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Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0921-MR

MATTHEW SWAIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JULIE KAELIN, JUDGE
ACTION NO. 24-CI-004113

LOUISVILLE METRO HOUSING AUTHORITY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; L. JONES AND TAYLOR, JUDGES.

JONES, L., JUDGE: This dispute involves a claim brought under Kentucky's Whistleblower Act[1] (Act) centered on Matthew Swain's allegation that he was suspended and then terminated from his employment with Louisville Metro

[1] The Kentucky Whistleblower Act is codified at Kentucky Revised Statutes (KRS) 61.101 through 61.103.

Housing Authority (Metro) in retaliation for his disclosure of alleged improprieties to the United States Department of Housing and Urban Development (HUD) in February and May of 2024. The Jefferson Circuit Court found Swain was not entitled to protection under the Act. We affirm the circuit court's determination that Swain's May 2024 disclosure to HUD does not fall under the Act's protection, but conclude the circuit court erred by granting summary judgment to Metro regarding Swain's February 2024 disclosure. Therefore, we affirm in part, reverse in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Metro is a local governmental entity whose core purpose is to help provide affordable housing for people in Jefferson County, Kentucky. Most of Metro's funding comes from federal sources and grants provided and administered by HUD. Swain was initially hired by Metro as a Safety, Security and Investigations Supervisor in 2020 and was promoted to OSHA[2]/Safety, Security and Investigations Manager the next year. In January of 2024, Metro hired a new Executive Director, Elizabeth Strojan.

During a February 2024 teleconference between Metro and HUD personnel, Swain stated that illegal subletting was "rampant" at Metro. Leases between Metro and its tenants specifically forbid tenants from "assigning this lease

[2] Occupational Safety and Health Administration.

or subletting the dwelling unit . . . ."[3] Subletting was an ongoing topic of concern at Metro and had been mentioned at multiple internal meetings during 2022, 2023, and January of 2024; however, Metro collects no empirical data to either support or disprove the allegation. While it is undisputed that Metro suspected subletting was a problem prior to Swain's February 2024 statement to HUD, Swain alleges that no one from Metro had previously disclosed the concern to HUD. Metro does not point to evidence in the record to refute Swain's assertion.

According to Swain's deposition, "[i]mmediately after the [February 2024] meeting," Strojan told Swain to "Stop talking about subletting."[4] Swain went on to testify that he "knew at that point that if I defied her request, I would more than likely be terminated."[5]

In April of 2024, Swain's job title changed to Coordinator of Security and Investigations. Swain testified at his deposition that this change was a "demotion" which "came directly from Elizabeth Strojan . . . ."[6] Following this, on or about May 10, 2024, in a private phone call, Swain informed HUD that $17 million in Section 8 housing funds provided to Metro were unaccounted for or

[3] Trial Court Record (TR) at 98.

[4] TR at 113.

[5] TR at 113.

[6] TR at 100.

missing. Section 8, also known as the Housing Choice Voucher Program, is administered by HUD. Section 8 vouchers help eligible participants pay rent on private housing. Local housing authorities, such as Metro, manage Section 8 vouchers. *See* 24 Code of Federal Regulations (C.F.R.) § 982.1.

On May 14, 2024, Metro suspended Swain without pay. The letter informing Swain of the suspension listed multiple reasons for the action, including Swain's failure to follow his supervisor's instructions. The letter indicated that Swain could participate in a fact-finding meeting, and such a meeting was later scheduled for May 29, 2024. Swain did not attend the meeting. Metro sent a letter to Swain that same day, with notice that his employment was terminated, effective immediately. The termination letter noted the reasoning in the suspension letter and discussed Swain's failure to have a fact-finding meeting with Metro while on suspension. On May 30, 2024, before Swain received the termination letter, he emailed his resignation to Metro.

Swain filed this action soon thereafter. Discovery ensued. In May of 2025, while discovery still was ongoing, Metro filed a motion for summary judgment. The circuit court denied Swain's request to hold Metro's motion in abeyance until discovery had been completed, and, in June of 2025, the circuit court granted Metro's motion for summary judgment. Swain brought this timely appeal from the circuit court's determination that he failed to establish a *prima*

facie claim for relief under the Act, that he acted in bad faith by failing to conduct his own investigation into the veracity of the information before making his disclosures to HUD, and that he suffered no detrimental employment action from Metro due to his resignation before he received notice of his termination.

II. STANDARD OF REVIEW

The Kentucky Supreme Court has described our review of an order granting summary judgment as follows:

> The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Determination that a fact is material or immaterial rests on the substantive law's identification of which facts are critical and which facts are irrelevant. An issue of material fact is genuine at the summary judgment phase when discovery has revealed facts which make it possible for the non-moving party to prevail at trial. Summary judgment is not a substitute for trial, and should not be granted unless it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.
>
> The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. It is vital that we not sever litigants from their right of trial, if they do in fact have valid issues to try, just for the sake of efficiency and expediency. Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, we generally review the grant of

> summary judgment without deference to either the trial court's assessment of the record or its legal conclusions.

Morales v. City of Georgetown, 709 S.W.3d 146, 153 (Ky. 2024) (internal quotation marks and citations omitted). "Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*." *Moss v. Kentucky State Univ.*, 465 S.W.3d 457, 459 (Ky. App. 2014) (citation omitted).

Also, we may affirm the trial court on any alternate ground supported by the record and applicable law. *Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 496 (Ky. 2014). Moreover, we have examined the parties' briefs "but will discuss only the arguments and cited authorities we deem most pertinent, the remainder being without merit, irrelevant, or redundant." *Schell v. Young*, 640 S.W.3d 24, 29 n.1 (Ky. App. 2021).

We further note that Swain has submitted to this Court a brief that is deficient both in the inadequacy of its preservation statements and its lack of pinpoint citations to the record. "Parties are strictly required to comply with the preservation statement requirements of RAP,[7] and we may strike a brief that does not contain proper preservation statements." *Edwards v. Edwards*, 732 S.W.3d 72, 78 (Ky. App. 2026) (citations omitted). While we are choosing not to impose

[7] Kentucky Rules of Appellate Procedure.

sanctions at this time, we cannot promise there will be no adverse consequences as we will not rummage through the record to determine whether an argument was raised by Swain before the circuit court. *See W.I.S. v. K.M.B.*, 722 S.W.3d 569, 575 (Ky. App. 2025).

III. ANALYSIS

Precedent shows Kentucky's Whistleblower Act protects state employees "who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Harper v. Univ. of Louisville*, 559 S.W.3d 796, 801 (Ky. 2018) (internal quotation marks and citations omitted). Accordingly, "[b]ecause the [Act] serves the public purpose of identifying governmental wrongdoing, it must be liberally construed to serve that purpose." *Id*. (quoting *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789, 793 (Ky. 2008) (internal quotation marks and citation omitted)). "In sum, a public employer may not take any adverse action against an employee who makes known to appropriate governmental agencies any misconduct of that agency or its employees." *Thornton v. Office of Fayette Cnty. Att'y*, 292 S.W.3d 324, 329 (Ky. App. 2009). Misconduct refers not only to violations of the law but "actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety." KRS 61.102(1).

This Court has instructed:

> In order to demonstrate a violation of [the Act], an employee must establish the following four elements: (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure. The employee must show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action. The burden of proof is then on the state employer to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action.

Davidson v. Commonwealth, Dep't of Mil. Affs., 152 S.W.3d 247, 251 (Ky. App. 2004) (internal quotation marks, footnotes, and citations omitted). Therefore, because it is undisputed that Metro is an applicable employer and Swain is an applicable employee under the Act, in order for Swain to prevail on his claim, it remains for him to prove that: (1) he made a good faith disclosure of either an actual or suspected violation of the law, or mismanagement, waste, or fraud to HUD; (2) HUD was an appropriate body or authority under the Act to receive the disclosure; and (3) Metro acted to punish him for making the disclosure. *See Kearney v. Univ. of Kentucky*, 638 S.W.3d 385, 398 (Ky. 2022).

A. Swain Failed to Contest Metro's Motion for Summary Judgment Regarding His May 2024 Disclosure to HUD

Swain claims to have made two protected disclosures to HUD. Metro explicitly sought summary judgment regarding both the February 2024 and May 2024 disclosures. Swain's lengthy response addressed only the February 2024 incident but was *completely* silent regarding the disclosure of May 2024.

Silence is insufficient to defeat a properly supported motion for summary judgment. "[T]he party opposing summary judgment must show there are genuine issues of material fact—meaning that the factual dispute actually affects whether the party moving for summary judgment is entitled to judgment in his/her favor." *Key v. CitiMortgage, Inc.*, 686 S.W.3d 630, 637 (Ky. App. 2023) (internal quotation marks omitted). Swain has not met that burden.

For well over 80 years, Kentucky precedent has held that an "appellant is precluded from raising [a] question on appeal because it was not raised or relied upon in the court below. It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Combs v. Knott Cnty. Fiscal Court*, 141 S.W.2d 859, 860 (Ky. 1940). While our rationale is not the same as that employed by the circuit court, we affirm the circuit court's decision to grant summary judgment to Metro on Swain's claims stemming from the May 2024 disclosure. Therefore, we shall

only address the merits of the circuit court's grant of summary judgment to Metro regarding Swain's February 2024 statements to HUD regarding subletting.

B. The Circuit Court Did Not Abuse its Discretion by Denying Swain's Motion to Hold Metro's Summary Judgment Motion in Abeyance

Before addressing the merits, we must consider Swain's insistence that the circuit court erred by denying his motion to hold Metro's summary judgment motion in abeyance. In essence, Swain argues the summary judgment decision was premature. We disagree.

Summary judgment may be granted "only where the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence. However, it is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Schwing v. Knott Cnty. Fiscal Ct.*, 729 S.W.3d 743, 748 (Ky. App. 2026) (internal quotation marks, brackets, and citations omitted). We review a circuit court's determination that the parties have had sufficient opportunity to conduct discovery prior to resolving a motion for summary judgment under the deferential abuse of discretion standard. *Key*, 686 S.W.3d at 636. "A trial court has abused its discretion when its ruling reflects arbitrariness, unreasonableness, unfairness, or a lack of support from sound legal principles." *Zewoldi v. Transit Auth. of River City*, 553 S.W.3d 841, 846 (Ky. App. 2018).

Roughly eleven months passed between the date on which Swain filed his complaint and the date the trial court granted summary judgment to Metro. Longstanding Kentucky precedent has affirmed granting summary judgment much earlier in a non-complex case. *See Hartford Ins. Group v. Citizens Fid. Bank & Tr. Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979).

Moreover, Swain "has not explained what facts essential to justify his opposition to summary judgment are potentially available to him yet remain undiscovered." *Schwing*, 729 S.W.3d at 748. Swain's motion to hold Metro's motion for summary judgment in abeyance noted that there were additional depositions of Metro employees he wished to take, including that of Strojan. But he did not describe the specific information he expected to glean from those depositions necessary for him to respond adequately to Metro's motion for summary judgment, nor did he explain why those depositions could not have been scheduled in the roughly eleven months which had passed since he filed his complaint. In fact, Swain misstated the applicable standard to the circuit court when he insisted during oral argument on his motion before the circuit court that a summary judgment motion cannot be ripe until discovery is complete. In short, we agree with Metro that Swain has not shown how further discovery would "change the summary judgment analysis." Appellee's Brief at 11.

We recognize that "[a]s a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties." *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007). However, this case is not overly complex as Swain's claims are based on a limited number of events involving a limited number of people which occurred over a limited time.

Another court may have allowed Swain to take additional depositions. However, the issue is not what we, or another court, might have done; the issue is whether the trial court's decision was an abuse of discretion. A decision is an abuse of discretion which entitles a party to appellate relief only if the decision is manifestly unreasonable or lacks a firm basis in the law. *Zewoldi*, 553 S.W.3d at 846. We do not believe the circuit court abused its discretion by denying Swain's motion to hold Metro's summary judgment motion in abeyance.

C. It Would Not Be Impossible for Swain to Show at Trial that He Suffered an Adverse Personnel Action

The circuit court held that Swain cannot show he suffered an adverse personnel action because he voluntarily resigned before receiving notice of his termination. We disagree.

"While KRS 61.102(1) is broad in its description of prohibited conduct by employers, for an employee to prove a violation under the [Act], the personnel action taken against him must be 'materially adverse.'" *Burton v.*

Kentucky State Police, 733 S.W.3d 229, 237 (Ky. 2026). The Act does not define "personnel action."

Under these unique facts, Swain resigned but, unbeknownst to him, he had already been fired. Although the situation is unique, it is inarguable that Metro decided to take an adverse personnel action against Swain by firing him before Swain submitted his resignation. Furthermore, Swain was suspended from his position via a letter issued roughly two weeks before he was terminated. The letter describes Swain's purportedly unacceptable job performance. Swain vehemently disputes the letter's accuracy. The accuracy of the letter's allegations about Swain's job performance are beyond the limited scope of this appeal. Instead, we merely note the temporal proximity between Swain's February 2024 disclosure to HUD and his May 2024 suspension. Also, Swain alleged in his deposition that Strojan demoted him in April 2024, not long after his February 2024 statement to HUD.

Considering these facts, construing them in the light most favorable to Swain, and drawing all reasonable inferences in his favor, a jury could conclude Swain suffered an adverse personnel action. Or not. Accordingly, Metro has not shown it is entitled to judgment as a matter of law. Therefore, this issue cannot properly be resolved at the summary judgment stage.

D. Swain's February 2024 Statement was a Qualifying Disclosure for Summary Judgment Purposes

There is no dispute that Swain was a public employee and Metro is a public entity. The dispute is whether Swain made a cognizable disclosure under the Act and, if so, whether that disclosure was a contributing factor in an adverse personnel action taken against him. *Davidson*, 152 S.W.3d at 251.

1. HUD Qualified as an Entity to Whom Swain Could Properly Make a Disclosure

We begin with Metro's argument that Swain's February 2024 statement to HUD regarding subletting cannot qualify as a good faith disclosure because HUD is not an entity to whom a qualifying disclosure may be made under the Act. We agree HUD is not among the specifically denominated entities to whom a disclosure may be made under KRS 61.102(1); however, that subsection also allows a disclosure to be made to "any other appropriate body or authority . . . ." According to our Supreme Court, "'any other appropriate body or authority' should be read to include any public body or authority with the power to remedy or report the perceived misconduct." *Gaines*, 276 S.W.3d at 793. Furthermore, in *Consol. Infrastructure Mgmt. Auth., Inc. v. Allen*, 269 S.W.3d 852, 855 (Ky. 2008), the Supreme Court held that Kentucky's Whistleblower Act was to be liberally construed to fulfill the intent of the legislature.

To allow Kentucky housing authorities, such as Metro, to access federal funding, these agencies are overseen by HUD. Misuse of those federal funds are, therefore, appropriately reported to HUD. Thus, failing to address the issue of illegal subletting would be a waste of resources, and a form of agency misconduct that would fall under HUD's oversight.

While the parties have not cited, nor did we independently locate, published precedent from a Kentucky state court which addresses whether a statement by a state employee to HUD may constitute a disclosure under the Act, based on the reasoning above, we find HUD falls under the "any appropriate body or authority" catch-all provision of KRS 61.102(1).[8]

2. The Record Contains Evidence Permitting a Reasonable Conclusion that Swain Made a Good Faith Disclosure

The parties devote most of their briefs to the issue of whether Swain made a good faith disclosure. For reasons echoed by Metro in its brief, the circuit court concluded Swain's February 2024 report to HUD could not be a good faith disclosure as a matter of law. We cannot agree.

It is uncontested that an employee's report must be made in good faith to qualify as a disclosure under the Act. *See, e.g.*, KRS 61.102(1) ("No employer

[8] Swain does refer to the unpublished federal case *Dickerson v. Georgetown Housing Authority*, No. 08-367-KSF, 2009 WL 10711781 (E.D. Ky. May 14, 2009), with facts strikingly similar to those in the case at hand.

shall subject to reprisal . . . any employee *who in good faith* reports . . . information relative to an actual or suspected violation of any law . . . or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority . . . .") (emphasis added); *Thornton*, 292 S.W.3d at 330 ("Certainly, the Act protects from retaliation an employee, who in good faith, reports or causes to be reported any activity that the employee has reasonable cause to believe is a violation of any law . . . ."). But determining whether a report was made in good faith is not an inherently straightforward matter, especially at the summary judgment stage.

Precedent unambiguously holds that determining whether a party acted in good faith is a question of fact. *Riley v. Flagstar Bank, FSB*, 316 S.W.3d 884, 891 (Ky. App. 2009) ("However, the determination of whether a party acted in good faith is a question of fact. Therefore, this is an issue for a jury to determine in the first instance, not an appellate court.") (citations omitted).[9] The

[9] *Riley* did not involve a whistleblower claim. But its general statement of the law regarding good faith applies to such claims. In fact, though we did not cite *Riley* either time, we have at least twice held in opinions resolving whistleblower claims (albeit unpublished, which we cite only to illustrate the applicability of *Riley* to whistleblower cases) that determining whether a reporting employee acted in good faith is generally inappropriate to determine at the summary judgment stage. *See Ross v. Univ. of Kentucky*, No. 2011-CA-000433-MR, 2014 WL 29001, at *7 (Ky. App. Jan. 3, 2014) (unpublished); *Jones v. Oldham Cnty. Sheriff's Dep't*, No. 2009-CA-000350-MR, 2010 WL 1508150, at *7 (Ky. App. Apr. 16, 2010) (unpublished). A federal court sitting in Kentucky reached the same conclusion in a published opinion in a whistleblower case brought under the Act. *See Pacheco v. Waldrop*, 72 F. Supp. 3d 738, 749 (W.D. Ky. 2014). Upon reconsideration, the federal court changed its holding on another issue but explicitly reiterated that it is generally inappropriate to determine a reporting employee's good faith at the summary judgment stage. *Pacheco v. Waldrop*, 84 F. Supp. 3d 606, 609 n.3 (W.D. Ky. 2015).

circuit court here did not acknowledge the general unsuitability of making a good faith determination at the summary judgment stage. Moreover, we stress that it is appropriate to grant summary judgment only when, as a practical matter, it is impossible for the non-movant to prevail at trial. *Morales*, 709 S.W.3d at 153. Thus, summary judgment in whistleblower cases based on a conclusion a disclosure was not made in good faith is proper only in extreme cases.

a. Under these Facts, Swain Was Not Required to Investigate the Subletting Issue Prior to Making a Disclosure

The circuit court faulted Swain for not personally investigating the subletting concerns before reporting them to HUD. The circuit court's holding was based on our holding in *Thornton*.

We begin by emphasizing, and reiterating, that a report based on hearsay *may be* a protected disclosure under the Act. *See Thornton*, 292 S.W.3d at 330. Nonetheless, "establishing that an employee reported suspected violations of law with second-hand information does not end the inquiry. The critical question remains as to whether the report was made in good faith." *Id*. at 331. Accordingly, we set forth in *Thornton* the following guidelines to help a court in making that determination:

> To show that good faith was used in making a report, it is incumbent upon the employee to demonstrate that the report was based on a reasonable belief of accuracy. . . . Surely, it is not good faith to make a report,

particularly one based on second-hand knowledge, for a corrupt motive like malice, spite, or personal gain.

In order to determine whether a report of a violation or suspected violation of law is made in good faith, we must look not only at the content of the report, but also at the reporter's activities in making the report. Here, Thornton's activities are problematic in terms of good faith. She was a part-time employee who worked almost completely outside the office. *Thornton made no attempt to corroborate or discover firsthand information about the suspected activities.* Thornton had no personal basis for making the allegations and knew that they were being reported by [another employee]. Moreover, while we have determined that the use of hearsay alone does not mean a report was not made in good faith, the use of hearsay evidence alone may certainly be a factor in determining if a report was made in good faith.

We believe, based on the public policy behind whistleblower statutes, to enhance the legality of state government and protect employees who make reports of wrongdoing, that it is impractical to add technical legal terms—like hearsay—to limit employees' good faith reports. Notwithstanding this limitation, undoubtedly, the Kentucky Whistleblower statutory scheme does not protect an employee who unjustifiably complains to management or the authorities about non-existent employer misconduct.

Based on the fact that Thornton's employment duties required her to be out of the office, her statements were not based on actual knowledge of the alleged misconduct. Her eagerness to report misconduct based on no actual knowledge, when it was being reported by someone else, belies the "good faith" of her report. We concur with the circuit court that her report was not made in good faith.

Id. at 331 (emphasis added).

The circuit court seized upon our discussion of how the whistleblower in *Thornton* did not investigate the verity of the information she disclosed to mean that Swain also had a pre-disclosure investigatory obligation. Whistleblower cases are inherently fact-dependent, and so our analysis of the facts in *Thornton* was not intended to mean that all disclosures based on hearsay are deemed to have been made in bad faith unless the reporting employee has investigated and verified the hearsay before disclosing it. We believe that principle, and the rationale for our holding in *Thornton*, may be best understood by presenting the facts of *Thornton* in detail and then comparing those extreme facts with those in the case at hand.

Trudy Thornton received information about alleged wrongdoing occurring in an office in which she did not regularly work as she performed her job duties "almost entirely outside the" offices of the Fayette County Attorney. *Thornton*, 292 S.W.3d at 327. Consequently, she had "no personal knowledge about" the alleged misconduct told to her by another employee. *Id.*

Nonetheless, she "made no attempt to corroborate or discover firsthand information about the suspected activities" even though she "had no personal basis for making the allegations and knew that they were being reported by" another employee. *Id*. at 331. In other words, the information disclosed by Thornton had no seeming relation to her job duties, involved an office in which she did not regularly work, and essentially amounted to mere office gossip.

Nonetheless, Thornton had an "eagerness to report misconduct based on no actual knowledge" and so she did not make any attempts to verify the accuracy of the gossip which she disclosed. *Id.*

We held that a good faith report must be based on a "reasonable belief of accuracy." *Id*. at 331. Unsurprisingly, we concluded that disclosing mere office gossip without any inkling as to whether the gossip is true was not a good faith disclosure under the Act. *Id*. That is the context for our holding in *Thornton* that Trudy Thornton had not made a good faith disclosure. The facts at hand are materially distinguishable.

First, Swain's subletting disclosure was not mere office gossip. Metro admits—even stresses—that it was concerned about possible subletting prior to Swain's February 2024 statement to HUD.[10] Second, Swain's disclosure did not involve improprieties occurring in an office with which Swain had minimal contact. On the contrary, in his response to interrogatories, Swain lists *numerous* people who complained about subletting to him, many of whom occupied positions

[10] An employee may make a proper disclosure under the Act of suspected improprieties "in good faith" based on the employee's personal opinions, "even if those opinions are wrong." *Harper*, 559 S.W.3d at 809. Thus, construing the record in the light most favorable to Swain and accepting for purposes of summary judgment the representations that Metro was aware of the potential that its tenants were engaging in subletting, there is no indication that Swain was merely "an employee who unjustifiably complain[ed] to management or the authorities about non-existent employer misconduct[,]" *Thornton*, 292 S.W.3d at 331, even if Swain's estimate that subletting was "rampant" was an overstatement of the issue.

of respect and authority. Specifically, Swain stated that he received subletting complaints from multiple unnamed residents, two police officers, a person working in security, a property manager, and a maintenance supervisor.[11] Additionally, as the safety and security of Metro's tenants and properties arguably fell under Swain's job description, it was logical for Swain to receive these complaints.

A report based on information the reporting employee received from such a wide array of people in positions of knowledge and trust is sufficient at the summary judgment stage to show "that the report was based on a reasonable belief of accuracy." *Thornton*, 292 S.W.3d at 331. Kentucky law does not require a whistleblower to have absolute certainty that the disclosed information is completely correct in every aspect. *See* KRS 61.102(1) (preventing an employer from retaliating against an employee who reports "suspected" violations of the law or mismanagement, waste, fraud, and the like). The circuit court erred by construing *Thornton* to require Swain to acquire "first-hand information" to make a good faith report.[12]

Arguably, Swain overstated the prevalence of subletting to HUD. Nevertheless, though he failed to investigate the allegations, it is possible for Swain to show at trial that his subletting disclosure to HUD was made in good

[11] *See* TR at 167.

[12] TR at 297.

faith, given the people who raised concerns to him and Metro's admitted concern that subletting was occurring. The final determination of whether Swain acted in good faith is a factual issue which must be resolved at trial, not at the summary judgment stage. *Riley*, 316 S.W.3d at 891. The circuit court thus erred by concluding that, as a matter of law, Swain's report was not made in good faith because he had not verified the information before disclosing it to HUD.

b. A Disclosure May Be Protected by the Act Even if the Disclosure Contains Information Obtained While Performing Job Duties or Information Job Duties Require the Employee to Disclose

The circuit court, citing a Kentucky federal trial court opinion, held that "Mr. Swain's February 9th comment to HUD officials about 'subletting' is not actionable under the [Act] because Mr. Swain admits that the comment was made in the course of performing his everyday job duties. A public employee does not become a whistleblower by simply performing their job."[13] Of course, while we respect interpretations of our state law made by federal courts, such interpretations are not binding upon us. *LKS Pizza, Inc. v. Commonwealth ex rel. Rudolph*, 169

[13] TR at 296, citing *Lewis-Smith v. Western Kentucky Univ*, 85 F. Supp. 3d 885 (W.D. Ky. 2015), *declined to follow by Jackson v. Genesee Cnty. Road Comm'n*, 999 F.3d 333, 346 n.2 (6th Cir. 2021).

S.W.3d 46, 49 (Ky. App. 2005). However, the parties have not cited, nor have we independently located, binding precedent directly on point.[14]

The starting point for determining whether any disclosure is a good faith disclosure under the Act is the language in the Act itself. Neither the circuit court nor Metro point to specific language in the Act indicating an employee cannot make a good faith disclosure of information which the employee acquired while performing his job duties, or of information which the employee's duties require him to disclose. In fact, the sweepingly broad language of the Act leads to the opposite conclusion.

KRS 61.102(1) provides in relevant part that an employer may not subject an employee to reprisals for disclosing "*any* facts or information relative to an actual or suspected violation of any law . . . or *any* facts or information relative to actual or suspected mismanagement, waste, fraud, [or] abuse of authority[.]" (emphasis added). The General Assembly did not choose to add limiting language to the all-encompassing phrase "any facts or information."

[14] Swain asserts on page six of his reply brief that we addressed the issue of whether a disclosure may be made despite being part of an employee's job duties in *Ross*, 2014 WL 29001 at *9. However, the discussion of that issue in *Ross* to which Swain cites is within Judge Maze's separate concurring opinion (which is generally consistent with our conclusions here). Counsel should always note when citing to a separate concurring or dissenting opinion. In any event, *Ross* is unpublished and therefore not binding. Moreover, a concurring opinion not joined by a majority of the Court also is not binding authority. Thus, we are unaware of any binding Kentucky precedent addressing this issue.

We must interpret statutes as written, without adding or subtracting from the language chosen by the General Assembly. *See, e.g.*, *Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 577 (Ky. 1994). We may not add exceptions to a statute which contains none. *See, e.g.*, *Lee v. Kentucky Dep't of Corr.*, 610 S.W.3d 254, 262 (Ky. 2020). Therefore, facts or information which an employee obtains while performing his job duties, as well as facts or information the employee's job duties require him to disclose, fall comfortably within the wide, wide expanse of "any facts or information." Thus, there is no obvious statutory support for the circuit court's conclusion that Swain's February 2024 disclosure was not protected as a matter of law because it contained information he obtained in the course of his job duties.

E. We Decline to Resolve Whether Swain's February 2024 Disclosure was a Contributing Factor to an Adverse Personnel Action

KRS 61.103(3) provides in relevant part that an employee must "show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action." *See also Davidson*, 152 S.W.3d at 251. A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision[,]" and there is a presumption that a whistleblower's disclosure was a contributing factor to an adverse personnel action "if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person

would conclude the disclosure was a factor in the personnel action." KRS 61.103(1)(b). Under KRS 61.103(3), if Swain made "a *prima facie* case of reprisal" and his "disclosure [was] determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action."

Here, the circuit court held that Swain had not made a *prima facie* case of discrimination. Therefore, the circuit court understandably did not analyze the contributing factor element. However, as we have now concluded Swain did establish a *prima facie* case sufficient to survive summary judgment, it remains to be determined whether his February 2024 disclosure was a contributing factor in an adverse personnel action taken against him, or whether Metro can show by clear and convincing that the disclosure was not a material fact in any adverse personnel action.

We are a court of review, not an initial decision-maker. *See, e.g.*, *Klein v. Flanery*, 439 S.W.3d 107, 122 (Ky. 2014). Moreover, we generally may not address issues which were not addressed by the trial court. *See, e.g.*, *Monin v. Monin*, 156 S.W.3d 309, 318 (Ky. App. 2004) ("The trial court did not address the issue of the sealing of the attorney fees invoice, a fact which prevents our review

of the issue.”). Therefore, we decline to be the first court to address this element of Swain’s whistleblower claim and remand the matter to the circuit court.

IV. CONCLUSION

Though we disagree with some of the circuit court’s well-intentioned conclusions, we are keenly aware that this is a difficult case with unique facts and several novel issues for which there was not binding precedent upon which the circuit court could have confidently relied. For the foregoing reasons, (1) the Jefferson Circuit Court’s grant of summary judgment to Metro on Swain’s whistleblower claim stemming from his May 2024 report to HUD about alleged missing Section 8 funds is affirmed; and (2) the Jefferson Circuit Court’s grant of summary judgment to Metro on Swain’s whistleblower claim stemming from his February 2024 disclosure to HUD about subletting is reversed, and that portion of Swain’s complaint is remanded for further proceedings consistent with this Opinion.

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