 2006, Chilton was removed from a prestigious assignment as commander of the executive protection team for the University President and his party at UK football games and reassigned to traffic duties, which no commander had worked previously or since. (*Id.* at 102-104). The following year – after filing the discrimination report – Chilton was reassigned from traffic to guarding the ticket booth, a degrading assignment for a commander. (*Id.* at 106-107).

In another instance of disparate treatment, Gina Wilson was accused of having damaged a gate at UK parking garage. (MEx. 12; Wilson depo. at 53). She prepared an e-mail explaining what she knew about it. (*Id.* at 54). She was told later that Robbie Turner was responsible for damaging the gate, although he had initially denied any involvement or knowledge and confessed only upon being confronted with a videotape inculpating him. (*Id.* at 55 – 59). Turner confirmed that he received no discipline with regard to this matter.

Wilson was denied opportunity to enhance her department standing by training recruit officers. (*Id.* at 62). Although Wilson had previously served in this capacity and had been told by her superiors that she had done well, when she was denied this opportunity she inquired as to why to Lieut. Greg Hall, who was responsible for the assignments and he told her "I was told to do this. They told me not to put a recruit with

you." (*Id.* at 64). Hall also told her that he had originally assigned her a recruit but had been instructed to countermand that assignment. (*Id.* at 72 – 73). When she resolved to leave the UKPD, she discussed the issue with her Sgt., Bobby Pearl, who told her that her future would be better served by leaving the UKPD. (*Id.* at 75 – 76).

Carpenter was the only plaintiff still employed at UKPD by the time of the trial. She had worked there since September 1975 and, along with the other senior female officer, Stephanie Bastin, experienced a continuing and near-total diminution of her duties when defendant Kenneth Clevidence began oversight of UKPD. Nearly all of her duties were removed at Clevidence's direction while Fred Otto was chief of UKPD. (*Id.* at 21-25).[6] Her material responsibilities were restored only when McDonald Vick came aboard as chief of UKPD. (*Id.* at 26-27). Monroe expressed to her his opposition to the restoration of her duties. (*Id.* at 89-90). Monroe began completing her evaluations in 2004 and unfairly rated her too low for the years 2004 – 2007, including grading her down for not performing a responsibility that had been removed. (*Id.* at 91-92). Carpenter had long exercised responsibility for the organizational planning for University of Kentucky football games; this was removed in 2005 without explanation. (*Id.* at 63-66). Her duties went from organizational planning to patrol. (*Id.* at 98-99).

Carpenter inquired on numerous occasions as to why she was not left in charge of UKPD on those occasions when the highest commanders were absent. (*Id.* at 93-95). She specifically asked why a male counterpart with lesser experience was regularly left in charge. (*Id.*). Monroe explained that he was following directions, directions that then could only have come from Clevidence. (*Id.* at 95).

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[6] Otto confirms this by affidavit; see MEx. 19.

Carpenter also testified regarding an interview process involving plaintiff Lori Creech, who by the time the case came to the Court of Appeals was employed by the Fayette County Sheriff. Creech performed exceptionally well in the interview as reflected in the scores assigned her by Carpenter and by a representative of DOCJT, Ken Morris. (MEx. 4 - Carpenter depo. vol. II at 132-138). Morris, in fact, was moved to comment on Creech's textbook knowledge of the material, which provoked Kevin Franklin, a male commander at UKPD, to state to the effect that her good performance was aberrational. (*Id.* at 133-136).

Summary Judgment Ruling I: Motion Denied As to All Claims of All Plaintiffs

The circuit court below first overruled entirely defendants' motions for summary judgment, noting that there existed disputed issues of material fact. (Opinion and Order, RA 1600-1610).

The Trial Court's Order Have Six Separate Trials

The circuit court also initially overruled defendants' motion to have six separate trials, concluding that "the allegations are confined to the UKPD and its supervisors" and noting the policy favoring "permissive joinder of claims and parties in the interest of judicial economy." (Order, RA at 1625-29).

Almost immediately, the circuit court below reversed itself based on the United States Supreme Court's decision in *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011), a massive nationwide class action involving over 1.5 million putative class members, about 3400 different work sites spread out all over the country and thousands of different supervisors. (Order, RA at 1638). Plaintiffs were then directed to choose whose case went to trial first; Bobbye Carpenter was designated.

The Motion in Limine Rulings for Carpenter's Trial

Prior to trial the circuit court ruled that Carpenter could present evidence and testimony from the other plaintiffs regarding the discriminatory treatment they had experienced and witnessed. (Order re Motions In Limine re Bobbye Carpenter; RA 1938-1939).[7] This ruling, however, was abandoned once Carpenter's trial started.

The circuit court erred in excluding the data compiled during the interviews of the UKPD personnel reported in Todd in 2006. (*Id.*).

Carpenter's Trial & Directed Verdict

Lee Todd, the President of the University of Kentucky during the time period when this case arose, affirmed that university policy forbade discrimination in any form. University policy, Todd added, required any university employee, including himself as President, to notify the university Office of Institutional Equity upon receiving information of discrimination in a university department but this was not done. (CD A-2 4/23/12 at 03:02:00-03:04). University policy also forbids, according to Todd, retaliation in any form against someone who reports discrimination or participates in an investigation related to a discrimination report. (*Id.* at 03:03:25-42). A possible violation of the anti-retaliation policy could be where a university employee incites another employee to threaten an employee that reported discrimination. (*Id.* at 03:04:30-05:39).

Plaintiffs Lisa Shuck and Tiua Chilton met with Todd privately in April 2005, while a search for a new UKPD chief was ongoing. (*Id.* at 03:06:00-07:06). At this meeting, Shuck and Chilton expressed concerns that Joe Monroe would be named chief,

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[7] This ruling acknowledges the commonality of fact issues shared by the plaintiffs, as well as the wisdom and propriety of their claims' joinder pursuant to CR 20. At trial, however, the court below abandoned this ruling and precluded all testimony from any of the other plaintiffs about discrimination they had suffered or witnessed. *See infra.*

discussed an incident in a parking lot where Monroe's gun had been discharged, an incident where some fellow officers and Monroe had visited a strip club and discussed the next day in the workplace a "lap dance" bought for Monroe, and that undue favoritism and discrimination might result from Monroe's selection. (*Id.* at 03:07:35-09:01, 03:09:10 -10:12). Todd considered their reports credible and concerning. (*Id.* at 03:10:12-11:30).

Ken Clevidence headed the search process for the new UKPD chief, a responsibility that included assuring that university policies and priorities were honored throughout it. (*Id.* at 03:12:10-12:50). In February 2006, McDonald Vick was hired as chief of the UKPD, and Vick's selection was almost immediately surrounded by controversy arising from disclosures that Vick's department had been the target previously of sexual harassment charges. (*Id.* at 03:13:06-13:25, 03:16:03-18:00). Subsequently and later, it was disclosed that Vick had paid money to settle a sexual harassment charge, a disclosure that resulted in his dismissal as UKPD chief. (*Id.* at 03:18:00-32). Todd acknowledged that Clevidence should have informed him of the sexual harassment allegations surrounding Vick. (*Id.* at 03:19:00-20:33).

After Vick was fired, Todd directed that UKPD personnel be interviewed and had Carol Jordan and Kim Wilson lead this process. (*Id.* at 03:23:00-35). A questionnaire was prepared for use in these interviews, and Todd advised Jordan and Wilson that the interviews should focus in part on issues of fairness and equality in the UKPD. (*Id.* at 03:23:55-25:48). Todd wanted to gather information regarding discrimination and bias in the UKPD. (*Id.* at 03:27:00-08:34).

Wilson and Jordan prepared a written report and reported verbally to Todd their findings. (*Id.* at 03:28:30-29:00). Plaintiff's ex. 39 is the report. (*Id.* at 03:29:30-30:36).

Todd recalled Wilson and Jordan reporting the existence of a "good ol' boy" network in the UKPD, and he acknowledged that "fairness and equity" was reported as one of the major themes drawn from the interviews of the UKPD personnel. (*Id.* at 03:31:30-31:50). Todd further acknowledged that "fairness and equity" included discrimination and bias issues. (*Id.* at 03:31:50-32:12).

Todd added that Terry Allen, the head of UK's Office of Institutional Equity, later investigated discrimination in the UKPD when the plaintiffs filed a complaint with his office, was not informed of the report. (*Id.* at 03:32:12-33:23).[8] Todd also testified that he had seen additional data compiled in the interviews that indicated to him that discrimination was not pervasive throughout the department. (*Id.* at 03:33:23-34:33).[9] Todd explained that "the level of concern" regarding discrimination in the UKPD was not high enough at the time for the reports of discrimination to then be referred to the Office of Institutional Equity, notwithstanding university regulations. (*Id.* at 03:36:30-37:30). According to Todd, neither Wilson nor Jordan mentioned anything to him about a "frat house atmosphere" in the UKPD. (*Id.* at 03:37:30-59). Todd confirmed that Clevidence at the time was in charge of the UKPD and would have been responsible for addressing any discrimination. (*Id.* at 03:40:00-41:11).

Carol Jordan, the director of a women's studies program at the university, testified that she helped organize interviews of UKPD personnel following Vick's firing. (*Id.* at 04:34:21-35:51). Plaintiff's ex. 42 is the questionnaire used in these interviews. (*Id.* at

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[8] Notwithstanding Todd's testimony, the court below would bar Carpenter from introducing as evidence the complaint she and the other plaintiffs filed with Allen's office, were barred from even testifying about the content of the complaint and were barred from testifying about what information they disclosed to Allen during his investigation.

[9] This additional data was Plaintiff's ex. 43, which the court below excluded from evidence; it is Court Ex. 1.

04:38:04-20). Nearly all the UKPD personnel were interviewed. (*Id.* at 04:40:55-41:30). Plaintiff's ex. 39 is the report Jordan prepared based on the information disclosed in the interviews. (*Id.* at 04:52:30-53:31). Five major themes were identified in the interviews, one being fairness and equity. (*Id.* at 04:54:15-21). She explained that this regarded what she considered a "fraternity house state of mind" in the UKPD, a male-dominated work environment. (*Id.* at 05:20:00-59).

At the conclusion of Jordan's trial testimony, Carpenter renewed her motion that Plaintiff's Ex. 43, which is the recording of the UKPD personnel responses during the interview, be admitted, noting that defense counsel had informed the jury that no discrimination issues were reported in these interviews, and that Lee Todd had made similar misrepresentations. (*Id.* at 05:29:00-30:25). Carpenter's counsel noted that the university had adopted and relied on the information set forth in Plaintiff's ex. 43. (*Id.* at 05:33:20-34:20). Notwithstanding the university's adoption of and reliance on the information, the court below ruled that the exhibit was not admissible. (*Id.* at 05:34:20-36:15). Plaintiff's ex. 43 was admitted in the record as Court Ex. 1.

Joe Monroe testified that he succeeded Clevidence in charge of the UKPD in July 2006 as interim Chief and later was appointed chief. He affirmed that Clevidence had exercised near-total day-to-day control over police department matters including down to the level of what officers were assigned to what shifts from the last quarter 2004 to Vick's arrival in February 2006. (CD A-3 4/24/12 at 09:18:04-19:52). He did not recall that Carpenter had ever served as acting chief (even on a temporary basis) and had never designated her as such since he had been chief. (*Id.* at 09:26:25-54).

The court below barred Carpenter from extracting any testimony from Monroe regarding discriminatory acts toward plaintiffs Laura Marco and Tiua Chilton. (*Id.* at 10:02:00-06:15, 10:07:00-15:00).[10]

Monroe first saw any data regarding the interviews done in July 2006, which identified discrimination concerns as a major theme in the police department, only days before Carpenter's trial commenced. (*Id.* at 10:19:12-47). Monroe negligently discharged a firearm in the police department parking lot, asked for and received a suspension of two days. (*Id.* at 10:20:00-21:50).

Monroe denied emphatically showing or discussing any deposition testimony given by a Stephanie Bastin with Alexandra McConnell. (*Id.* at 10:23:30-24:14). He likewise denied saying anything to McConnell about any testimony by Bastin regarding a pre-employment polygraph taken by McConnell. (*Id.* at 10:24:14-42).

Monroe testified that he had had extensive training in workplace discrimination, which enabled him to recognize discriminatory work practices and incidents. (*Id.* at 10:25:30-26:47). He agreed that the following types of practices would be gender discrimination: treating women as second-class employees, subjecting women employees to a higher level of scrutiny as compared with men, applying different standards to women as opposed to men, excluding qualified women from leadership opportunities and excluding qualified women from training opportunities. (*Id.* at 10:26:50-31:42). A "frat-house atmosphere" could be discriminatory if it included subjecting women to harsher

[10] With regard to Chilton the issues would have regarded the defacing of Chilton's property by Robbie Turner and the instance in which he refused to follow a direct order from her. The trial judge stated that Chilton would be able to testify regarding these matters. (CD A-3 4/24/12 at 10:12:20-13:00). However, Chilton was not permitted to do so. Marco was similarly prevented from testifying regarding discriminatory acts by Monroe toward her. These rulings were directly contrary to the trial court's pretrial motion *in limine* ruling.

penalties or adverse conditions such as a "hostile work environment." (*Id.* at 10:31:42-33:10). Monroe claimed that both men and women had discussed strip club visits in the workplace. (*Id.* at 10:33:10-37:00).[11] The court below barred Carpenter from extracting any testimony from Monroe regarding discriminatory actions directed at Chilton with regard to her shift assignments. (*Id.* at 10:37:44-40:45).[12]

The court below sustained an objection regarding whether discussion of strip club visits in the workplace would contribute to a hostile work environment. (*Id.* at 10:33:10-34:50).

Alexandra McConnell testified that Monroe informed her that her pre-employment polygraph had been mentioned in a deposition by Stephanie Bastin. (*Id.* at 11:51:10-58:10). McConnell had a lawyer send a letter threatening legal action against Carpenter, Chilton, Marco, Shuck, Creech, Gina Wilson, Brenda Palmer, Kara Jeter (and Stephanie Bastin) referencing the discrimination complaint they had filed with the university and alleging that they had been discussing her polygraph in the workplace. (Plaintiff's Ex. 44). She acknowledged that, contrary to the letter sent on her behalf, she was aware of no such discussions regarding her polygraph. (*Id.* at 12:01:20-05:42).

Kara Jeter, who was still employed by the UKPD as a police officer, testified that after McConnell was hired, she never discussed with anyone anything pertaining to McConnell's polygraph and never heard anyone else discuss it either. (*Id.* at 02:07:02-09:55). She participated in the filing of a discrimination complaint with the university, as elicited by defense counsel. (*Id.* at 02:15:00-19). The Court refused to admit in evidence

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[11] These types of discussions were specifically mentioned in the discrimination report that Carpenter and the other plaintiffs filed with the university. However, the court below barred any testimony from Carpenter and/or Chilton, Shuck, Marco and Creech regarding the content of their report.

[12] The trial judge also observed that Bobbye Carpenter had yet to testify how this affected her. Yet later the trial judge would bar Carpenter from giving that testimony.

the discrimination complaint, which was Plaintiff's ex. 37, asserting that it related to everything that the court had ruled could not be admitted. *(Id.* at 02:18:50-19:17).[13] The Court with defense counsel's agreement stated that any error regarding the exclusion of evidence was sufficiently preserved and presented in the record by way of witness's depositions and motions previously filed in the record; the trial judge specifically pointing out that a recently-adopted civil rule precluded the need to take each witness's excluded testimony in the courtroom. (*Id.* at 02:20:20-24:35). This was repeated later in the trial during Carpenter's testimony. (CD A-4 at 03:53:30-55:10).

Bobbye Carpenter testified that she had been employed at UKPD since September 1975, worked in all sorts of positions with supervisory, administrative and investigative duties and attained the rank of Captain in 2000, which she held at the time of trial. (*Id.* at 02:26:02-02:40:00). As Captain she has commanded both the administration and operations branches, her duties growing under former UKPD chief Rebecca Langston. (*Id.* at 02:43:00-44:19). However, when Ken Clevidence assumed oversight of UKPD, her duties steadily diminished to the point that she was removed from the chain of command by June 2004. (Plaintiff's ex. 11; CD A-3 4/24/12 02:49:35-52:00). In July 2004, at the then-Chief's request, she wrote a memo regarding her past experience with UKPD and assignments that would be consistent with her experience and expertise. (*Id.* at 02:53:00-56:31; Plaintiff's ex. 12).

By mid-2005, Carpenter was very concerned about her future with UKPD, because hardly any actual police duties were assigned to her, and she saw that Stephanie Bastin, the female assistant chief, had had nearly all her duties removed from her. (CD A-

[13] The discrimination complaint is in the record as Ex. A to the Complaint at RA 25.

4 4/24/12 at 03:56:00-58:15). Carpenter never discussed McConnell's pre-employment polygraph outside of the hiring process, when it was part of her job duties. (*Id.* at 04:02:00-03:40).

Carpenter was interviewed as part of UKPD interviews in summer 2006. (*Id.* at 04:09:20-10:00). She was apprehensive at the interview, because she knew she could be identified easily as the source of information. (*Id.* at 04:10:00-11:31).

Carpenter, at this point, felt she was being discriminated against in the UKPD because she was a woman, noting that she had been for an extended time deprived of the authority and duties that supposedly came with her position, something she had seen also with Bastin, the only other high-ranking woman in UKPD. (*Id.* at 04:14:12-16:55). The court sustained the defense objection and precluded Carpenter from testifying about discriminatory treatment directed at Chilton that contributed to the discriminatory atmosphere she worked in or discriminatory acts directed at any other female employee. (*Id.* at 04:17:30-26:00). Carpenter elaborated that she had been denied opportunity to lead the department for even a short duration after Clevidence became involved with it. (*Id.* at 04:26:00-28:18). She noted the stark contrast in this regard with her male counterparts. (*Id.* at 04:28:18-30:22).

Carpenter was not permitted by the court below to fully explain why she deemed it appropriate and necessary to file a discrimination complaint with the university, the court ruling that Carpenter could not testify regarding other, specific instances of discriminatory practices reported in the discrimination complaint. (*Id.* at 04:32:20-39:00). Carpenter acknowledged that she had seen glimpses of a "frat-house" atmosphere at UKPD. (*Id.* at 04:39:05-40:11). The discriminatory atmosphere endured by Carpenter

caused it to become harder for her to do her job, and affected her outside the workplace in the form of disrupted eating and sleep patterns. (*Id.* at 05:00:00-02:30, 05:30-07:35).

Restrictions On Other Plaintiffs' Testimony

The court below barred any testimony from co-plaintiffs Lisa Shuck, Tiua Chilton, Laura Marco and Lori Creech regarding the following: (1) discriminatory acts and incidents that contributed to a discriminatory work environment; (2) discriminatory acts and incidents they disclosed to human resources in July 2006 interviews; (3) discriminatory acts and incidents they disclosed to Terry Allen during his investigation following filing of their discrimination complaint; and, (4) testimony regarding why they signed and felt appropriate to submit to the Office of Institutional Equity the discrimination complaint. (CD A-5 4/25/12 at 9:54:16-55:33). The court also barred any testimony by Shuck, Chilton, Marco and Creech with regard to Carpenter's treatment in the UKPD that they considered discriminatory based on sex. (*Id.* at 10:10:30-11:05).

Tiua Chilton was limited by the court below to testifying simply as to her tenure at UKPD, that she worked with Carpenter, that she had never discussed or heard discussed McConnell's polygraph in the workplace, that she and others filed a discrimination complaint with the university's EEO office. (*Id.* at 10:39:14-44:30). Although Chilton was permitted to testify that she and Shuck had met with Todd regarding Monroe, she was not permitted to testify what conduct of Monroe's had motivated them. (*Id.* at 10:42:00-43:55).

Plaintiff Lori Creech was limited to testifying to her current employment with Fayette County Sheriff, her tenure at UKPD, that never participated or heard of any discussion regarding McConnell's polygraph, that filed discrimination complaint in

conjunction with others and sustained a significant pay decrease upon leaving UKPD and going to sheriff's department. (*Id.* at 10:48:09-50:55).

Plaintiff Lisa Shuck was limited to testifying regarding her tenure with UKPD, that she had never discussed nor heard discussed McConnell's polygraph, she filed a discrimination report in conjunction with others, that she was interviewed following the filing of that complaint and that she left her employment with UKPD involuntarily. (*Id.* at 10:52:25-54:25).

Laura Marco was limited to testifying regarding her current employment as a police officer at Kentucky State University, her tenure at UKPD, that she had never discussed nor heard discussed McConnell's polygraph, that she filed the discrimination report in conjunction with others and that she left voluntarily her employment at UKPD. (*Id.* at 10:56:15-57:52).

Carpenter rested and the court below directed verdict for the defendants.

After directing verdict against Carpenter, the court below reversed course again and granted all of the defendants' renewed motions for summary judgment. (Order, RA 18; Opinion & Order, RA 23).

The Ruling by the Court of Appeals

The Court of Appeals reversed the directed verdict entered on Carpenter's of gender discrimination and retaliation with regard to the university, Monroe and Clevidence. It also reversed the summary judgment on Chilton's and Marco's gender discrimination claims, but affirmed the circuit court as to Marco's retaliation claim. The Court of Appeals remanded all for a single trial.

ARGUMENT

Point 1

Plain, Unambiguous Statutory Language Provides for Individual Supervisor Liability Under the Kentucky Whistleblower Act (Responding to Point I of Appellants' Brief)

"[T]he first rule of statutory interpretation is that the text of the statute is supreme." *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016). "[O]ur practice [is] [ ] interpreting statutory provisions faithfully to their text [.]" *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 581 (Ky. 2016). "If the literal language of a statute is clear and unambiguous, it must be given effect as written." *Wilburn v. Commonwealth,* 312 S 321, 328 (Ky. 2010). This Court "will not construe a meaning that the text of the statute cannot bear." *Owen, supra.*

This Court's ruling in *Cab. for Families & Children v. Cummings,* 163 S.W.3d 425 (Ky. 2005), departs from and is contrary to these rules, because the plain, unambiguous text of the Kentucky Whistleblower Act, KRS 61.101-103, provides for individual supervisor liability for violating the Act. Accordingly, it is respectfully submitted that the Court should reconsider and reverse this holding in *Cummings.*

The specific ruling in *Cummings* was that individual policy-makers and managerial supervisors were not included with in the Act's definition of "employer" found in KRS 61.101(2). That ruling is directly contrary to the statute's plain, unambiguous text.

KRS 61.101(2) defines "employer" as follows:

> "Employer" means the Commonwealth of Kentucky or any of its political subdivisions. *Employer also includes any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees*; (emphasis added).

The Act's prohibition is on certain acts or actions of an "employer" as set forth and KRS 61.102(1):

> *No employer* shall subject to reprisal ... Any employee who in good faith reports, discloses, divulges, or otherwise bring to the attention of ... any ... appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance ... or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. (emphasis added).

The cause of action against an "employer" who violates the prohibition in KRS 61.102 (1) is found at KRS 61.103 (2) which allows the action to be "filed in the Circuit Court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom a civil complaint is filed resides or has its principal place of business."

The Act intends to deter certain wrongful actions and allow remedy for those injured thereby taken by an employer, which the Act takes pains to specify "includes any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees [.]" KRS 61.102(2). That the plain, unambiguous statutory text provides for individual supervisor liability is inescapable.

If the text of the statute is to reign supreme and if the Court is to honor its pledge not to "construe a meaning that the text of the statute cannot bear," it should and must reconsider and reverse its ruling in *Cummings.* Accordingly, the Court should affirm the Court of Appeals ruling remanding these claims for trial.

Point 2

KRS 344 Prohibits Discrimination In the Terms and Conditions of Employment Based on An Employee's Sex or Gender. The Existence of Such Discrimination is Determined Based on The Totality of Circumstances Including Discriminatory Acts Directed at Co-Workers. (Responding to Points II and III of Appellants' Brief)

The issue in gender based discrimination cases is "whether members of one sex are exposed to disadvantageous terms or conditions of employment which members of the other sex are not exposed." *Harris v. Forklift-Systems, Inc.*, 510 U.S. 17, 25 (1993). Appellees pleaded that they were subjected to discrimination in the terms and conditions of their employment based on their female gender. A hostile work environment based on gender is discrimination in the terms and conditions of employment. This must be assessed by considering the totality of the circumstances. Appellees can present ample and sufficient proof to sustain this claim. The Court of Appeals ruled correctly and should be affirmed.

A hostile work environment based on gender can be based on non-sexual conduct, contrary to appellants' contentions.[14] "To constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee." *Andrews v City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir 1990). "[H]arassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the 'based on sex' requirement." *Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999). "Intimidation and hostility toward women because they are women can obviously result from conduct other

[14] Appellants assert that a hostile work environment based on sex must and can only be based on proof of "sexual conduct." Brief for Appellants at 19. This is error and disregards a vast body of caselaw.

than explicit sexual advances." *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); *see McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C.Cir. 1985); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); *see also* Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683 (1998)(arguing that non-sexual harassment is often a major part of a hostile work environment). A hostile work environment based on gender does not turn solely on the number and frequency of sexual comments, advances, physical touchings a woman is obliged to endure in her workplace; the issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment which members of the other sex are not exposed."

Whether appellees were subjected to disadvantageous terms or conditions of employment which male police officers did not experience requires consideration of the totality of the circumstances. *Lumpkins v. City of Louisville,* 157 S.W.3d 601, 605 (Ky. 2005). This Court has cautioned against disaggregating and minimizing particular instances. *Id.* We turn now to what proof properly comprises this totality of circumstances.

The totality of circumstances properly presented in support of a hostile work environment claim includes a variety of proof types. In *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814 (Ky. 1992), this Court held that evidence of gender-based discrimination in assignments, statements by the employer's managing agent that women in general and the plaintiff in particular were unfit for work, and testimony supporting the inference that the employer's sexually demeaning attitude towards women pervaded the entire employment atmosphere in the form, among other things, of conversation by and with other employees on the job reporting the managing agent's hostility towards women was

both admissible and probative of the plaintiff's hostile work environment claim. 840 S.W.2d at 822-23.

The Court of Appeals in *Kentucky Center for the Arts v. Handley,* 827 S.W. 2d 697, 701 n.5 (Ky. App. 1992), observed that a plaintiff may show discrimination by a variety of means including "that there has been a general attitude of discrimination throughout the employment climate." *Handley* reiterated the holdings of two prior decisions, *White v. Rainbo Baking Co.,* 765 S.W.2d 26, 30 (Ky. App. 1988) and *Willoughby v. Gencorp, Inc.*, 809 S.W.2d 858, 862 (Ky. App. 1990), which both held that evidence of discriminatory acts directed at others is admissible and probative evidence in support of a plaintiff's individualized claim of discrimination.

These cases and their analysis are consistent with the body of law developed in Title VII cases, the principal federal employment discrimination statute. A particularly instructive case is *Hurley v. Atlantic City Police Dept.,* 174 F.3d 95 (3d Cir. 1999), especially given the plaintiff's workplace and the similarity of her complaints. In *Hurley,* a police sergeant claimed sex discrimination in her workplace. The plaintiff complained of numerous discriminatory acts directed at her including but not limited to, (1) even after a promotion to sergeant she received only "menial" assignments, gained "no useful experience," and "supervised no one,"; (2) being insulted by her supervisor at the rollcall; (3) being excluded from sergeants' meetings; (4) being "keyed out" on her radio transmissions (meaning they were interfered with); (5) being told she was "too emotional" in her reaction to a "sanitary napkin incident"; (6) being the target of sexually-oriented graffiti and commentary toward which her supervisor took no action; and, (7) receiving a transfer to an undesirable position. 174 F.3d at 103-105.

On appeal following a jury verdict in the plaintiff's favor, the employer challenged the admission at trial of testimony from a "number of witnesses ... about alleged incidents of harassment and retaliation that ... involved matters of which [the plaintiff] was unaware until after she filed suit." *Id.* at 107. This testimony came from "four women who were associated with the [police department] about incidents of sexual harassment and retaliation of which [the plaintiff] had no knowledge until after commencing suit," and "testimony by eight male police officers about 'locker-room' conversations between men outside the presence of women [.]" *Id.*

The Third Circuit held that the testimony from both groups was properly admitted, beginning by asserting that "[a] plaintiff's knowledge of harassment or pervasively sexist attitudes is not, however, a requirement for admitting testimony on these subjects [.]" *Id.* at 110. First, the Third Circuit explained, "[e]vidence of harassment of other women and widespread sexism is also probative of 'whether one of the principal nondiscriminatory reasons asserted by [an employer] for its actions was in fact a pretext for ... discrimination.'" *Id., quoting Glass v. Philadelphia Elec. Co.,* 34 F.3d 188, 194 (3d Cir. 1994). Second, evidence of other acts of discrimination are "extremely probative as to whether the harassment was sexually discriminatory and whether the [police department] knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy." *Id.* at 111. The probative value of this evidence, the court continued, did not depend "on the plaintiff's knowledge of an incident; instead, they go to the motive behind the harassment, which may help the jury interpret otherwise ambiguous acts, and to the employer's liability." *Id.* In conclusion, the court added that the "general atmosphere of sexism reflected by the challenged evidence

is quite probative of whether decision-makers at the [police department] felt free to take sex into account when making employment decisions, when deciding whether to abuse their positions by asking for sexual favors, and when responding to sexual harassment complaints." *Id.* at 111.

Hurley is not a jurisprudential outlier. In *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008), the Sixth Circuit concluded "that the factfinder may consider similar acts of harassment of which a plaintiff becomes aware during the course of his or her employment, even if the harassing acts were directed at others or occurred outside of the plaintiff's presence," a conclusion, the court noted, consistent with that of other circuits. 517 F.3d at 336 (citing cases including *Hurley*). The appellees' claims herein trod a well-beaten legal and evidentiary path.

The appellants do not take issue with this caselaw; indeed, Points II and III of appellants' brief have very little caselaw citation. Instead and even while noting that appellee pleaded in their complaint "that they had 'been subjected to unlawful discrimination based on their female gender in the terms and conditions of their employment by the defendant UK, in violation of KRS Chapter 344,'" Brief for Appellants at 19, appellants assert that plaintiffs did not make or plead a hostile work environment based on sex claim. This unfounded argument appears to rest on at least two errors.

Appellants' first error is overlooking that a hostile work environment based on sex claim is a claim asserting discrimination in the terms and conditions of employment, as this Court acknowledged in *Ammerman v. Bd. of Educ.*, 300 S.W.3d 793, 798-99 (Ky. 2000). CR 8.01(1) requires merely "a short and plain statement of the claim[.]" The

appellees' complaint was 18 pages in length; attached to it was, among other things, a six-page report they signed and tendered to the university's Office of Institutional Equity detailing some of the discriminatory practices and acts in the police department including discussion among male officers of their visits to strip clubs with the department chief, defendant Joe Monroe. (Complaint, RA 6-33). Appellants' also reference Marco's acknowledgement in her deposition that her claim was not premised solely on sexual conduct and harassment. Brief for Appellant at 21. Even assuming a plaintiff's understanding of the legal terms attendant to her claims is material, Marco's answer is correct: neither Marco nor Carpenter nor Chilton have claimed that sexual harassment or conduct alone is the basis for their claim; rather, each claims that discrimination in the terms and conditions of their employment based on sex, the issue being whether "whether members of one sex are exposed to disadvantageous terms or conditions of employment which members of the other sex are not exposed."

Appellants' second error is their unfounded assertion that a hostile work environment based on sex claim must and can only include sexual advancements, propositions and the like. Appellants do not recognize that harassing and discriminatory conduct that does not have an overt sexual component also supports the claim; the parallels between appellees' complaints and those present in *Hurley* are telling in this regard.

Appellees can present more than ample evidence to support their claims of discrimination in their work at the UKPD. First, the report prepared following the 2006 interviews of UKPD personnel recites a discriminatory atmosphere. *Handley, supra,* 827 S.W.2d at 700. Second, the university failed to follow its purported policies and

procedures, and an employer's failure to take remedial action in response to a report of discrimination is discriminatory. *Norville v. Staten Island Univ. Hosp.*, 196 F3d 89, 97 (2d Cir 1999); *Alvarado v. Board of Trustees*, 928 F.2d 118, 122 (4th Cir. 1991). Third, the evidence that men and women were subject to different discipline standards is proof of discrimination. *Handley, supra.*

Fourth, there is evidence that the UKPD devalued and undermined the command authority of its women commanders. All of the plaintiffs testified that they witnessed steady diminution and erosion of Bastin's authority, while she was still employed at UKPD. Carpenter has testified how she was denied opportunity to exercise command authority. Chilton, in turn, had her authority directly defied without any penalty. This is proof of a discriminatory atmosphere devaluing the capabilities of women in the UKPD under this Court's decision in *Handley.* The parallels with the plaintiff in *Hurley,* who had a supervisory title but no actual authority, are, again, telling.

Fifth, that women were given less desirable assignments, denied opportunities to enhance their standing in the department, were denied training opportunities, were retaliated against when they reported sex-based rumors in the workplace that were hindering their job, and had requests for particular shift assignments denied in contradiction to ordinary procedure is proof of discrimination. *Handley, supra.*

Sixth, there is evidence of frequent viewing of pornography and discussion of strip club visits in the workplace, all of which at least implicitly suggests a gender-hostile work environment, *Andrews v. Philadelphia,* 895 F.2d at 1482 n. 3, as does discussion of strip club visits. *Anderson v. SecTek, Inc.*, 238 F.Supp.2d 66, 84-85 (D.D.C. 2002).

Carpenter, Chilton and Marco can all present ample evidence of the discriminatory atmosphere the worked in at the UKPD. This evidence is sufficient for a reasonable jury to find that they were exposed to disadvantageous terms and conditions of employment which members of the other sex were not exposed in violation of KRS Chapter 344. Accordingly, the Court of Appeals should be affirmed, and these claims remanded for trial.

Point 3

The Trial Court Committed Numerous Reversible Errors Excluding Evidence Supporting Carpenter's Claims and the Directed Verdict Was Error (Responding to Point IV of Appellant's Brief)

The trial court abused its discretion and excluded nearly all of Carpenter's properly admissible and probative evidence supporting her claims. Then, having excluded nearly all of the evidence supporting Carpenter's claims, the trial court entered a directed verdict for defendants. The Court of Appeals correctly reversed the trial court

The standard of review of decisions to admit or exclude evidence is for an abuse of discretion. *Clephas v. Garlock,* 168 S.W.3d 389, 393 (Ky.App.2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky.1999) (citations omitted); *see also Kuprion v. Fitzgerald,* 888 S.W.2d 679, 684 (Ky.1994). The trial court abused its discretion in many instances, as a recitation of the trial court's restrictions on Carpenter's proof shows.

Carpenter was not permitted to testify why she deemed it appropriate and necessary to file a discrimination complaint with the university's Office of Institutional Equity. The complaint itself was excluded from evidence. Further, the trial court ruled

that Carpenter could not testify regarding other, specific instances of discriminatory practices reported in the discrimination complaint. (CD A-4 4/24/12 at 04:32:20-39:00).

The court below barred any testimony from co-plaintiffs Lisa Shuck, Tiua Chilton, Laura Marco and Lori Creech regarding the following: (1) discriminatory acts and incidents that contributed to a discriminatory work environment; (2) discriminatory acts and incidents they disclosed to human resources in July 2006 interviews; (3) discriminatory acts and incidents they disclosed to Terry Allen during his investigation following filing of their discrimination complaint; and, (4) testimony regarding why they signed and felt appropriate to submit to the Office of Institutional Equity the discrimination complaint. (CD A-5 4/25/12 at 9:54:16-55:33). The court also barred any testimony by Shuck, Chilton, Marco and Creech with regard to Carpenter's treatment in the UKPD that they considered discriminatory based on sex. (*Id.* at 10:10:30-11:05).

Tiua Chilton was limited by the court below to testifying simply as to her tenure at UKPD, that she worked with Carpenter, that she had never discussed or heard discussed McConnell's polygraph in the workplace, that she and others filed a discrimination complaint with the university's EEO office. (*Id.* at 10:39:14-44:30). Although Chilton was permitted to testify that she and Shuck had met with Todd regarding Monroe, she was not permitted to testify what conduct of Monroe's had motivated them. (*Id.* at 10:42:00-43:55).

Plaintiff Lori Creech was limited to testifying to her current employment with Fayette County Sheriff, her tenure at UKPD, that never participated or heard of any discussion regarding McConnell's polygraph, that filed discrimination complaint in

conjunction with others and sustained a significant pay decrease upon leaving UKPD and going to sheriff's department. (*Id.* at 10:48:09-50:55).

Plaintiff Lisa Shuck was limited to testifying regarding her tenure with UKPD, that she had never discussed nor heard discussed McConnell's polygraph, she filed a discrimination report in conjunction with others, that she was interviewed following the filing of that complaint and that she left her employment with UKPD involuntarily. (*Id.* at 10:52:25-54:25).

Laura Marco was limited to testifying regarding her current employment as a police officer at Kentucky State University, her tenure at UKPD, that she had never discussed nor heard discussed McConnell's polygraph, that she filed the discrimination report in conjunction with others and that she left voluntarily her employment at UKPD. (*Id.* at 10:56:15-57:52).

The exclusion of the interview data showing the discriminatory atmosphere in the UKPD was also erroneous. Since the university relied on this information for the report prepared by Jordan, this information was not hearsay, it was an admission adopted by the university. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009). Furthermore, both Todd and Jordan were permitted to testify contrary to this information and defense counsel made statements contrary to the information in opening statement. This was unfair and error.

These rulings were an abuse of discretion, both individually and cumulatively. First, as already discussed, Carpenter was entitled to present evidence of discriminatory acts directed at her co-workers in support of her discrimination claim, both to show defendants' discriminatory animus and to show the pretextual nature of any explanation

offered by defendants with regard to any discriminatory act. *See* Point II, *supra,* pp. 21-25. Second, Carpenter was certainly entitled to present testimony and evidence corroborating that she herself had been subjected to discrimination. *Id.* Third, Carpenter was entitled to present evidence that she worked in a discriminatory atmosphere based on her gender. *Id.* Fourth, while this Court has ruled recently that a plaintiff asserting a retaliation claim under KRS Chapter 344 need not prove her good faith,[15] it certainly buttresses a plaintiff's claim to do so, and, in any event, Carpenter also asserted a retaliation claim pursuant to KRS 61.103 with regard to which she is required to present evidence establishing her good faith. *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998). The trial court was very unfair and arbitrary in the evidentiary rulings at trial, and they were not supported by sound legal principles.

When reviewing a grant of a directed verdict, a *de novo* standard of review applies since, as with a review of summary judgment, a directed verdict involves no fact finding.[16] A directed verdict may be granted only where the evidence is insufficient to sustain a verdict. *Asbury University v. Powell,* 486 S.W.3d 246, 257 (Ky. 2016). As when considering a motion for summary judgment, a motion for directed verdict admits the truth of all evidence which is favorable to the non-moving party, and all inferences are drawn in favor of the non-moving party. *Id.*. The trial judge cannot weigh the evidence or assess credibility of the witnesses; this function, of course, is reserved for the jury. *Id.*

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[15] *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 580-81 (Ky. 2016).

[16] "Because summary judgments involve no fact finding, this Court will review the circuit court's decision *de novo.*" *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky.2005). Federal courts have applied a *de novo* standard. *Gairola v. Com. of Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985); *Bridges v. Groendyke Transport, Inc.*, 553 F.2d 877, 878 (5th Cir.1977).

When the evidence supporting Carpenter's claims that the trial judge excluded is fully and fairly considered, the error in granting the directed verdict is manifest. Accordingly, the Court of Appeals ruling reversing the directed verdict and remanding Carpenter's claims for a fair trial should be affirmed.

Point 4

The Court of Appeals Correctly Ordered for Only One Trial (Responding to Point V of Appellants' Brief)

The trial court order for six separate trials in reliance on *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011), was error and contrary to CR 20. Now, of course, there are only three plaintiffs left, so the grounds for separate trials are even less.

The material distinctions between this case and *Dukes* are staggering. First, this case involved six plaintiffs; *Dukes,* by huge, huge contrast, involved the "certification of *a class comprising about one and a half million plaintiffs.*" 131 S.Ct. at 2547 (emphasis added). Second, this case involves a single workplace; *Dukes* involved some 3400 different Wal-Mart stores. *Id.* Third, this case identifies two specific supervisors, defendants Monroe and Clevidence, at a single workplace; *Dukes* involved thousands, perhaps tens of thousands of supervisors spread out all over the country at the 3400 different Wal-Mart stores.

Joinder of parties under CR 20 is proper if the plaintiffs assert any right to relief "arising out of the same transaction, occurrences, or series of transactions or occurrences and if *any question of law or fact* common to all these persons will arise in the same action." (emphasis supplied). A number of "occurrences, or series of transactions or occurrences" give rise to plaintiffs' claims including (1) the university's recognition of institutionalized gender discrimination in the UKPD; (2) the university president's

establishment of a university policy tolerating and sanctioning that discrimination; (3) the aiding and abetting of discriminatory and retaliatory practices by specific named individual defendants; and, (4) the university's ratification of the attempted intimidation and retaliation directed at the plaintiffs.

All to these lead into common questions to all plaintiffs as follows: (1) have plaintiffs been subjected to discrimination in the terms and conditions of their employment based on their gender; (2) have defendants aided and abetted illegal gender discrimination; (3) have defendants aided and abetted unlawful retaliation against plaintiffs; and, (4) have defendants retaliated against plaintiffs.

Furthermore, CR 20 specifically contemplates that there may be some variation in the claims by and/or against various parties, specifying that "[a] plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded." So the variation of some of the claims or relief demanded by some of the plaintiffs does not weigh against joinder at trial of the plaintiffs in a single trial. CR 20 properly provides for a single trial in this case, which serves the interest of all concerned.

Appellants ignore the report generated in 2006[17] that identified "fairness and equity" as major issues in the UKPD, and then-President Todd's concession that this included discrimination and bias issues, (CD A-2 4/23/12 at 03:31:50-32:12), while arguing that there is no evidence of entrenched discrimination in the UKPD. Brief for Appellant. Likewise, appellants ignore the absence of any remedial response to this report, which was contrary to purported university policy. The discrimination in the terms and conditions of employment of which Carpenter, Chilton and Marco complain

[17] The report was admitted in evidence as Plaintiff's Ex. 39.

was identified by the university before this lawsuit was filed. Appellants' contentions regarding the evidence are contrary to the record.

Appellants also assert that the discriminatory acts directed at Shuck, Creech and Wilson cannot serve as evidence supporting the claims of Carpenter, Chilton and Marco, although they offer no supporting citation. Brief for Appellants at 28-29. This also is error. The relevant caselaw from our state has not required evidence of other acts of discrimination to on their own independently establish a claim for liability. *See Lumpkins v. City of Louisville,* 157 S.W.3d 601, 605 (Ky. 2005); *Meyers v. Chapman Printing Co.,* 840 S.W.2d 814 (Ky. 1992); *Kentucky Center for the Arts v. Handley,* 827 S.W. 2d 697 (Ky. App. 1992); *Willoughby v. Gencorp, Inc.*, 809 S.W.2d 858 (Ky. App. 1990); *White v. Rainbo Baking Co.,* 765 S.W.2d 26 (Ky. App. 1988). Such a requirement has not been imposed by other courts either. *See Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999)(affirming summary judgment on plaintiff's religious discrimination claim and noting proof regarding it was admissible to augment his race discrimination claim); *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1415–17 (10th Cir.1987) (answering in the affirmative the question "whether incidents of racial harassment which may, by themselves, be insufficient to support a racially hostile work environment claim can be combined with incidents of sexual harassment to prove a pervasive pattern of discriminatory harassment in violation of Title VII").

This case now entails a trial for only three women who worked at the same workplace at the same time during which time the same supervisory personnel were in charge. At the root of the case is gender discrimination that colored their workplace and opportunities. Courts have repeatedly ruled that joinder of plaintiff-parties and claims

was proper in employment discrimination cases where there is pleaded a pattern and practice of discrimination and common issues of law and fact are predominant. *See, e.g., Alexander v. Fulton County,* 207 F.3d 1303 (11th Cir. 2000)(18 plaintiffs in race discrimination case against police department); *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974)(10 plaintiffs in race discrimination case); *Mack v. J.C. Penney Co.*, 108 F.R.D. 30 (S.D. Ga. 1985)(allegations of pattern and practice of discrimination made joinder of multi-plaintiffs in discrimination case appropriate); *King v. Pepsi-Cola*, 86 F.R.D. 4 (E.D. Pa. 1979). Carpenter, Chilton and Marco surely accomplished this by the pleadings in their complaint including at least as follows:

> 83. Defendants have engaged in repeated and continuing unlawful employment practices including but not limited to subjecting plaintiffs to discrimination in the terms and conditions of their employment based on their female sex, unlawfully retaliating against plaintiffs on account of their opposition to unlawful and gender discriminatory employment practices, their participation and assistance in investigations and proceedings involving unlawful employment practices including discrimination and retaliation and retaliating against plaintiffs on account of their reports and disclosures within the meaning of KRS 61.102.

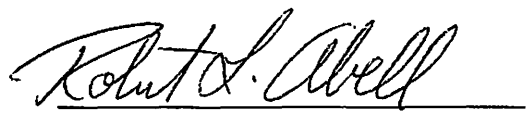
(Complaint, RA 6-33).

The Court of Appeals ruled correctly that a single trial should be held; accordingly, it should be affirmed.

CONCLUSION

For all the foregoing reasons, the Court should affirm the Court of Appeals and remand the case for a single trial at which Carpenter, Chilton and Marco may present their claims to a jury.

Respectfully submitted,



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APPENDIX