

KELLER, JUDGE: This case involves considerable procedural history which can be adequately summarized as to both appellees, Kelvin Brooks and Donna Martin. In 1998, Brooks and Martin initially filed a complaint against the Louisville-Jefferson County Metro Government² (hereinafter Metro), and Ron Bishop as the Director of the Jefferson County Metro Jail and in his individual capacity under the Civil Rights Act of Kentucky, KRS Chapter 344 (KCRA), for racial discrimination and retaliation. Brooks and Martin's joint claims proceeded to trial before a single jury in 1999. The jury verdict was adverse, and they appealed. In an unpublished decision, this Court remanded Brook's claim of disparate impact discrimination against Metro for retrial as well as Martin's claim of retaliation against Metro and against Bishop in his individual capacity. *Brooks and Martin v. Jefferson County Fiscal Court*, 2003 WL 23005603 (Ky. App. 2003)(1999-CA-000624-MR) (hereinafter *Brooks I*).

Upon retrial the jury returned a verdict in favor of Brooks and Martin. The court entered a judgment consistent with the verdict and subsequently entered a supplemental judgment in August 2007 awarding attorney fees and costs. However, the circuit court denied injunctive relief in the form of promotion for Brooks and reinstatement for Martin. The damages, fees and costs resulted in an award in excess of one million dollars (\$1,000,000.00). Both parties have appealed the various judgments. Additionally, Brooks and Martin filed a motion asking this Court to dismiss the attorney fee portion of Metro's appeal as it failed

² Which was entitled the Jefferson County Fiscal Court at that time.

to name the attorneys as parties. A motion panel of this Court passed that motion to this merit panel.

We will address the eight errors asserted by Metro, and the two errors from Brooks and Martin in their cross-appeal. We turn first to the factual matters that are undisputed and then to Metro's claims followed by the cross-appeal of Brooks and Martin and finally the motion to partially dismiss.

FACTS

Brooks and Martin were employed by Metro to work at the Metropolitan Correctional Services Department, better known as the Jefferson County Jail (hereinafter jail). Brooks was employed as an officer at the jail and Martin was the long-time human resources manager. In 1995, Bishop was appointed as director of the jail, while litigation was ongoing involving the previous director and several members of the staff who alleged sexual harassment and retaliation. This litigation continued well into Bishop's tenure as director and was ultimately settled.

Martin, as a human resources manager, was involved in the investigation and discipline of the alleged harassers due to her position with the jail. She and Bishop disagreed as to the course of action that should be taken to ensure the female employees were not retaliated against. Martin was concerned about the liability of the county and the safety of the jail if conditions among the employees remained volatile. Once she expressed these concerns, she was allegedly subjected to increasing verbal abuse and other forms of harassment by

Bishop. Concurrently, Martin began suffering more acutely from an illness known as Post-Polio Syndrome that increased in severity as her employment at the jail continued.

Brooks has a condition particular to African Americans known as Psuedofolliculitis Barbae (PFB). The primary symptoms of PFB are that the skin becomes irritated and inflamed if shaved closely. The policy under Bishop was that officers must be clean-shaven. Brooks was disciplined on numerous occasions and ultimately fired in November 1997 for violation of the shaving policy. He was later re-hired after negotiations in January 1998, however he was not promoted to Sergeant despite scoring in the top five on the promotion examination and satisfactory performance evaluations. Martin, in her role as human resources manager, expressed her concerns regarding Bishop's treatment of Brooks which in turn led to further retaliation and harassment by Bishop, including allegedly referring to her in a derogatory manner as "Ms. ADA" and "Ms. EEOC" during staff meetings.

Martin eventually applied for disability in April 1998 and then filed suit in May of 1998, claiming that because of her disagreements with Bishop regarding the treatment of the female employees and Brooks, she was retaliated against and harassed. After filing the lawsuit, Martin was denied entrance to the jail and her previous office. She was then told to report to Metro's County Personnel Department. The county director of personnel to the jail made phone calls and Martin was eventually told to report back to the jail and resume her

duties. At the direction of Bishop, Martin's duties and responsibilities were progressively stripped from her, until she was left with little to do. His harassment of her increased to the point where he disputed the severity of her disability, saying during a meeting, "I don't believe you are as weak as you pretend to be." Martin continue to work for nine months after she filed suit, but eventually she took sick leave and retired.

STANDARD OF REVIEW

Due to the number of issues presented to this Court for review, the standard of review will be examined, when pertinent, as each claim of error is discussed below. As a general principal that bears repeating, absent palpable error "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Matthews v. Ward*, 350 S.W.2d 500 (Ky. 1961); *Combs v. Knott Co. Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (1940); *Tipton v. Brown*, 273 Ky. 496, 117 S.W.2d 217 (1938); *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

The reviewing court must consider all evidence favoring the prevailing party as true and is not at liberty to determine the credibility or weight which should be given to the evidence. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990). The reviewing court must draw all reasonable inferences in favor of the claimant, refrain from questioning the credibility of the claimant, and from assessing the weight which should be given to any particular item of evidence. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464 (Ky. 1999). The

appellate court is required to consider the evidence in the strongest light possible in favor of the opposing party. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985). After completion of the evidentiary review, the decision must be affirmed unless the verdict rendered is “‘palpably or flagrantly’ against the weight of the evidence so as ‘to indicate it was reached as a result of passion or prejudice.’” *Lewis v. Bledsoe Surface Mining Co.* at 461-62 (Ky. 1990).

ANALYSIS

I. IMPROPER AMENDMENT OF COMPLAINTS

On remand, Brooks and Martin each sought leave to file amended complaints. Metro argues that the trial court abused its discretion by permitting the amendments: (a) they created confusion; (b) resulted in an unpled claim of constructive discharge which was disallowed by this Court; (c) allowed the introduction of evidence of post-complaint conduct that was beyond scope of the complaints; and finally, that (d) Brooks’s amended complaint failed to state a claim for which relief could be granted.

Brooks and Martin take issue with Metro’s brief as it does not specifically pinpoint for this Court where in the record their objections to the amendments occur.³ We note that Metro filed pre-trial motions in limine objecting

³ The reference cited by Metro as containing the preservation of this error spans one hour and forty-two minutes.

to the amended complaints. Further, a review of the record cited, while lengthy and cumbersome, does reflect the arguments of Metro's counsel regarding this issue. Therefore that argument by Brooks and Martin is not well taken.

The standard of review is whether or not the trial court committed error by abusing its discretion in allowing the amendments. *Bradford v. Billington*, 299 S.W.2d 601 (Ky. 1957); *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961). Kentucky Rule of Civil Procedure (CR) 15.01 states that a party may amend his pleading only by leave of court or by written consent of the parties, "and leave shall be freely given when justice so requires." The liberal nature of notice pleading is further outlined in CR 15.02 which addresses allowing amendment at the close of proof and even after judgment, and states in pertinent part:

...[A]mendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Kentucky Rules of Civil Procedure (CR) Rule 15.02.

The amended complaint of Martin does not include new factual averments, and only sought the injunctive relief of reinstatement of her position. Brooks' amended complaint likewise requested injunctive relief via promotion as well as outlining further acts of harassment by co-workers in 2004 whereby they

told him to shave and called him “wooly bully”. Metro declares that these amendments caused confusion, but cites to nothing in the record to support this conclusion. We cannot simply acquiesce to Metro’s bald assertion of confusion, and because we can discern no abuse of discretion we hold that the court’s ruling that permitted the amendments was proper.

Metro’s subsequent arguments that the circuit court’s ruling allowed Martin an unpled “claim” of constructive discharge and post-complaint retaliation is similarly without merit. Metro’s position is that the first jury found against Martin in her claim of hostile work environment, thus she is precluded from presenting a “claim” of constructive discharge or post-complaint retaliation. Metro correctly asserts that the adverse verdict of Martin’s initial claim of hostile work environment was not appealed. Therefore, the claim should be barred as *res judicata* on remand. What appears to be missing from Metro’s analysis is that this Court remanded Martin’s case for a retrial of her claim of retaliation. As the circuit court correctly and repeatedly stated in its rulings, the retaliation claim necessarily included the presentation of relevant evidence of the hostility and retaliation Martin suffered at the hands of Bishop.

Furthermore, Metro seems to be confusing a separate “claim” of constructive discharge, which is a cause of action for which a jury may award damages or other relief, with the presentation of evidence necessary to support an element of the retaliation claim. Metro points to *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004), as standing for the

proposition that constructive discharge is a claim and not an element of retaliation.

But, as the *Brooks* court clarified,

...[W]hile constructive discharge may constitute an adverse employment action within the meaning of the KCRA, not all adverse employment actions constitute constructive discharge. See, e.g., Meyers v. Nebraska Health and Human Services, 324 F.3d 655, 659-61 (8th Cir.2003). Thus, the fact that Brooks introduced sufficient evidence of adverse action to support her retaliation claim does not foreclose inquiry into the question of whether she introduced sufficient evidence to support her constructive discharge claim.

Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 807 (Ky. 2004). (Emphasis added).

Herein, the circuit court correctly stated the law, both in its pretrial rulings and in its instructions to the jury. The circuit court recognized that the *evidence* of harassment and abuse may, and in most cases will, overlap different causes of action or claims which may be made under the KCRA. In order to establish a prima facie case of retaliation, Martin was required to prove that she suffered “an ‘adverse employment action’ as that term is defined under federal law.”⁴ *Id.* at 802. One type of possible adverse employment action is constructive discharge. Allowing Martin to present evidence of this element of Martin’s claim

⁴ KRS 344.020. “Since the language of the Kentucky Civil Rights Act generally tracks the language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f), provisions of the Act ‘should be interpreted consonant with federal interpretation.’” *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 820 (Ky. 1992); *See also, Steilberg v. C2 Facility Solutions, LLC*, 275 S.W.3d 732, 735 (Ky. App. 2008); *Kentucky Comm’n on Human Rights v. Commonwealth*, 586 S.W.2d 270, 271 (Ky. App. 1979); *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1250 (6th Cir. 1995); *Gibson v. Finish Line, Inc. of Delaware*, 261 F.Supp.2d 785, 790 (W.D. Ky. 2003).

of retaliation was permissible. Metro does not cite any authority leading to an opposite conclusion. Indeed, Metro concedes in its brief that there was no *claim* of constructive discharge set forth in Martin's complaint or amended complaint. Thus we discern no error in the court's admission of this evidence.

Metro's next criticism is that Martin was allowed to present proof of retaliation that occurred after she filed her initial complaint in 1998, averring that this evidence should have been the basis for a separate and independent complaint, or a supplemental complaint. Absent that, Metro concludes, without citation to the record or argument as to how it was prejudiced or indeed, any authority for the proposition that it was in actual fact prejudiced, as this evidence was outside the scope of the lawsuit. Metro's failure to cite to us the place in this voluminous record where it preserved this issue by presenting it first to the trial court, is in violation of CR 76.12. In the case of *Elwell v. Stone*, 799 S.W.2d 46, (Ky. App. 1990), the importance of the rule is outlined:

This tribunal assumed the Supreme Court meant what it said for we wrote through Judge Dunn in *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987): CR 76.12(4)(c)(iv) in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court.

Elwell v. Stone, 799 S.W.2d 46, 47-8 (Ky. App. 1990). (citations omitted).

We would be justified in not considering the portion of the brief where the requirements of CR 76.12 are deficient, instead, we shall confine ourselves to a review for manifest injustice. See *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985); *Elwell v. Stone*, 799 S.W.2d 46, 47-8 (Ky. App. 1990).

Metro does not allege surprise or ambush in the presentation of such evidence. As they have not stated otherwise, we hold that the dictates of the liberal notice pleading doctrine and procedural due process are satisfied by the pleadings filed herein. “The purpose of this Rule is to assign to pleadings the function of giving notice and formulating true issues without the requirement that they detail every fact which in the past may have been necessary to constitute a formal ‘cause of action’ or a defense. The common law concept of pleading to an issue is completely abandoned.” *Stewart v. Lawson*, 437 S.W.2d 733, 734 (Ky. 1969). “All pleadings shall be so construed as to do substantial justice.” *Id.* at 734, citing CR 8.06. The Supreme Court of Kentucky noted in *McCollum v. Garrett*, 880 S.W.2d 530, 533 (Ky. 1994), “a pleading [should] be judged according to its substance rather than its label or form.” This Court also held, “[i]nasmuch as notice pleadings prevail in Kentucky practice, we see no necessity for anything more. The emphasis is on substance over form and discovery over pleading. . . . See CR 8.01, CR 8.05 and CR 8.06.” *V.S. v. Cabinet for Human Resources*, 706 S.W.2d 420, 425 (Ky.App. 1986). There can be no clear manifest injustice when Metro does not provide any incidence of prejudice caused by the trial court’s

admittance of evidence of post-complaint retaliation. We can only conclude that they had adequate and fair notice of the acts of their employees and the intention of Martin to present such evidence.

We move to Metro's next assignment of error, that being the admission of testimony of the event of name-calling discussed above, which took place post-complaint in 2004. Metro concludes "wooly bully" is not a racially derogatory term and that this single incidence does not constitute unlawful employment discrimination. Once again, Metro does not cite to the record, violating CR 76.12. Thus, we would be justified in striking this portion of the brief on this basis alone. However, when reviewing the testimony of Brooks without the aid of any specific citation, it is clear that the incident was discussed *only* during the cross-examination of Brooks by Metro. It is disingenuous for Metro to complain about testimony it elicited. Therefore the argument is spurious and without merit. Accordingly, it is the position of this Court that this issue fail without further comment.

II. DIRECTED VERDICT

STANDARD OF REVIEW

The standard of review of a trial court's denial of a motion for directed verdict as was set forth above is delineated in *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990):

All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. . . . Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is “palpably or flagrantly” against the evidence so as ‘to indicate that it was reached as a result of passion or prejudice.’

Id. at 461-62 (internal citations omitted).

A. DIRECTED VERDICT BROOKS

Metro claims it was entitled to a directed verdict on Brooks’s disparate impact claim. Keeping in mind the standard previously cited above we note that the “disparate impact theory requires a plaintiff to demonstrate that a facially neutral employment practice falls more harshly on one group than another and that the practice is not justified by business necessity.” *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 92 (6th Cir. 1982); *Dunlap v. Tennessee Valley Authority*, 519 F.3d 626, 629 (6th Cir. 2008). Employees who are members of a protected class who are disproportionately affected by such a practice need not prove “intent to discriminate. In such a case, the trial court is concerned with “the consequences of employment practices, not simply the motivation.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) (emphasis in original). Metro argues that Brooks failed to prove his case because

he did not prove, statistically, that the “no facial hair policy” had a disparate impact upon African Americans.

Metro argues that because of a variety of flaws in Brooks’s case, the circuit court was required to enter a verdict directed in their favor. The first of the alleged flaws is that the circuit court took judicial notice of a definition of the PFB from the website of the National Library of Medicine and the National Institutes of Health, www.pubmed.gov. The definition, in pertinent part, reads as follows:

Pseudofolliculitis barbae (PFB) is a common, chronic, inflammatory skin disorder seen mainly in individuals with curly hair. This condition is seen most frequently in black men who shave their beards but may also be seen in women of all races who wax or shave the axillary and pubic skin. The etiology of PFB is multifactorial, and heretofore a cure has been considered impossible for those desiring a clean-shaven face.

The circuit court took judicial notice of this definition as the parties had expressed a willingness to stipulate regarding a definition of the condition, but had failed to agree on the precise wording. Metro argued then and argues now that because the definitions of PFB differ slightly in medical treatises, it was subject to reasonable dispute. Brooks argues that PFB is “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned” as required by Kentucky Rule of Evidence (KRE) 201. Metro complains that the court reviewed various definitions and while one definition stated PFB was “most frequently” seen in black men, another stated PFB was of “particular nuisance to African-Americans” and a third said that PFB is found

“predominantly” in black men. Metro argues that because the “rate” at which African-American males are affected by PFB is “contradictory” it is not an indisputable fact as required by KRE 201. Further, Metro argues that “anyone with a computer can create a website” and without a separate finding of reliability of the internet source of the definition, the judicial notice was improper. We disagree.

The very case that Metro cites as supportive of its argument holds that the reason the judicial notice was improper therein was that the litigant failed to properly cite the source of the information. Thus, the source of the information was not “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004). Herein the circuit court knew precisely from whence the information came. Moreover, the court did not choose a definition proposed by either party, but chose a definition specifically because the parties could not agree on one. Merely because various medical treatises use distinctive although analogous adverbs to describe the fact that PFB affects African-American males more often than other groups of people, does not subject the meaning to *reasonable* dispute. In reality, the differences between the definitions are semantical and the circuit court used a website maintained by the National Institute of Health and the National Library of Medicine. Metro did not and does not assert that the definition is misleading or inaccurate in any way.⁵ Nor does Metro point

⁵ It should be noted that it was uncontroverted that during the negotiations that took place after Brooks was fired, but before he was re-hired, Brooks was required to see a doctor chosen by Metro for purposes of diagnosis. This doctor diagnosed Brooks with PFB and advised that he could not shave due to the condition.

to any irregularity with www.pubmed.gov. It simply alleges, that somehow the information is suspect because it came from the internet. We reject that contention and find that the circuit court acted properly. Courts across this country take judicial notice of medical terminology on a daily basis in order to save litigants the added expense of having a physician or other medical expert testify to a readily determined disease or malady. *See, Marcum v. Wolf Creek Collieries*, 850 S.W.2d 48, 49 (Ky. 1993); *Doherty v. United Student Aid Funds, Inc. (In re Doherty)*, 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998).

However, assuming *arguendo*, that the judicial notice was in error, it was harmless error given Bishop's testimony. Metro contends that the circuit court erred in allowing lay-witness testimony regarding PFB. Four witnesses who were not medical experts testified as to their knowledge of PFB. Metro objected only to one, Major Grace Smith's (hereinafter Smith) testimony, on that point, but neglected to ask the circuit court for a ruling on the matter. The three remaining witnesses, Bishop, Martin and Brooks testified without objection. Therefore, this error is unpreserved.

But this does not end the ramifications of this testimony, especially with regards to Bishop's and Metro's contention that Brooks failed to prove his case. It is uncontroverted that Bishop was the manager who enforced the policy at the jail requiring officers to be clean-shaven. Yet, he testified that he was aware of

PFB, and further stated that it was peculiar and particular to African-American men.

Metro argues that Brooks failed to introduce evidence sufficient to demonstrate that the shaving policy placed a greater burden on blacks than on whites. This contention is meritless given that the government official who implemented and enforced said policy testified that he knew that PFB was peculiar and particular to black men thus, he was aware of the greater burden that it placed on Brooks both individually, and as a member of a protected class. Additionally, Brooks admitted during his testimony that the policy in question would have a disparate impact on an African-American with PFB.

Bishop's testimony was direct evidence of his intent to discriminate. KRS Chapter 344 and Title VII prohibit two forms of this type of discrimination- disparate impact and disparate treatment. A plaintiff may establish a prima facie case of discrimination through either direct evidence of intentional discrimination, *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 114-15 (6th Cir. 1987), or circumstantial evidence giving rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). When a plaintiff presents credible and direct proof of discrimination, the so-called *McDonnell Douglas* formula is inapplicable because the "plaintiff no longer needs the inference of discrimination that arises from the prima facie case." *Terbovitz*, 825 F.2d at 115. "When it is shown that employment practices place a heavier burden on minority employees than on members of the majority, and this burden

relates to characteristics which identify them as members of the protected group, the requirements of a Title VII disparate impact case are satisfied.” *Lynch v. Freeman*, 817 F.2d 380, 389 (6th Cir. 1987). Thus, Brooks’s direct evidence obviously survives the directed verdict motion.

In the prior appeal to this Court, or *Brooks I*,⁶ Metro argued that Brooks had failed to survive the directed verdict on his claim of disparate impact discrimination. Metro attempts to make the same argument regarding the lack of statistical evidence as it put forth in *Brooks I*, but under a different guise. Metro insists that Brooks did not give the jury proof of any relevant comparison in terms of precisely how many African-American males suffer from PFB. As the *Brooks I* court previously decided the issue re-presented herein, we simply refer the parties to that opinion as it went to great lengths to resolve and explain the fallacy of this same recycled contention.

Next, Metro believes that Brooks failed to rebut its proof of a legitimate business necessity. As we have decided that Brooks produced evidence sufficient to prove his claim that the policy was discriminatory, the burden then shifts to Metro to show that the policy was necessary to the operation of the jail. The above cited case of *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987), is illustrative:

Once a prima facie case is established, the employer may rebut it by showing that the practice complained of is required by “business necessity,” or has “a manifest

⁶ Not reported. *Brooks and Martin v. Jefferson County Fiscal Court*, 2003 WL 23005603 (Ky. App. 2003)(1999-CA-000624-MR).

relationship to the employment in question.” If the employer makes this showing, the plaintiff may still prevail by showing that the employer relied on the practice as a pretext for discrimination. *Connecticut v. Teal*, 457 U.S. 440, 446-47, 102 S.Ct. 2525, 2530-31, 73 L.Ed.2d 130 (1982), quoting *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854.

Id. at 383.

At trial Bishop testified that there were two primary reasons for the no facial-hair policy: uniformity and safety. Major Michael Horton also confirmed Bishop’s testimony citing safety concerns such as an inmate restraining an officer by means of grabbing his beard. Metro is correct that “[p]rotecting employees from workplace hazards is a goal that, as a matter of law, has been found to qualify as an important business goal for Title VII purposes.” *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993). However, Metro misses the mark when stating that this testimony of Bishop and Horton went uncontested. In point of fact, Major Horton admitted that he was not in compliance with the policy at the time in question, thus uniformity was not present. Nor did Bishop explain why or how uniformity is of manifest necessity to the job of correctional officer.

Further, Bishop testified that the policy was necessary to “quasi-military” groups such as were present at the jail. What is ironic is that Brooks was excused from shaving during his actual military service due to PFB and this “waiver” was in his personnel file from the time of his hire. The safety reason cited by Bishop was also belied by the evidence that Brooks kept his beard and mustache closely cropped, thus there was no fear that an inmate might use his

facial hair to restrain him. This evidence convinces us that Metro failed to meet their burden of proving the policy served a legitimate business necessity.

B. DIRECTED VERDICT MARTIN

KRS 344.280(1) makes it unlawful for one or more persons “[t]o retaliate or discriminate *in any manner* against a person . . . because he has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under the chapter.” (Emphasis added).

Metro’s position is that Martin did not prove that she suffered a materially adverse employment action, as defined by the United States Supreme Court. “In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, “which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 2415 (2006).

As we must, we take the evidence presented by Martin as true. Thus, we do not find that the verdict rendered is palpably or flagrantly without substantiation in the record. After Martin expressed her opinions about the liability the jail would face given the treatment of the female officers and Brooks, it is uncontroverted that Bishop limited the communication of other employees with Martin. Nor does Metro deny that a “divide” was created once Martin expressed her concerns to Bishop. Martin’s testimony included Bishop referring to her in a derogatory manner as “Ms. ADA” and “Ms. EEOC” during staff meetings. These

incidents were corroborated by the testimony of Smith and others. Bishop directed an employee to refrain from speaking to Martin as she was “leaking” information to the female officers involved in the sexual harassment suit. Martin was denied entrance to the jail and her previous office after filing of this lawsuit. She was then told to report to Metro’s County Personnel Department and apparently reinstated in her position, but her responsibilities were increasingly limited to the point where she had little to do. She testified that it was humiliating to have her duties doled out to other employees, implying she was no longer capable of performing her job. A material modification in duties and loss of prestige may rise to the level of adverse action. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004).

In addition, Bishop questioned the severity of her disability, saying during a meeting, “I don’t believe you are as weak as you pretend to be.” Given the verdict, it is clear the jury found the testimony of Martin and her witnesses’ to be more credible than that of Bishop and the Metro witnesses. We hold that the jury had before it sufficient evidence to reasonably find that Bishop’s actions could dissuade a reasonable worker from making or supporting a charge of discrimination.

The next argument proffered by Metro is that Martin did not rebut their claim of a legitimate business necessity for the actions taken against her. Metro claims that because a new jail was being built, new positions were created and numerous individuals were assigned to contribute to the effort. It contends

that this is why Martin was “assisted” in her work responsibilities by others. This explanation is inconsistent on its face. If the construction of the new jail indeed required more work from existing employees, why would Martin’s responsibilities be simultaneously decreased? As the U.S. Supreme Court recently stated, “[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and “should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71, 126 S.Ct. 2405, 2417, 165 L.Ed.2d 345 (U.S. 2006). In reaching its verdict the jury also reasonably rejected name-calling and yelling as a legitimate business necessity. We hold that the evidence was sufficient to find against Metro and does not indicate that the verdict was reached as a result of passion or prejudice. Thus, the court properly denied the motion for a directed verdict.

III. COMPLIANCE WITH CR 8.01(2) BROOKS AND MARTIN

Kentucky Rules of Civil Procedure (CR) Rule 8.01(2) states, in pertinent part:

(2) When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories. If this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories; provided, however, that the trial court has discretion to allow a supplement to the answer to interrogatories at any time where there has been no prejudice to the defendant.

In 1999, in a negligence action involving a pedestrian struck by an automobile, the Supreme Court of Kentucky construed 8.01(2) when read in

conjunction with CR2 26.05 as placing a duty on parties to “seasonably” supplement responses to interrogatories:

Thus, CR 8.01(2) and CR 26.05 may be fairly and reasonably construed together so as to impose a “seasonable” time limit on a party's ability to supplement an answer to interrogatories for claims for unliquidated damages. While CR 26.05 does not include a definition of “seasonable,” we believe that, as a matter of law, any attempt to supplement answers to interrogatories after trial has commenced is not seasonable within the meaning of the rule. *We note that nothing in the rules precludes a trial court from entertaining a motion to supplement answers to interrogatories after trial has commenced.* However, Fratzke never made such a motion. Nor is there anything in the record to indicate that she in any way brought her supplemental answers to the attention of the trial court. Therefore, we hold that Fratzke's attempt to supplement her answers to interrogatories to include amounts claimed for unliquidated damages, which was made on the last day of trial and without leave of court, was ineffective.

Fratzke v. Murphy, 12 S.W.3d 269, 272 (Ky. 1999).

In 2002 the Court held:

The purpose of the rule [CR 8.01] is to put a party on notice as to the amount of unliquidated damages at stake to allow that party to make economically rational decisions concerning trial preparation and trial strategy.

LaFleur v. Shoney's, Inc., 83 S.W.3d 474, 481 (Ky. 2002).

Another panel of this Court summed up the rulings in both cases in 2003:

Fratzke and *LaFleur* both hold that the trial court retains the discretion to consider a motion for leave to file belated answers to interrogatories during the course of the trial. While *Fratzke* precludes a trial court “from

awarding damages for unliquidated claims that are in excess of the last amount claimed by the plaintiff in answers to interrogatories,” the Supreme Court further stated that “nothing in the rules precludes a trial court from entertaining a motion to supplement answers to interrogatories after trial has commenced.”

Prater v. Castle, 139 S.W.3d 921, 926 (Ky. App. 2003).

Metro claims that both Brooks and Martin failed to comply with CR 8.01 as required by *Fratzke, supra*. Metro alleges that the interrogatory answers provided by Brooks and Martin were never amended to put them on notice as to the amount of unliquidated damages both were seeking.

Brooks and Martin supplemented their responses, pursuant to the circuit court’s order of July 27, 1998, by filings containing specific damage figures. After the commencement of the trial they were given leave of the court to supplement their responses to comport with the proof produced at trial. The supplements that occurred at trial were well within the amount of damages listed in the pleadings that were produced and filed well within the time frame of the order. In fact the itemization of damages filed by Brooks in 1998 took place nearly eight years prior to the second trial, which did not occur until July of 2006. Still, Metro claims that the interrogatories themselves were not supplemented and urges us to hold that Brooks and Martin receive zero damages.

Metro urges us to maintain a “gotcha” mentality when it comes to pleadings via the *Fratzke* rationale, by denying any discretion to the trial court to allow supplementation. This ignores the later holding of the Supreme Court in

LaFleur and the fact that Brooks and Martin complied *vis á vis* the itemizations filed pursuant to the court's order. Metro was on notice of both the type and amount of damages Martin and Brooks were seeking prior to trial. We hold that the circuit court did not abuse its discretion by allowing the amount of previously disclosed damages to be amended to comport with the proof produced at trial. Again, "[t]he purpose of the rule is to put a party on notice as to the amount of unliquidated damages at stake ". . . . *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 481 (Ky. 2002).

IV. JURY INSTRUCTIONS

Metro asserts that the jury instructions were erroneous and misleading in that they did not contain "but for" language. It alleges that should the employer articulate a legitimate, non-retaliatory reason for the decision, the employee must show that "but for" the protected activity, the adverse employment actions would not have occurred. The standard of review by which we must abide when reviewing a trial court's instructions to the jury is to assess whether the instruction misstated the law. "It is within a trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion." *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005).

[Jury instructions] should not contain an abundance of detail, but should provide only the "bare bones" of the question for jury determination. This skeleton may then be fleshed out by counsel on closing argument." Bertelsman & Phillips, *Kentucky Practice*, Vol. 7 (1991 Supp.), and authorities cited therein . . . In Kentucky, the burden of proof is always on the party who would lose if

no evidence was presented. CR 43.01(2). In Kentucky jury instructions do not include evidentiary presumptions. Such presumptions alter the burden of going forward with the evidence, and thus may result in a directed verdict in the absence of countervailing evidence, but the jury instructions should be framed only to state what the jury must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.

Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 824 (Ky. 1992).

Brooks and Martin point out that while Metro filed proposed jury instructions, they never specifically objected to the lack of the “but for” language. In actual fact, a review of the proposed jury instructions filed by Metro does not show the “but for” language they now complain was missing from the instructions. We are at a loss to understand Metro’s rationale for its assertions to the contrary. As we have previously stated above, absent palpable error “[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court.” *Matthews v. Ward*, 350 S.W.2d 500 (Ky. 1961); *Combs v. Knott Co. Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (1940); *Tipton v. Brown*, 273 Ky. 496, 117 S.W.2d 217 (1938); *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

The jury instructions of the court contained the following principles: In a case claiming retaliation, the plaintiff must demonstrate that: (1) she engaged in a protected activity; (2) the defendant knew of her exercise of her protected rights; (3) the defendant subsequently took an adverse employment action against the plaintiff or subjected the plaintiff to severe or pervasive retaliatory harassment; and (4) there was a causal connection between the plaintiff’s protected activity and

the adverse employment action. *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). Based upon our review, the jury instructions comport with the law concerning the claim presented and are in no way misleading. More they need not do.

V. ERROR IN THE AWARD OF LOST WAGES

We begin by observing, once again, that there is no citation in the brief filed by Metro as to where this issue is preserved for our review. Further, our review of the record shows that there was no objection contemporaneously made to the testimony from Martin regarding lost wages. The Court of Appeals is without authority to review issues not raised in or decided by the trial court. *Matthews v. Ward*, 350 S.W.2d 500 (Ky. 1961); *Combs v. Knott Co. Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (1940); *Tipton v. Brown*, 273 Ky. 496, 117 S.W.2d 217 (1938); *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Generally, the court will not review unpreserved errors. *Commonwealth v. Maricle*, 15 S.W.3d 376, 379 (Ky. 2000).

However, when reviewing this issue for palpable error⁷ we take notice that Martin filed for retirement based upon her disability, a condition she did not formally prove was aggravated by Bishop's unlawful behavior. Metro contends that a person who admits that they are disabled, is not entitled to request lost wages as those wages would have been lost regardless of its behavior. *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 917 (Ky.App. 2006), cited by Metro, states

⁷ To be palpable, an error must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1999), citing *Black's Law Dictionary* (6th ed. 1995).

“[a] plaintiff in a wrongful termination case is entitled to lost wages only for the periods in which he was ready, willing, and able to work and in which he was physically capable of performing the essential functions of the job he claims was wrongfully denied. *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 917 (Ky. App. 2006), citing *Dunn v. Comcast Corp.*, 781 So.2d 940 (Ala. 2000). As this is a matter of law, therefore, our review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky. App. 1998); and *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). Pursuant to the holding in *Upchurch, id.*, the jury should not have been given the option of awarding lost wages to Martin. That part of the judgment awarding lost wages is hereby reversed.

VI. JOINDER OF THE CASES OF BROOKS AND MARTIN

Metro asserts that these cases should have been tried separately, both because they did not involve common questions of law and because Metro was prejudiced in Brooks’s case by the evidence of discriminatory intent adduced in Martin’s case. They point to the fact that Brooks was not required to prove discriminatory intent in order to prove the claim of disparate impact. CR 20.01 provides:

[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to

all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Kentucky Rules of Civil Procedure (CR) Rule 20.01.

Pursuant to CR 42.01:

[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Kentucky Rules of Civil Procedure (CR) Rule 42.01

In addition to considering whether there are common issues of fact and law, the court must also bear in mind the purpose of judicial economy. The trial court's discretion is given deference when determining whether or not repeated litigation is warranted. *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 359 (Ky. App. 2007).

In its brief Metro concedes that the cases of Brooks and Martin involved many of the same witnesses and “some common facts” but emphasize

that Martin's claim involved emotionally charged claims while Brooks's did not. We cannot agree that this matter should have been severed for purposes of trial. The commonality of the claims, *i.e.*, is discrimination in the workplace, along with the large number of shared witnesses and evidence make the consolidation of the cases not just practical and expedient, but paramount in terms of judicial economy. This matter involved concomitant defendants, time periods, and antagonists, and while Metro alleges it suffered prejudice as a result of the collective trial, it points to no particular instance of this prejudice. Further, while Brooks was not required to prove intent in his case, the intent of Bishop and Metro was certainly relevant and admissible evidence. Given the above, we find that the circuit court did not abuse its discretion when deciding to try these cases simultaneously.

VII. SOVEREIGN IMMUNITY

Metro encourages this Court to overturn the Supreme Court of Kentucky's case finding that the Commonwealth is not immune from liability under the KCRA. "To immunize the Commonwealth from the application of the Kentucky Civil Rights Act frustrates the act's purpose and intent, deprives many of its citizens of its protection, and renders meaningless its pledge to safeguard *all individuals* from discrimination. Such a construction is neither tenable nor tolerable." *Department of Corrections v. Furr*, 23 S.W.3d 615, 617 (Ky. 2000). Rules of the Supreme Court (SCR)1.030(8)(a) binds the Court of Appeals to follow precedents propounded in the opinions of the Supreme Court. Even if this were

not the law by which we must abide, we are not otherwise inclined to accept the invitation of Metro.

VIII. ATTORNEY FEE AND COST AWARD

Metro's final contention is that the attorney fees and costs awarded by the trial court were improper.⁸ Metro's argument involves five parts: (1) that Brooks and Martin should not have been permitted to provide additional proof regarding injunctive relief, attorney fees, and costs post judgment; (2) that the fees should not include those claims which proved unsuccessful; (3) various services were redundant and should be excluded from the fee award; (4) one attorney did not keep contemporaneous records, thus his fee award should be discounted; and (5) the fee petitions did not separate the time spent on each party. Metro asserts that the matter of the fee award should be remanded to the trial court for further proceedings and at no additional cost to Metro.

To begin, we look again to KRS 344.450, which provides that the KCRA provides injunctive relief and in pertinent part, that the court's order, "or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter." KRS 344.450. After the conclusion of the trial and the entry of judgment on July 17, 2006, the circuit court granted Brooks and Martin leave to file their Bill of Costs. Brooks and Martin's motion was filed to alter or amend the judgment on July 25, 2006, well within the time

⁸ These issues were properly preserved for review.

provided in CR52.02. The procedures for amending judgments are set forth in CR

52.02:

Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

“Thus, a court has unlimited power to amend and alter its own

judgments.” *Henry Clay Min. Co., Inc. v. V & V Min. Co., Inc.*, 742 S.W.2d 566, 566-67 (Ky. 1987), citing *Pattie A. Clay Infirmary v. First Presbyterian Church*, 605 S.W.2d 52, 54 (Ky. App. 1980). We can find no abuse of discretion in the ruling before us now.

Metro contends that the award should be reduced since punitive damages and injunctive relief were sought by Brooks and Martin, but not found by the jury or the court. Metro is correct that the United States Supreme Court held that when a plaintiff fails to prevail on a *claim*, the time spent by the attorney toward the unsuccessful claim may be excluded from the fee award.

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount . . . There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

Hensley v. Eckerhart, 461 U.S. 424, 436-37, 103 S.Ct. 1933, 1941 (1983).

We do not agree with Metro that Brooks and Martin were unsuccessful in their claims—retaliation and disparate impact discrimination. To the contrary, the jury found in favor of both litigants. The circuit court conducted an evaluation of the fees presented by the attorneys and we are not convinced that it abused the considerable discretion it is afforded in this instance.

When answering the remaining issues, and as both parties point us to identical case law, we next look to the ruling from our Supreme Court regarding the appropriate manner of calculating attorney fees. Therein, the Court held that the formula to be used is the “product of counsel's reasonable hours, multiplied by a reasonable hourly rate, which provides a “lodestar” figure, which may then be adjusted to account for various special factors in the litigation.” *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 826 (Ky. 1992).

The circuit court entered a specific and detailed supplemental judgment on August 2, 2007, following a flurry of motions filed by all parties. In the supplemental judgment, the court performed the required calculations, greatly reducing all of the attorneys’ hourly rates, one from \$375.00 per hour, to \$200.00 per hour. The court deducted what it considered to be duplicative fees. Again, this Court reviews an award of attorney’s fees for an abuse of discretion.

In light of a ‘[trial] court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters,’ an award of attorneys' fees under § 1988 is entitled to substantial deference.” “An abuse of discretion exists when the reviewing court is firmly convinced that a

mistake has been made.” ““A [] court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard.’ ”

Walters v. Moore, 121 S.W.3d 210, 215 (Ky.App. 2003). (Internal citations omitted).

After our review, we find no abuse of discretion on the part of the circuit court regarding the award of attorney’s fees especially given the time and amounts found in the supplemental judgment. Due to the above-referenced finding of this Court, the motion by Brooks and Martin requesting the dismissal of the attorney fees is moot and is therefore DENIED.

VIV. CROSS APPEALS

A. BROOKS

Brooks contends that the trial court’s refusal to order his promotion to Sergeant and thereafter to award back pay based upon that promotion was in error. The circuit court ruled that Metro was entitled to a directed verdict on that claim, as taking all of the evidence in the light most favorable to Brooks, no reasonable juror could have found that the lack of promotion was based upon racial discrimination. The court then denied Brooks’ motion post-trial for injunctive relief. “When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party.” *Meyers v. Chapman Printing Co., Inc .*, 840 S.W.2d 814 (Ky. 1992). If the trial court has

been presented with the issue, the reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984). “A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented.”

The trial of this matter lasted nine days, and the volume of motions and other documents fill twelve volumes. This Court cannot say that it is in a better position than was the trial court to evaluate the evidence of Brooks’ claim of failure to promote. Nor do the arguments presented in the brief persuade us to alter the post-trial judgment, thus we affirm the Jefferson Circuit Court’s order denying the request for injunctive relief.

B. MARTIN

Martin made a similar motion for injunctive relief seeking reinstatement to her former position as human resources manager. This request was denied by the circuit court. Martin testified that she was disabled, had retired, in part, because she was disabled and has continued to have severe health problems in the years following her retirement. The same reasoning applies that as she was not able to work for purposes of awarding lost wages, she would be incapable of working in her old position had the court granted her requested relief. We therefore affirm the Jefferson Circuit Court’s order denying the request for injunctive relief.

In conclusion, we reverse the Jefferson Circuit Court's award of lost wages to Martin, but affirm on all other matters discussed above. Additionally, this case is remanded to the Jefferson Circuit Court for entry of a judgment consistent with this opinion.

ALL CONCUR.

ENTERED: June 12, 2009

s// Michelle M. Keller
JUDGE, COURT OF APPEALS

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