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(2007-SC-0160-D & 2007-SC-0170-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002170-MR

RUSSELL W. BEHANAN; DR. PETER FLYNN; and the BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
CIVIL ACTION NO. 99-CI-01504

MELINDA LEWIS COBB — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** ** ** ** **

BEFORE: ACREE AND TAYLOR, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Russell Behanan, Peter Flynn, and the Board of Education of Fayette County (Board) bring this appeal from a jury verdict of the Fayette Circuit Court awarding compensatory and punitive damages totaling $3.5 million in favor

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of Melinda Cobb. Finding error, we affirm in part and reverse in part.

BACKGROUND

The Fayette County Public Schools (FCPS) hired Melinda Cobb to serve as the principal for Leestown Middle School (Leestown) for the 1997-98 school year. Cobb's contract was renewed for the 1998-99 school year. Cobb had previously worked for various public schools in the Commonwealth, but this was her first job within the FCPS. During that time, Russell Behanan was the Director of Middle Schools for the FCPS and was Cobb's immediate supervisor. Peter Flynn was the Superintendent of the FCPS and was Behanan's immediate supervisor. Cobb experienced a considerable amount of conflict with several members of the school's staff during her first year as principal at the school. She continued to have problems with certain members of her staff and with a small group of parents during her second year as principal.

Following Cobb's second year as principal, Behanan recommended to Flynn that she not be employed for the 1999-2000 school year. On May 14, 1999, Flynn delivered to Cobb an extensive seventeen-page "termination packet," which detailed a variety of factual charges against Cobb and notified her that, absent an answer to the charges, her employment would be terminated. The termination packet alleged that Cobb had violated KRS 161.790(1) by insubordination, conduct unbecoming a teacher, inefficiency, and incompetence. The termination packet

also described in detail the factual allegations underlying the charges, namely: (1) complaints about Cobb's interaction with parents, her staff, and the Site Based Decision Making (SBDM) Council at the school; (2) her failure to properly perform the "Day 4"[2] count of students; (3) her improper conduct related to her employee evaluation; and, (4) her carrying and possession of a gun on school property in violation of the Board's express policy. Cobb elected to answer the charges leveled against her. Pursuant to KRS 161.790(4), a three-member tribunal was convened to hear evidence of the charges and Cobb's response to the charges. The administrative hearing was held in August 1999 and lasted for twelve days.

The tribunal issued its written findings of fact, conclusions of law, and final order in September 1999. It found that Cobb had regularly carried a loaded gun on school property and that she had failed to report accurately the number of students attending Leestown in the "Day 4" count. The tribunal also found that Cobb had made inappropriate comments to parents and staff and that she had had numerous problems and conflicts with parents, staff, and SBDM members, but that all the parties were at fault for those problems and conflicts. Finally, the tribunal found the Board had committed "major procedural errors" in evaluating Cobb's performance.

As a result of these findings, the tribunal concluded that the Board had met its burden of showing a violation of KRS

[2] "Day 4" is the official attendance count that determines the amount of funding and staffing for the school for the coming year.

161.790 only as to two of the charges, to wit, that Cobb was guilty of "inefficiency and incompetency" for failing to properly perform the "Day 4" count and "insubordination and conduct unbecoming a teacher" for bringing a gun onto school property. The tribunal then determined that the "appropriate sanction and punishment" for the two violations was a reprimand for the erroneous "Day 4" count and a suspension without pay until the end of the 2000-2001 school year, a total of two years, for the violation of the weapons policy. The tribunal also specifically concluded that Cobb's inappropriate comments were not sufficient to warrant sanctions.

The Board appealed the tribunal's decision to the Fayette Circuit Court, and Cobb cross-appealed. The court reviewed the lengthy administrative record compiled before the tribunal and issued an opinion upholding the tribunal's ruling. It found substantial evidence to support the tribunal's ruling and held that there was no prejudicial error in the procedures used by the hearing officer who presided at the hearing. The court affirmed the tribunal order and findings. Upon appeal, both this court and the Kentucky Supreme Court affirmed the tribunal's decision.[3]

Prior to her termination, Cobb and the SBDM became the subject of an investigation by the Office of Education Accountability (OEA). Responding to the inquiries of the OEA, Cobb provided information alleging wrongdoing by other employees

[3] See Fankhauser v. Cobb, 163 S.W.3d 389 (Ky. 2005).

of the FCPS. Cobb also sought an advisory opinion from the office of general counsel for the commissioner of the Kentucky Department of Education (KDE). Cobb's initial complaint was filed (April 1999) before the administrative hearing was conducted (August-September 1999). She filed various amended complaints alleging several causes of action. Ultimately, the trial court allowed two causes of action to be presented to a jury, to wit, a statutory claim under Kentucky's Whistleblower Act against the Board, and a tort claim of wrongful use of administrative proceedings against Flynn and Behanan.

On June 13, 2005, a five day jury trial began on Cobb's claims. The jury returned a verdict against all Appellants, granting $500,000.00 in punitive damages against the Board under the Whistleblower Act; $500,000.00 each in punitive damages against Flynn and Behanan for wrongful use of administrative proceedings; and, $2,000,000.00 compensatory damages jointly against Flynn and Behanan for wrongful use of administrative proceedings for a total award of $3.5 million. The Fayette Circuit Court entered a judgment on the verdict and subsequently awarded Cobb attorney's fees and costs totaling more than $500,000.00. This appeal followed.

I. WHISTLEBLOWER ACT CLAIM

Kentucky's Whistleblower Act[4] protects state employees from reprisal for reporting actual or suspected agency violations of the law. In order to demonstrate a violation of

[4] Kentucky Revised Statutes (KRS) 61.102.

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. Woodward v. Commonwealth, 984 S.W.2d 477, 480-81 (Ky. 1998). The employee must show by a preponderance of evidence that "the disclosure was a contributing factor[5] in the personnel action." KRS 61.103(3). 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." Id.

[5] "Contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision. See KRS 61.103(1)(b).

A. Jury Instructions

The Board avers that the court's jury instruction was erroneous regarding the elements of a whistleblower claim. We disagree.

The Board argues that the jury instruction[6] did not allow the Board an opportunity to have the jury determine whether, even if the disclosure was a "contributing factor," it was, nonetheless, not a "material factor" in the personnel decision to fire Cobb. The Board cites Com., Dept. of Agriculture v. Vinson, 30 S.W.3d 162, 169 (Ky. 2000) for the proposition that "the employer now has an affirmative burden of proving by clear and convincing evidence that the report was not a material fact in the personnel action." The Board argues that the instruction given by the court incorrectly stated the law and allowed the jury to impose liability based on proof of a *prima facie* case without consideration of the burden shift.

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[6] The pertinent instruction states:

> You will find for Melinda Cobb and against Fayette County Board of Education under this Instruction if you are satisfied by a preponderance of the evidence the following:
>
> (a) That Melinda Cobb reported information regarding actual or suspected violation(s) of law, mandates, or rules to the Office of Education Accountability and/or the Kentucky Department of Educational Legal Services;
>
> AND
>
> (b) That employees of the Fayette County Board of Education caused Melinda Cobb to be subjected to reprisal or directly or indirectly used official authority or influence against her as a result of her reports to the Office of Education Accountability and/or Kentucky Department of Educational Legal Services.

We agree that the burden shifted to the Board to prove by clear and convincing evidence that the disclosures made by Cobb were not a material factor in the decision to terminate her employment. However, we do not agree that the instructions to the jury need to be tailored to consider every possible scenario under the Act. The instructions need only provide the "bare bones" of the pertinent questions for the jury, and those can be further fleshed out by counsel during closing arguments. Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974). In essence, the Board argues that the jury should have been instructed to weigh each party's burden in turn. The Board does not cite any relevant authority for its argument and it is contrary to Kentucky law. See Meyers v. Chapman Printing Company, Inc., 840 S.W.2d 814, 824 (Ky. 1992)("In Kentucky jury instructions do not include evidentiary presumptions."). See also, Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790 (Ky. 2004). Instructions should not explain evidentiary matters, evidentiary presumptions or contain unnecessary detail. Meyers, 840 S.W.2d at 824. After reviewing the instruction, we find nothing erroneous or so confusing that the jury could not reach a reasonable verdict based on the evidence.

Additionally, the Board argues that the trial court erred when it failed to instruct the jury to determine whether Behanan or Flynn "knew or had constructive knowledge" of Cobb's disclosure at the time the adverse personnel action was taken. We disagree.

KRS 61.103(1)(b) states that:

> It shall be presumed there existed a "contributing factor" 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.

The Board argues that the question of actual or constructive knowledge was not submitted to the jury. This is simply not the case. Although not explicitly stated as actual or constructive knowledge, the jury instruction necessarily required the jurors to consider it. Indeed, the instruction was tailored so that the jury could not find for Cobb unless she showed she was subjected to reprisal from official authorities as a result of her reports. Therefore, the jury must have inherently found that Behanan and Flynn were aware of the report and were satisfied that the reprisal against Cobb was connected. Thus, the instruction was adequate and the Board's argument is without merit.

The Board also contends that the trial court erred when it failed to instruct the jury that Cobb's disclosures must have been made "in good faith" as required by KRS 61.102(1). Again, we disagree.

Under KRS 61.102(1), an employer is prohibited from taking adverse action against an employee "who in **good faith** reports . . . an actual or suspected violation of any law . . . ." (emphasis ours). Contrary to the Board's

assertion, the jury instruction inherently incorporated the statute's required "good faith" standard. In order to find in Cobb's favor and against the Board, the instruction required the jury to find that she "reported information regarding actual or suspected violation(s) of law . . . ." Thus, "good faith" was inherent in the instruction given to the jury. There was no error.

B. Issue Preclusion

The Board argues that the trial court erred when it did not give "issue preclusive effect to the independent administrative tribunal's decision in the collateral, underlying proceeding." Issue preclusion (collateral estoppel) is not applicable to this case and thus the Board's argument is without merit.

The Board argues that the administrative tribunal's findings (i.e., the hearing regarding whether to terminate Cobb's employment) concluded that Cobb's workplace conduct warranted adverse personnel action and thus should be given issue preclusive effect to the case at hand. Essentially, the Board contends that the tribunal's findings should have been given preclusive effect on the legal issue of whether adverse personnel action would have still been taken against Cobb based on the non-retaliatory reasons for her firing offered into evidence. The Board avers that the administrative tribunal adduced sufficient facts warranting adverse personnel action

against Cobb and thus should not have been subject to further litigation by the court below. We disagree.

Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. See Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 459, 465 (Ky. 1998). In Yeoman, the Kentucky Supreme Court enunciated a four element test to determine whether issue preclusion will bar subsequent litigation. For purposes of this opinion, we need only examine the third element, to wit, "even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action." Id. (citing Restatement (Second) of Judgments § 27 (1982)).

Here, the administrative tribunal hearing was conducted with regard to whether adverse personnel action should be taken against Cobb. The issue of whether Cobb's termination was being sought based on alleged retaliation by school officials was not "actually decided" by the tribunal. Moreover, the administrative hearing, conducted in accordance with KRS 161.790 and KRS Chapter 13B, was solely concerned with issues associated with employment termination, not civil causes of action such as Cobb's whistleblower claim and the wrongful use of administrative proceedings claim. Because the issues decided by the administrative tribunal are starkly different from the issues decided by the jury in the trial below, we are of the

opinion that issue preclusion is wholly inapplicable to this case.

C. Protected Disclosure

The Board argues that the trial court's Whistleblower Act instruction erroneously indicated certain alleged acts by Cobb constituted a protected disclosure. Again, we disagree.

The Whistleblower Act protects an employee from retaliation by an employer provided the employee makes a disclosure regarding actual or suspected violations of law to an "appropriate body or authority." See KRS 61.102(1). A "disclosure" is defined as "a person acting on his own behalf, or on behalf of another, who reported or is about to report, either verbally or in writing, any matter set forth" under the Whistleblower Act. See KRS 61.103(1)(a). Thus, in order for a disclosure to be protected by the Whistleblower Act, it must be made in accordance with the statutory definition.

The Board argues that the trial court erroneously instructed the jury that the "Kentucky Department of Education Legal Services" was an agency to whom Cobb could have made a protected "disclosure" under the statute. Additionally, the Board contends that Cobb's alleged disclosure was actually a request for advisory guidance from the Kentucky Department of Education (KDE) and not an allegation of any violation of law. Consequently, the Board argues, Cobb's actions did not amount to a protected disclosure as a whistleblower.

In order for Cobb to have prevailed at trial, the jury was instructed that she had to have "reported information" (i.e., made a disclosure) "regarding actual or suspected violation(s) of law, mandates, or rules to the Office of Education Accountability and/or the Kentucky Department of Educational Legal Services." Under this instruction, the trial court considered the OEA and the KDE appropriate bodies or authorities to whom Cobb could make a protected disclosure. We agree.

Whistleblower Acts, such as Kentucky's, are remedial in nature. See Davis v. Ector County, Texas, 40 F.3d 777, 785 (5th Cir. 1994)(construing the Texas whistleblower statute). Statutes that are remedial in nature are entitled to a liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute. Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers, 13 S.W.3d 606, 611 (Ky. 2000)(quoting 73 Am.Jur.2d Statutes, § 278 (1974)). Moreover, Kentucky's Whistleblower Act has been subject to constitutional challenge. See Vinson, 30 S.W.3d 162 (Ky. 2000). The Vinson court opined that subsection (1) of the Act was not written in such broad sweeping terms as to make it constitutionally vague and that a person of ordinary intelligence can understand the intended meaning of the language. Id. at 164.

Applying these principals to the present case, we have no trouble finding that the jury instruction was appropriate and that Cobb's disclosures were adequate and entitled to

whistleblower protection. Whether the information Cobb reported[7] to the OEA and the KDE constituted a disclosure was a question for the jury. Obviously, the jury found that it was in fact a disclosure and entitled Cobb to the protections afforded to a whistleblower. We decline to second guess the jury's factual determinations.

The Board makes much of the fact that the jury instruction asked jurors to determine whether Cobb's disclosure was to the OEA and/or the "Kentucky Department of Educational Legal Services." The Board argues that no such agency named "Kentucky Department of Educational Legal Services" exists and thus, no disclosure was made. We need not detain ourselves with such trivial semantics. Cobb made disclosures to counsel for the Kentucky Department of Education's Office of Legal and Legislative Services. We find that the jury instruction was tailored with enough specificity such that any reasonably intelligent juror would have no trouble understanding that the "Kentucky Department of Educational Legal Services" is one and the same as the "Kentucky Department of Education's Office of Legal and Legislative Services." The Board's argument is without merit.

[7] Cobb provided the OEA with information regarding alleged actual and attempted violations of law by personnel of Leestown Middle School. Additionally, on March 12, 1999, Cobb sent an e-mail to Kevin Noland, legal counsel with the Office of Legal and Legislative Services, alleging violations of school policy by her supervisor.

Finally, the Board contends that even if Cobb did make a disclosure, she did not make it to "an appropriate body or authority" as required by the statute. Again, we disagree.

The instruction required that the jury, in order to find in Cobb's favor, determine whether a disclosure had been made to "the Office of Education Accountability and/or the Kentucky Department of Educational Legal Services." The OEA, pursuant to KRS 7.410(2)(c)(1) and (4), has the authority to investigate allegations of wrongdoing by school officials and personnel. Thus, it is elementary that the OEA is an "appropriate body or authority" for Cobb to make disclosures to because the wrongdoing will be uncovered, as intended by the Whistleblower Act. Similarly, Cobb's e-mail to legal counsel with the KDE's Office of Legal and Legislative Services is also an appropriate body or authority to whom disclosures can be made under the Act. The KDE's own legal counsel, as officers of the court, are not free to ignore allegations of wrongdoing by school officials. Moreover, KDE's legal counsel also report to the Chief State School Officer. Pursuant to KRS 156.210, the Chief is required to report allegations of wrongdoing to the Kentucky Board of Education and the Commonwealth's Attorney. Both of those entities are obviously able to undertake investigative roles and determine whether allegations can be substantiated. Thus, Cobb's statements to both the OEA and the KDE sufficed as appropriate bodies or authorities to make disclosures to under the Whistleblower Act.

II. WRONGFUL USE OF ADMINISTRATIVE PROCEEDING CLAIM

Cobb's second civil action is a wrongful use of administrative proceeding claim against both Flynn and Behanan. We note at the outset that this tort is traditionally disfavored in the Commonwealth. See Feinberg v. Townsend, 107 S.W.3d 910 (Ky.App. 2003). There is a long-standing precedent that one claiming wrongful use of civil[8] proceedings must strictly comply with the elements of the tort. Id.; Prewitt v. Sexton, 777 S.W.2d 891 (Ky. 1989); Broaddus v. Campbell, 911 S.W.2d 281 (Ky.App. 1995). Kentucky's Supreme Court has outlined the elements necessary to prove a claim for wrongful use of civil proceedings:

> (1) the institution or continuation of original judicial proceedings . . . or of **administrative** or disciplinary proceedings,
> (2) by, or at the instance, of the original plaintiff/complainant,
> (3) the termination of such proceedings in the original defendant's favor,
> (4) malice in the institution of such proceeding,
> (5) want or lack of probable cause for the proceeding, and
> (6) the suffering of damage as a result of the proceeding.

Farmers Deposit Bank v. Ripato, 760 S.W.2d 396, 399 (Ky. 1988)(emphasis ours)(citing Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981)). See also, Restatement (Second) of Torts § 660. Flynn and Behanan argue, persuasively, that Cobb failed to meet

[8] A claim for "wrongful use of civil proceedings" would include a claim for "wrongful use of administrative proceedings." See Farmers Deposit Bank v. Ripato, 760 S.W.2d 396 (Ky. 1988); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981).

several elements of the tort and thus were entitled to a directed verdict. We agree and reverse the judgment against both Flynn and Behanan.

A. Underlying Proceeding Did Not Terminate in Cobb's Favor

The third element of Cobb's wrongful use of administrative proceedings claim requires that the underlying proceedings terminate in her favor. Flynn and Behanan argue that because the proceedings did not, they were entitled to a directed verdict. We agree.

The underlying proceeding in this case is the tribunal's administrative hearing conducted to determine whether Cobb's employment should be terminated. The tribunal's decision was appealed by the Board to both the Kentucky Court of Appeals and the Kentucky Supreme Court. The Kentucky Supreme Court ultimately affirmed the tribunal's decision, finding that Cobb was guilty of carrying a loaded gun onto school premises and failed to accurately perform the "Day 4" count. See Fankhauser, 163 S.W.3d at 391. In other words, the underlying proceeding did not terminate in Cobb's favor because the tribunal's decision, upheld on appeal, resulted in adverse personnel action being taken against her, to wit, a reprimand and suspension. Moreover, Cobb was well aware that the tribunal's decision did not terminate in her favor as is evidenced by her filing of a counter-claim in Fayette Circuit Court seeking reversal of those adverse actions.

In Feinberg, supra, we cited with approval the comments to Restatement (Second) of Torts § 674, indicating that civil proceedings may be terminated in favor of the person against whom they are brought if there is a favorable adjudication of the claim by a competent tribunal. Id. at 912. Here, the underlying administrative tribunal's decision was obviously not terminated in Cobb's favor because she was punished for her actions. Cobb argues, conversely, that even though she did lose on some of the issues below, she did prevail against all other claims leveled against her, keeping her job. Cobb contends that her tort can be premised on a parsing out of claims that she successfully defended against below. We do not agree as the authority on this issue is squarely against Cobb's contention.

In Provident Sav. Life Assur. Soc. v. Johnson, 115 Ky. 84, 72 S.W. 754 (1903), a former employee of a company criticized and maligned his former employer by publishing a three paragraph story in the local newspaper. Id. The former employee was indicted for criminal libel, charging that all three paragraphs of the story were false, however he was only charged as to the comments made in one of the paragraphs. Id. The employee was acquitted and thereafter sued his former employer for malicious prosecution. Id. In its defense, the employer sought to show that even if the one paragraph was actually true, the other two paragraphs were false, and therefore gave probable cause for the indictment for libel. Id.

The trial court did not allow this proof, and instead required the employer to show that there was probable cause as to the specific paragraph on which the employee was tried. Id. Finding error, the Provident court held that the question of probable cause on a claim of malicious prosecution[9] is to be considered "on the whole case" and not on individual paragraphs of the indictment. Id.

Similarly, the administrative proceeding was initiated in much the same manner. Cobb was found to have engaged in wrongful conduct, both personally and professionally. Flynn and Behanan sought her dismissal based on this misconduct. Even though Cobb successfully defended against several of the charges, Flynn and Behanan were justified in seeking to terminate her employment. Viewing "the whole case" against Cobb and in light of the fact that the underlying proceeding did not terminate in her favor, the trial court erred in allowing the wrongful use of administrative proceeding claim to go forward against Flynn and Behanan. Accordingly, the trial court erred in denying their motion for a directed verdict and we reverse.

Although we reverse on this issue, we consider several other arguments raised by the appellants.

B. Cobb Failed to Show Lack of Probable Cause

Another requisite element of an action for wrongful use of administrative proceedings, as set out above, is a

[9] The tort of wrongful use of civil proceedings is derived from the common law tort of malicious prosecution. See Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981).

showing of lack of probable cause to support the underlying proceeding. Flynn and Behanan argue that Cobb failed to demonstrate that probable cause was lacking for institution of the administrative proceeding against her and thus, the trial court erred in allowing the action against them to go forward. We agree.

For purposes of a claim for wrongful use of administrative proceedings, probable cause "exists where the person who initiates civil proceedings 'reasonably believes in the existence of the facts upon which the claim is based, and . . . that under those facts the claim may be valid under the applicable law.'" See Prewitt v. Sexton, 777 S.W.2d 891, 894 (Ky. 1989). The Supreme Court stated that "probable cause to initiate a civil action does not require 'the same degree of certainty as to the relevant facts that is required of a private prosecutor of criminal proceedings.'" Id. (quoting Restatement (Second) of Torts § 675 cmt. d, p. 459 "*Points of Difference Between Criminal and Civil Proceedings*"). "Probable cause" is a suspicion founded upon circumstances sufficiently strong as to warrant a reasonable person in the belief that the charge is true. Id. at 896 (citing Kassan v. Bledsoe, 252 Cal.App.2d 810, 60 Cal.Rptr. 799, 803 (1967)).

In this case, Flynn and Behanan were in receipt of facts and evidence of sufficient strength to believe that Cobb had engaged in misconduct. The burden of proving an absence of probable cause to support the underlying proceeding was Cobb's

to bear. See Prewitt, 777 S.W.2d at 895. Cobb presented no evidence at trial tending to show that Flynn and Behanan were unreasonable in their opinion of her. Like the employee in Provident, supra, while Flynn and Behanan may have lacked probable cause for all of the allegations or charges against Cobb, at least some of their claims were supported by probable cause because Cobb was found guilty of two offenses and punished. Thus, probable cause existed for Flynn and Behanan to seek termination of Cobb's employment. Consequently, because Cobb failed to demonstrate an essential element of her claim, a directed verdict should have been granted and we reverse.

C. Advice of Counsel Defense

Flynn and Behanan argue that the trial court erred when it refused to give the jury an instruction on the defense of advice of counsel. At trial Flynn testified that he sought legal counsel prior to sending the termination letter to Cobb. On appeal Flynn and Behanan contend that because ample evidence was presented showing that the Board's general counsel played an active role in the investigation of Cobb and the drafting of the termination letter, they were entitled to the jury instruction. We agree.

The defense of "advice of counsel" to an action requires that the party asserting the defense have sought legal advice in good faith and that the advice have been given after a full disclosure of the facts within the party's knowledge and information. See Restatement (Second) of Torts § 666. Here,

after Flynn and Behanan sought to use the defense, Cobb requested to call Virginia Gregg, counsel for the Board, as a witness to determine whether her advice was sought in good faith and whether she was given full disclosure of the facts. The judge denied the request[10] to examine the attorney based upon Cobb's failure to meet her evidentiary burden pursuant to CR 26.02(3).[11] The judge also denied Flynn and Behanan's request for the "advice of counsel" defense jury instruction. After a careful review of the evidence presented on this matter, we conclude that the trial court erred in denying the proposed jury instruction.

Certainly each party to civil litigation is entitled to have an instruction upon his theory of the case submitted to the jury for its acceptance or rejection if there is any evidence to sustain it. See Coulter v. Thomas, 33 S.W.3d 522 (Ky. 2000). Here, Flynn and Behanan offered uncontradicted testimony that extensive legal advice was sought prior to sending Cobb the termination letter. Thus, there was ample evidence to sustain Flynn and Behanan's request for a jury instruction on the defense of advice of counsel. It would then be for the jury to determine whether the legal advice was sought in good faith and with full disclosure of the facts. The trial

[10] Cobb did not cross appeal from the trial court's denial of her motion to examine the attorney and thus waived the argument on appeal.

[11] CR 26.02(3) allows a party to obtain discovery of documents and tangible things prepared in anticipation of trial by the opposing party (including his attorney) provided that the party seeking discovery show a substantial need for the materials and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

court's failure to submit the instruction was an abuse of discretion and we reverse.

D. Probable Cause Not For Jury Determination

Flynn and Behanan contend that the trial court erred when it left exclusively for jury determination the existence of probable cause.[12] We agree.

In Prewitt, supra, the Supreme Court of Kentucky delineated which elements of a claim of wrongful use of civil proceedings are for the trial court to determine and which are for the jury's determination. The Court held that in an action for wrongful use of civil proceedings, the trial court determines whether the defendant has probable cause for his action. See Prewitt, 777 S.W.2d at 895. Here, the trial court left the probable cause determination to the jury. Clearly, the existence of probable cause is a question of law for the court and the trial court erred when it failed to make that determination. We reverse.

E. Issue Preclusion

Flynn and Behanan also assert the same argument as the Board regarding issue preclusion[13]. They argue that the trial court erred by not giving the administrative tribunal's decision issue preclusive effect and must be reversed. We disagree and decline to grant relief for the reasons we discussed regarding the Board's identical argument above.

[12] We discuss the issue of probable cause as an element of a wrongful use of civil proceedings claim in section II(B).

[13] We discuss issue preclusion in section I(B).

III. EXPERT TESTIMONY

At trial, Cobb called as a witness a licensed clinical social worker. The social worker was permitted to testify, over objection, regarding her diagnosis of Cobb and its purported cause. Appellants argue that the trial court erred in allowing the social worker to testify as an expert witness regarding Cobb's psychological condition. We agree.

We need not belabor this issue as the law of Kentucky is well-settled regarding this matter. In Kentucky, a social worker is not qualified to give opinion testimony regarding the diagnosis of a mental or emotional disorder. See Prater v. Cabinet for Human Resources, 954 S.W.2d 954, 958 (Ky. 1997) (opinions of social workers not expert testimony because they are insufficiently qualified); Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1992)(same); Drumm v. Commonwealth, 783 S.W.2d 380, 385 (Ky. 1990)(same); R.C. v. Commonwealth, 101 S.W.3d 897, 900-901 (Ky.App. 2002)(same). See also KRE[14] 702 and KRS 319.010 ("practice of psychology" includes "diagnosis") cf. KRS 335.020(2)("practice of social work" does not include "diagnosis"). Only a medical expert can testify as to diagnosis and causation of injuries, be they mental or physical. See Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997).

Here, Cobb's witness, as a social worker, did not possess the appropriate medical background and training required to testify as an expert regarding Cobb's psychological

[14] Kentucky Rules of Evidence.

condition. The admission of this evidence was an abuse of discretion by the trial court. Although we reverse on other grounds above, we would also reverse the jury's verdict against Flynn and Behanan based solely on the trial court's admission of this evidence.

IV. PUNITIVE DAMAGES

The Appellants argue that the punitive damages awarded by the jury violated their rights under the Eighth and Fourteenth Amendments. Based on our reversal of the judgments against Flynn and Behanan, we need not address this issue as it pertains to each of them. As against the Board, we disagree that the award amounts to a violation of constitutional due process rights.

Contrary to Cobb's assertion, we believe that the appellants have properly preserved for review by this court the issue of whether the judgment itself is grossly excessive and violates federal constitutional due process rights. The appellants' motion to alter, amend or vacate is the proper method to preserve this issue. Thus, Cobb's contention is without merit.

The jury's award of $500,000.00 in punitive damages against the Board does not appear excessive. Cobb sued the Board directly under the Whistleblower Act as a corporation. A corporation which violates the Whistleblower Act is subject to a criminal penalty of a maximum $10,000.00. See, KRS 61.990(3) and KRS 534.050(1)(b). We are not persuaded by the appellants'

argument that they did not have notice prior to the complained of conduct that the elements contained in the jury instructions might subject them to damages. The criminal provisions served as adequate notice to the Board of the severity of the penalty available for retaliatory misconduct against an employee. Moreover, the Whistleblower Act specifically acknowledges that a wronged employee may seek not only compensatory damages but also punitive damages. See, KRS 61.103(2). Additionally, the Kentucky Supreme Court, in interpreting the statute, has upheld the imposition of punitive damages. See, Vinson, 30 S.W.3d 162 (Ky. 2000). While the punitive damage award against the Board by the jury was fifty times the available criminal penalty, such awards have been upheld in other cases. See e.g., Vinson, supra, (upholding an award of $1 million in punitive damages against the Kentucky Department of Agriculture). The United States Supreme Court has stated that the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996). Here, the Board not only received fair notice of the prohibited conduct, but also of the severity of the punishment. Under these facts, we cannot say that the jury's punitive damage award against the Board was grossly excessive or without adequate notice. Accordingly, we affirm.

V. ATTORNEY FEES AND COSTS

Following the trial, the court granted Cobb's motion for attorney fees, costs and witness fees, pursuant to KRS 61.990(4), in excess of $500,000.00. The appellants argue that the amount of fees awarded[15] are so excessive and unreasonable as to constitute an abuse of discretion. We agree.

Cobb argues that the appellants' failure to identify the law firm of Golden & Walters, PLLC,[16] in their notice of appeal is fatal to any argument regarding the award of fees. The Kentucky Supreme Court has concluded that the only instance where an attorney must be named as a party to an appeal is where there is "an award of fees to an attorney by judgment in his or her favor[.]" Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326, 331 (Ky. 1993). Here, neither Cobb's motion for attorney fees nor the judgment thereon identifies Cobb's attorneys. Thus, Cobb's attorneys were not necessary parties to this appeal. Cobb's argument is without merit.

The award of attorney fees and costs was excessive and therefore unreasonable. Cobb filed two verified complaints in this matter and multiple amendments thereto. In those pleadings Cobb asserted several claims against the Board. In the end, only one claim against the Board proceeded to trial and the rest were disposed of through summary judgment in the Board's favor. The award of attorney fees and costs by the trial court below is

[15] Attorney fees and costs were only awarded against the Board.

[16] Attorneys for Cobb.

not specific as to how the fees were derived. For instance, we are unable to determine what amount of the awarded attorney fees and costs were associated with the Board's successful defenses on summary judgment, which were incurred as a result of the wrongful use of administrative proceeding claim against Flynn and Behanan, and which were derived from Cobb's successful claim under the Whistleblower Act. In considering an award of attorney fees, the trial court must provide a concise but clear explanation of its reasons for the award. See Wooldridge v. Marlene Industries Corp., 898 F.2d 1169, 1176 (6th Cir. 1990). Here, the trial court failed to make such an explanation for awarding attorney fees and we reverse.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), the United States Supreme Court set out precise guidance for determining what fee is reasonable, indicating that a trial court should first determine the number of hours reasonably expended on the litigation and a reasonable hourly rate. A party seeking fees should submit evidentiary support not only for the time expended, but also the hourly rates claimed. Id. at 433. The trial court should also exclude from any fee request "hours that were not 'reasonably expended.'" Id. at 434. On remand, the trial court should exclude costs of secretaries, law clerks, and other overhead expenses. See Ky. Bar Ass'n v. Graves, 556 S.W.2d 890, 892 (Ky. 1977). Further, the trial court should exclude fees incurred by Cobb in the collateral administrative proceeding and in the judicial review

thereof for which no fee-shifting is authorized.[17] See KRS 161.790 and KRS 13B.140. Moreover, the costs claimed by Cobb for the testimony of the social worker should be excluded as well. See Brookshire v. Lavigne, 713 S.W.2d 481 (Ky.App. 1986)(fees paid by a party to expert witnesses are not recoverable as part of the cost of the action, unless specifically authorized by statute). No statutory authority was identified by the trial court authorizing the reimbursement of expert witness fees. Accordingly, we reverse and remand for a hearing to determine an appropriate award of attorney fees and costs.

CONCLUSION

Because we reverse on other grounds, we need not consider Flynn and Behanan's remaining argument that the trial court erred by not entering a directed verdict in their favor due to the absence of any evidence that they initiated the administrative proceeding.

For the foregoing reasons, we affirm the judgment against the Board and reverse the judgment against Flynn and Behanan and remand to the Fayette Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

[17] "Except for fee-shifting statutes which provide that a trial court may assess an attorney's fee for one party against the other, such as provided for in Civil Rights Act litigation by KRS 344.450 and in divorce litigation by KRS 403.220, the obligation to pay one's own attorney falls upon the person employing the attorney rather than upon the opposing litigant." Louisville Label, Inc. v. Hildesheim, 843 S.W.2d 321, 326 (Ky. 1992).

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Robert L. Chenoweth S. Shea Luna Frankfort, Kentucky	J. Dale Golden Eddie Wilson Lexington, Kentucky
ORAL ARGUMENT FOR APPELLANTS:	ORAL ARGUMENT FOR APPELLEE:
Robert L. Chenoweth Frankfort, Kentucky	J. Dale Golden Lexington, Kentucky