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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001899-MR

ROBERT DIETZ AND
LAURA MCKUNE — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NOS. 09-CI-005984 AND 10-CI-004009

MARK BOLTON; LOUISVILLE
METRO GOVERNMENT;
AND CHAD CARLTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Robert Dietz and Laura McKune have appealed from several orders of the Jefferson Circuit Court granting summary judgment in favor of and dismissing their claims for wrongful discharge, retaliation, defamation, and false light, among others, against the defendants, Mark Bolton and Chad Carlton,

in both their individual and official capacities, and the Louisville/Jefferson County Metro Government ("Louisville Metro Government"). Having carefully considered the record and the parties' respective arguments, we affirm the circuit court's rulings.

Robert Dietz and Laura McKune (collectively, "the plaintiffs" or "the appellants") are former at-will employees of the Louisville Metro Government Department of Corrections ("Metro Corrections"); Dietz was a Major, and McKune was the Deputy Director. Mark Bolton, the Director of Metro Corrections, terminated their employment in May 2009. Director Bolton maintained that Dietz was terminated because of his actions related to a domestic violence complaint involving another Metro Corrections employee, and McKune was terminated due to Bolton's lack of confidence in her support and judgment. On the other hand, the plaintiffs contended that they were wrongfully terminated, in part, based upon their testimony at an EEOC hearing related to a former deputy director and McKune's complaints about not receiving equal pay as her male counterpart.

A few weeks after the terminations, Chad Carlton, the Director of Communications for the Metro Government, called a press conference to allow the County Attorney and Director Bolton to address alleged threats to Director Bolton's safety. Talking points included threats made against Director Bolton and that both he and his out-of-state family were under police protection. Questions arose during the press conference about the plaintiffs' terminations. While no one

stated at the press conference that the terminations and the threats were connected, the plaintiffs claim that the inference was clear and was picked up by the press.

On June 16, 2009, a week following the press conference, the plaintiffs filed a multi-count complaint in Jefferson Circuit Court against Director Bolton, individually and in his official capacity as the Director of Metro Corrections; Louisville Metro Government; and fifteen John and/or Jane Does, individually and in their official capacities as employees of Louisville Metro Government.[1] They alleged claims for libel and slander; violations of the Kentucky Civil Rights Act (KCRA), including gender discrimination; pay discrimination as to McKune; violation of the Whistleblower Act as to Dietz; and wrongful termination. In their respective answers, Director Bolton and Louisville Metro Government asserted several affirmative defenses, including sovereign immunity and qualified immunity.

In March 2010, Director Bolton filed a motion for summary judgment. In his motion, Director Bolton argued that the common law wrongful termination claims did not fall into the narrow exception to the termination-at-will doctrine; that the plaintiffs failed to establish a *prima facie* case for discrimination or retaliation under the KCRA, Kentucky Revised Statutes (KRS) Chapter 344; that Dietz failed to establish a claim under the Whistleblower Protection Act, KRS 61.102 and KRS 61.103; that McKune's claim for pay discrimination failed because she never sought protection pursuant to KRS 337.423 and because the pay

[1] Case No. 09-CI-05984.

differential between her and the other deputy director was based on other legitimate factors; and that they failed to establish a *prima facie* claim for libel/slander because the media statements upon which the claims were based were truthful and did not mention McKune. Shortly thereafter, on the plaintiffs' motion, the circuit court placed the motion for summary judgment in abeyance until late September to allow discovery to be completed.

In June 2010, the plaintiffs filed a separate complaint, this time naming Chad Carlton, both individually and in his official capacity as Director of Communications for Louisville Metro Government.[2] The complaint again named Louisville Metro Government and fifteen John and/or Jane Does, but did not name Director Bolton. In this complaint, the plaintiffs made the same claims as in the first complaint (other than for pay discrimination), but added additional claims for false light invasion of privacy and civil conspiracy, both arising out of the June 9, 2009, press conference. The two complaints were consolidated by order entered November 15, 2010. The same order dismissed all claims against Louisville Metro Government on sovereign immunity grounds.

In response to the previously filed motion for summary judgment, the plaintiffs argued that Director Bolton did not meet the standard for summary judgment, asserting that summary judgment was not warranted when the facts were reviewed in a light most favorable to them and with all doubts resolved in their

[2] Case No. 10-CI-04009.

favor. Their main argument was that an impermissible reason was a substantial motivating factor contributing to their discharges.

On February 24, 2011, the circuit court entered an opinion and order granting the motion for summary judgment and dismissing the claims against Director Bolton and Carlton. The court set forth the factual background as follows:

> In May of 2009, the Plaintiffs Robert Dietz and Laura McKune were employed by the Louisville Metro Department of Corrections (LMDC) in the respective capacities of Major and Deputy Director. Both were at-will employees serving under the command of the Director, Mark Bolton.
>
> On the morning of May 8, 2009 Louisville Metro Police responded to a call of domestic violence at the home of Corrections Officer Ron Morris. Morris' wife claimed Morris physically assaulted her before fleeing their home with his service weapon. As a result of the police investigation, a warrant was issued for Morris' arrest. Morris went into hiding at a local motel. He retained an attorney and eventually made an appearance in Court on the warrant on May 12, 2009.
>
> Meanwhile LMDC Director Bolton became aware of the incident and began an investigation into the whereabouts of Morris. On May 11, Bolton specifically asked Dietz if he had any "official" communications[3] with Morris, which Dietz denied. Upon further investigation, Bolton obtained Metro cell phone records, which revealed that Dietz had numerous communications with Morris during the time between the Morris incident and the time of Bolton's inquiry. A later Corrections Professional Standards Unit Investigation interview with Morris confirmed that Dietz and Morris communicated

[3] Whether Bolton used the qualifier "official" in questioning Dietz is disputed. For purposes of summary judgment, the Plaintiff's [sic] version will be assumed to be true. [Footnote 2 in original.]

> during the time frame in question and that Dietz knew of Morris' whereabouts.
>
> On May 12, 2009, after obtaining the phone records, Director Bolton called Dietz into his office and once again asked about communications with Morris, which Dietz continued to deny. Upon this second denial, Dietz was given a prepared notice of termination. At some point in the investigation, Bolton obtained text messages between Dietz and Deputy Director McKune revealing that McKune was, at the time, aware of the communications occurring between Dietz and Morris but said nothing to Bolton. By letter dated May 21, 2009, Bolton terminated McKune citing a lack of confidence in her support as Deputy Director and questions about her judgment in matters affecting the credibility and integrity of the Department. This suit followed.
>
> The plaintiffs allege common law wrongful discharge, violations of Kentucky's Civil Rights Act, KRS 344, violation of Kentucky's Whistleblower Protection Act, KRS 61.02 et. seq. and common law libel and slander. McKune also alleges wage discrimination during the course of her employment. They place their claims in the context of a larger story of political and personal conflict within the LMDC and Metro Government involving a wide range of ulterior motives and agenda.

With this background, the court addressed the issues raised in the motion for summary judgment.

Regarding the common law wrongful termination claims, the court recognized that both the plaintiffs were at-will employees and therefore terminable-at-will, but noted that there was a narrow public policy exception to this doctrine. The court noted that while the plaintiffs did not dispute that they were at-will employees, they claimed that their discharge was not based upon their

withholding of information about Officer Morris, but was due to their testimony in an EEOC proceeding, Dietz's refusal to alter staffing budget reports, and his reporting of inter-departmental violations of law and policy. However, the court held that the plaintiffs' claims were for the most part pre-empted because they fell within the parameters of existing statutory framework, including the KCRA and the Whistleblower Protection Act, which would not permit an independent action under common law wrongful discharge. The court found no evidence to support the claim regarding the overtime budget or that they were pressured to commit perjury in the EEOC hearing.

Regarding the KCRA claims, the court noted that Dietz did not make a claim of direct discrimination or that he was a member of a protected class; rather, his claim rested on his allegation that he was terminated in retaliation for his participation in the EEOC proceeding, and McKune made the same claim. The court did not find any causal connection between the EEOC proceedings and the termination, noting that Director Bolton had not been the director at the time they gave their testimony. The court also held that their tacit concealment of Morris' whereabouts was a legitimate reason for their dismissal. The court found no support for McKune's disparate treatment claim, since she received the same treatment as Dietz regarding the failure to provide information and she was replaced by a female. Her unequal pay claim pursuant to KRS 337.423 also failed because while the other deputy director was paid a higher salary, they did not

perform the same duties, meaning that there was no objective basis to compare the skills, effort, and responsibilities of the two positions.

Regarding Dietz's whistleblower claim, the court held that he never made any report of disclosure associated with any of the incidents to a statutorily-designated authority and could not claim protection under the statute. Finally, the court found no evidence to support the plaintiffs' defamation claims. McKune did not identify any defamatory language about her and could not maintain a claim. The court held that the press release statements were not defamatory to Dietz in reporting that he was terminated because he lied about having communications with Morris. The court also found no sustainable cause of action against Carlton based upon his participation in the press conferences, stating that there was no evidence that Carlton made any statement about either Dietz or McKune or that any defamatory language was published based on any of Carlton's actions. The court ultimately granted summary judgment to both Director Bolton and Carlton and dismissed the consolidated actions.

The plaintiffs filed a motion to alter, amend, or vacate the opinion and order, arguing that Director Bolton did not address his claims for civil conspiracy and false light invasion of privacy and that Carlton never moved for dismissal of any claims against him. In response, Director Bolton argued that the plaintiffs were improperly attempting to create a new cause of action because they never alleged a false light claim against him, either in their complaint, the briefing process, or during oral argument. In their reply, the plaintiffs maintained that they did in fact

raise the false light claim during oral argument.[4] They also stated that the false light claims were made in the 2010 complaint and went on to discuss the press conference, which was the basis for the claim. Director Bolton responded and continued to argue that they had never asserted a false light claim against him, but that even if they had, the court's previous opinion could be applicable to this claim as well. Carlton filed a separate response, stating that the summary judgment in his favor was appropriate, although he never filed a motion requesting summary judgment. Carlton also moved for a partial summary judgment on the false light claim.

By separate motion, the plaintiffs moved to amend and consolidate the two complaints to include a false light claim against Director Bolton. Director Bolton, in response, objected to the motion, noting that it had been nearly two years since the initial complaint had been filed. By order entered August 4, 2011, the court granted the motion to amend and ordered the amended consolidated complaint filed of record. The court did not require any party to file a responsive pleading, deeming the allegation to be controverted.

On September 12, 2011, the court entered an opinion and order ruling on the pending motions and addressing the defamation and false light claims. The court first considered the defamation claims against Carlton. As with the claim against Director Bolton, McKune did not identify any defamatory language published about her and therefore could not maintain a claim. And with Dietz, the court

[4] The certified record on appeal does not contain the recordings of any court proceedings.

noted its previous decision that the press release statements were not defamatory. As to Carlton's participation in the press conference and whether that created a false impression about Dietz, the court held that there was no evidence of any statement attributed to Carlton or that any defamatory language was published as a result. The court held that the statements made at the press conference were truthful and that Carlton was protected under the doctrines of official immunity and qualified official immunity.

Regarding the false light claim against Director Bolton, the court held that neither Dietz nor McKune could maintain such a claim, noting Director Bolton's statement that he could not connect Dietz or McKune to any of the threats he received and that the statement related to the reason for their terminations could not form the basis for this claim. Additionally, the court held that Director Bolton was entitled to the protections of official immunity and qualified official immunity. The court then granted summary judgment to Carlton and to Director Bolton (on the false light claim), and dismissed the consolidated actions. This appeal by the plaintiffs (hereinafter, "the appellants") now follows.

On appeal, the appellants maintain that the circuit court erred in dismissing their claims against Louisville Metro Government based upon sovereign immunity; in granting summary judgment as to their claims against Director Bolton and the Metro Government for wrongful termination, retaliation, and civil rights violations; and in granting summary judgment to Director Bolton, Carlton, and Louisville

Metro Government on their defamation and false light claims. The appellees have addressed these arguments in their respective briefs.

Our standards of review are well-settled in this matter. First, our standard of review in the appeal of a summary judgment is as follows:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest[, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. [Citations in footnotes omitted.]

Lewis v. B&R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001).

Second, Kentucky Rules of Civil Procedure (CR) 12.03 addresses motions for a judgment on the pleadings:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

In *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003), the Supreme Court of Kentucky addressed the application of CR 12.03, explaining:

> Civil Rule 12.03 provides that any party to a lawsuit may move for a judgment on the pleadings. The purpose of the rule is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided. The procedure is not intended to delay the trial in any respect, but is to be determined before the trial begins. The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings. When a party moves for a judgment on the pleadings, he admits for the purposes of his motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. *Archer v. Citizens Fidelity Bank & Trust Co.*, Ky., 365 S.W.2d 727 (1963). The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief. *Cf. Spencer v. Woods*, Ky., 282 S.W.2d 851 (1955).

With these standards in mind, we shall review the arguments raised on appeal.

The first issue we shall address is the appellants' contention that the circuit court erred in granting summary judgment to Director Bolton and Louisville Metro

Government on their claims of common law wrongful termination, retaliation, and civil rights violations.

First, we disagree with the appellants' statement of the law that the court must disregard any evidence that supports Director Bolton or Louisville Metro Government, including any evidence from Director Bolton or anyone who works for him. While the summary judgment rule is designed to be narrowly applied in order to preserve the right to trial by jury, summary judgment is nevertheless appropriate in cases where the non-moving party relies on little more than speculation and supposition to support his claims. *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) ("This Court has often stated that 'speculation and supposition are insufficient to justify a submission of a case to the jury, and that the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation.' *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)."). Non-moving parties must set forth "at least some affirmative evidence showing that there is a genuine issue of material fact for trial" to withstand a properly supported motion for summary judgment. *Steelvest*, 807 S.W.2d at 482. "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

Turning to the appellants' claim for wrongful termination, the Kentucky Supreme Court has recognized that, "ordinarily an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as

morally indefensible." *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). *See Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985), for the Supreme Court's discussion of the terminable-at-will doctrine. Regarding the application of this doctrine, the Supreme Court has recognized that "employers as a group have a legitimate interest to protect by having the cause of action for wrongful discharge clearly defined and suitably controlled." *Meadows*, 666 S.W.2d at 733.

In *Meadows*, the Supreme Court adopted judicial exceptions to the terminable-at-will doctrine as crafted by the Wisconsin Supreme Court in *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834 (1983). The *Grzyb* court summarized these exceptions as follows:

> 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
>
> 2) That policy must be evidenced by a constitutional or statutory provision.
>
> 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Grzyb, 700 S.W.2d at 401.

In addition, the *Grzyb* Court adopted the position of the Michigan Supreme Court in *Suchodolski v. Mich. Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982), which noted two situations "where 'grounds for discharging an employee are so contrary to public policy as to be actionable' absent 'explicit legislative statements prohibiting the discharge.'" *Grzyb*, 700 S.W.2d at 402, citing *Suchodolski*, 316 N.W.2d at 711. Those two situations are:

> First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment."

Id., citing *Suchodolski*, 316 N.W.2d at 711-12. The Court expressly stated that, "the concept of an employment-related nexus is critical to the creation of a 'clearly defined' and 'suitably controlled' cause of action for wrongful discharge." *Id*. Finally, the Court held that, "[w]here the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Id.*, 700 S.W.2d at 401.

Here, the appellants attempted to establish that their discharges were not related to their withholding of information about Officer Morris, but were instead related to their participation in an EEOC proceeding, Dietz's refusal to alter staffing budget reports, his reporting of inter-departmental violations of law and policy, and McKune's actions in seeking equal pay. We must agree with the circuit court, as well as Director Bolton and Louisville Metro Government, that all but the alteration of records and reporting claims fall within the parameters of the KCRA and the Whistleblower Protection Act and, therefore, the common law wrongful terminations claims are preempted and must fail.

Furthermore, we agree that Dietz's remaining claims are not sufficiently supported to overcome the standard for summary judgment. Dietz's deposition testimony did not establish that Director Bolton pressured him to violate overtime reporting laws; we agree with the circuit court that at best his testimony

established that they disagreed on reporting and staffing procedures. And regarding the EEOC proceedings, the evidence established that this was conducted well before Director Bolton was hired as the director, meaning that Director Bolton could not have pressured either Dietz or McKune to commit perjury.

Turning to the appellants' statutory retaliation claims, we recognize that this cause of action arises under KRS 344.280 of the KCRA, which provides, in relevant part, as follows:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
>
> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]

Because the KCRA is virtually identical to the Federal Civil Rights Act of 1964, this Court may consider how federal law has been interpreted. *Jefferson County v. Zaring*, 91 S.W.3d 583 (Ky. 2002), citing *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226 (Ky. 1984).

Kentucky follows the burden shifting formula set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once the plaintiff establishes a *prima facie* case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id*. at 802. If this burden is met, "the plaintiff must then have an opportunity to prove by a preponderance of

the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

In *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003), the Supreme Court of Kentucky set out the procedure to establish a retaliation claim:

> A claim for unlawful retaliation requires the plaintiff to first establish a *prima facie* case of retaliation, which consists of showing that "(1) she engaged in a protected activity, (2) she was disadvantaged by an act of her employer, and (3) there was a causal connection between the activity engaged in and the [defendant] employer's act." *Kentucky Center for the Arts v. Handley*, Ky.App., 827 S.W.2d 697, 701 (1991), *citing De Anda v. St. Joseph Hospital*, 671 F.2d 850, 856 (1982). In a case where there is no direct evidence of retaliation, as is the case here, the burden of production and persuasion follows the familiar *McDonnell Douglas* framework.

Related to the causation element, *McCullough* instructs that a causal connection may be established by direct or circumstantial evidence. *Id*. at 135. In this case, the appellants appear to argue that they have presented both direct and circumstantial proof to prove this element.

> Circumstantial evidence of a causal connection is "evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." *Nguyen*, 229 F.3d at 565. In most cases, this requires proof that (1) the decision-maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action. *See, e.g.,*

> *Breeden*, 532 U.S. at 273, 121 S.Ct. at 1508, 149 L.Ed.2d at 515.

McCullough, 123 S.W.3d at 135. *See also Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 804 (Ky. 2004).

Based upon our review of the record and their brief, the appellants' argument on appeal rests on their notion that even if they were fired for a legitimate reason, the appellees would remain liable if the jury believed that an impermissible reason was a substantial motivating factor for the discharge. In support of this, they cite to this Court's opinion in *Bishop v. Manpower, Inc. of Cent. Kentucky*, 211 S.W.3d 71, 76 (Ky. App. 2006):

> In *First Property Management Corp. v. Zarebidaki*, [867 S.W.2d 185 (Ky. 1993)], the Kentucky Supreme Court applied the pretext reasoning of civil rights claims to a statutory claim alleging discrimination against an employee who has filed workers' compensation claims. Thus, the pretext analysis set out in *Williams*, *Reeves*, and *Hicks* is applicable to the current case. However, the Court in *Zarebidaki* also held that an employee need not show that retaliation was the sole or even the primary motivating factor in the discharge, but only that retaliation for filing or pursuing a workers' compensation claim was a substantial motivating factor in causing his discharge. *Id*. at 188–89. Thus, an "employer is not free from liability simply because he offers proof he would have discharged the employee anyway, even absent the lawfully impermissible reason, so long as the jury believes the impermissible reason did in fact contribute to the discharge as one of the substantial motivating factors." *Id*. at 188.

However, *Bishop* addresses the pretext prong of the *McDonnell Douglas* test. And in the present appeal, we agree with the appellees that the appellants have failed to

establish a causal connection between their participation in the EEOC proceedings and their terminations, or with their claim that they refused to acquiesce in violations of law or policy. Accordingly, we need not reach the pretext question because the appellants failed to establish a *prima facie* case of retaliation.

While the appellants do not expressly make these arguments in their brief, we also agree with Director Bolton and Louisville Metro Government that they did not establish a *prima facie* case of discrimination under the KCRA; Dietz did not demonstrate that he was a member of a protected class, and McKune could not establish disparate treatment claim because she was replaced by a female, and she did not present proof that a similarly situated non-protected employee was treated more favorably. Likewise, Dietz's Whistleblower Protection Act claim must fail because he did not make any reports to a statutorily-designated authority associated with the incidents that form the basis of his claim. And finally, the appellants did not present a legal argument disputing the circuit court's ruling on McKune's pay discrimination claim, but we shall nevertheless uphold the circuit court's summary judgment on this claim because McKune and the other deputy director did not have the same responsibilities.

Next we shall consider whether the circuit court properly granted summary judgment to the appellees on the appellants' defamation and false light claims. Intertwined with these claims is an allegation of civil conspiracy. These claims are based upon the June 9, 2009, press conference, a speaking-points memorandum, and media releases.

In *Smith v. Martin*, 331 S.W.3d 637, 640 (Ky. App. 2011), this Court recently set forth the elements needed to establish a claim for defamation, as well as the defenses available to defeat this claim:

> To establish a claim for defamation, the following elements must exist: "[1.] defamatory language, [2.] about the plaintiff, [3.] which is published, and [4.] which causes injury to reputation." *Stringer v. Wal–Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004) (footnote omitted). A claim of defamation may be defeated by establishing the truth of the matter asserted which is an absolute defense. Additionally, a defamation claim may be defeated by assertion of a "privilege." A privilege is recognized as a defense to a defamation claim; the defense may be either absolute or qualified. An absolute privilege affords a defendant a complete defense to a claim of defamation; whereas, a qualified privilege only affords a defendant a conditional defense to a claim of defamation.

In *Stringer*, the Supreme Court of Kentucky more fully described the elements of this cause of action, stating, in part, as follows:

> "Defamatory language" is broadly construed as language that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." And, "[i]t is for the jury to determine, on the basis of competent evidence, whether a defamatory meaning was attributed to it by those who received the communication. The terms should be construed in their most natural meaning and should be 'measured by the natural and probable effect on the mind of the average reader.'"

151 S.W.3d at 793 (footnotes omitted).

Before we begin our analysis, we shall set forth the full texts of the media releases and memorandum. The May 19, 2009, Media Release stated:

Mark Bolton's Statement on the Firing of Robert Dietz

> Robert Dietz, a top manager in the Louisville Metro Corrections Department, was fired because he lied when I asked about his communications with a Corrections employee who was being sought by Louisville Metro Police on a bench warrant for alleged domestic violence. Phone records confirmed that Dietz had repeated communications with the Corrections employee and the employee's lawyer during a time the employee was being sought by law enforcement and was absent from work.
>
> As sworn public servants, we must take seriously our responsibility to uphold the law and principals [sic] of the justice system.

The May 20, 2009, Media Release read:

> Mark Bolton's Statement on the Firing of Robert Dietz
>
> Robert Dietz, a top manager in the Louisville Metro Corrections Department, was fired because he lied when I asked about his communications with a Corrections employee who was being sought by Louisville Metro Police on an arrest warrant for alleged domestic violence.
>
> Phone records confirmed that Dietz had repeated communications with the Corrections employee and the employee's lawyer during a time the employee was being sought by law enforcement and was absent from work. Mr. Dietz failed to inform me about his conversations with the employee being sought and, when asked, lied to me about his contact with the employee.
>
> Domestic violence is an extremely serious allegation, particularly against a law enforcement officer authorized to carry a weapon. Mr. Dietz's attempts to withhold information about the matter from the Director and his lies when asked about the matter warranted his termination from his position of trust. As a sworn public servant, Mr. Dietz had a responsibility to uphold the law and principles of the justice system.

Finally, the press conference notes drafted by Carlton read:

> Key points on Corrections
>
> <u>County Attorney comments</u>
>
> - The FBI is looking into threats made against Corrections Director Mark Bolton.
> - Mr. Bolton contacted law enforcement officials recently after receiving threatening phone calls and discovering lug nuts had been loosened and a tire slashed on his Metro vehicle.
> - The Mayor and County Attorney are concerned about Mr. Bolton's safety. He is receiving 24-hour police protection while the investigation continues. His family, which lives out of state, is also receiving police protection.
> - We have reviewed some communications, including e-mails and text messages from employees and former employees. We have shared those with investigators.
> - We do not want to go into detail about the threats because we do not want to hinder the on-going investigation.
>
> <u>Bolton comments</u>
>
> - I've been a change agent in this job. I've made decisions and reforms that have not been universally popular.
> - I can understand people disagreeing with me or my actions. But these threats are serious and go well beyond what is reasonable disagreement with policy decisions.

First, we agree with the appellees and the circuit court that McKune did not identify any defamatory language published about her and, accordingly, she cannot maintain a claim for defamation. Second, we agree with Carlton and the circuit court that there is no evidence that Carlton made any defamatory statements

against either McKune or Deitz, and the internal talking points memorandum he drafted made no mention of either of them. Finally, we agree with Director Bolton and the circuit court that the two media releases were truthful, which provides an absolute defense to the appellants' claim. The evidence certainly establishes that Dietz had contact with Officer Morris during the time period in question and was untruthful to Director Bolton when asked. Accordingly, the circuit court properly granted summary in favor of the appellees on the defamation claim.

Turning to the false light claims, the appellants contend that the statements made at the press conference placed them in a false light before the public.

> The two basic requirements to sustain such an action are: (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed. Restatement (Second) of Torts, Sec. 652E (1976).

McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882, 888 (Ky. 1981). The Supreme Court went on to explain:

> Much has been written as to the similarity of "false light" and defamation. The purpose of a false light action is to protect the individual in not being made to appear before the public in an unreasonably objectionable false light and otherwise than as he is. To sustain this action, the person need not be defamed. It is sufficient that the publicity attribute to him characteristics, conduct or beliefs that are false, and that he is placed before the public in a false position. *See* comment b to Restatement (Second) of Torts, Sec. 652E (1976). *See also False Light-Invasion of Privacy?* 15 Tulsa Law Review 113 (1979).

McCall, 623 S.W.2d at 888 n.9. Kentucky has adopted an actual malice standard for false light invasion of privacy cases:

> By our analysis of United States Supreme Court precedent in *McCall*, we felt compelled to adopt the actual malice standard in false light invasion of privacy cases involving private individuals and public issues. *See Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *but see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), D. Elder, super, § 3.09 at 457–59. Although we expressed a preference for simple negligence as the standard of fault in such cases, *McCall*, 623 S.W.2d at 888, we are not prepared to overrule *McCall* on the basis of speculation about the high court's parting ways with established precedent.

Yancey v. Hamilton, 786 S.W.2d 854, 860 (Ky. 1989) (citation in footnote omitted).

We have considered the arguments provided in the parties' respective briefs, and we agree with Carlton and Director Bolton that the circuit court properly granted summary judgment in their favor. As was the case in our defamation analysis, there was nothing false presented about either Dietz or McKune by Carlton or Director Bolton, and they have certainly not shown any actual malice in the actions of the appellees.

We also have considered the appellants' claims regarding civil conspiracy, and again we must agree with Carlton that there is no legal basis for this claim in the suits. In *James v. Wilson*, 95 S.W.3d 875, 896-97 (Ky. App. 2002), this Court thoroughly considered this doctrine:

A conspiracy is inherently difficult to prove. Notwithstanding that difficulty, the burden is on the party alleging that a conspiracy exists to establish each and every element of the claim in order to prevail. [*Krauss Wills Co. v. Publishers Printing Co.*, Ky. 390 S.W.2d 132, 134 (1965).] We begin our analysis with a definition of the term civil conspiracy, a topic rarely dealt with in Kentucky case law. In *Smith v. Board of Education of Ludlow*, [264 Ky. 150, 94 S.W.2d 321 (1936). *See also McDonald v. Goodman*, Ky., 239 S.W.2d 97, 100 (1951) (adopting the definition of civil conspiracy set forth in *Smith v. Board of Education of Ludlow*).] Kentucky's highest court defined civil conspiracy. "As a legal term the word 'conspiracy' means a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means." [*Id*. at 325.] The Supreme Court reaffirmed this definition when it again addressed the issue of conspiracy in *Montgomery v. Milam*[, Ky., 910 S.W.2d 237 (1995)]. The Court emphasized that in order to prevail on a claim of civil conspiracy, the proponent must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act. [*Id*. at 239.]

Our attention must then shift to determine what is meant by "concerted action." Kentucky's highest court provided direction as to the necessary components of a conspiracy in the case of *Davenport's Adm'x v. Crummies Creek Coal Co.*[, Ky., 299 Ky. 79, 184 S.W.2d 887 (1945),] in which the decedent's personal representative sued a coal company alleging that a conspiracy was formed between the company and its employees to commit a wrongful act resulting in the death of an innocent party. The Court held that before a conspiracy can be found, a "necessary allegation is that the damage or death resulted from some overt act done pursuant to or in furtherance of the conspiracy." [*Id*. at 888.] The Court acknowledged that there is no such thing as a civil action for conspiracy, noting that the action is for damages caused by acts committed pursuant to a formed conspiracy. In the absence of such acts done

> by one or more of the conspirators and resulting in damage, no civil action lies against anyone since the gist of the civil action for conspiracy is the act or acts committed in pursuance of the conspiracy, not the actual conspiracy. [*Id*.]

Based upon these holdings, we need not address whether Director Bolton and Carlton were entitled to qualified official immunity. However, we shall briefly address the appellants' argument that the circuit court erred in dismissing their claims against Louisville Metro Government on sovereign immunity grounds. They contend that because the General Assembly has waived sovereign and governmental immunity for the tort claims that they set forth in the complaint and amended complaint, including the KCRA, the Wage and Hour Laws, and the Whistleblower Protection Act, their claims against Louisville Metro Government should not have been dismissed. On the other hand, Louisville Metro Government contends that because the gravamen of the appellants' lawsuits is defamation and false light claims arising from the press conference, it is protected from suit by sovereign immunity. We agree that the circuit court properly dismissed Louisville Metro Government as a party to the actions.

In KRS 67C.101, the General Assembly provided for the consolidation of cities of the first class and counties, and specifically stated that "[a] consolidated local government shall be accorded the same sovereign immunity granted counties, their agencies, officers, and employees." KRS 67C.101(2)(e).

> "Immunity from suit is a sovereign right of the state." *Foley Construction Company v. Ward*, 375 S.W.2d 392, 393 (Ky. 1963). "The General Assembly

> may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." Kentucky Constitution, Section 231. A county "is a political subdivision of the Commonwealth as well, and as such is an arm of the state government. It, too, is clothed with the same sovereign immunity." *Cullinan v. Jefferson County*, 418 S.W.2d 407, 408 (Ky. 1967), *overruled on other grounds by Yanero v. Davis*, 65 S.W.3d 510, 527 (Ky. 2001). Therefore, absent an explicit statutory waiver, Metro Government is entitled to sovereign immunity. The only question remaining is whether there was an explicit waiver of its sovereign immunity by the General Assembly's enactment of KRS 441.045(3).
>
> In *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), a patient argued that legislative authority to purchase medical insurance constituted a waiver of a state hospital's sovereign immunity. The Kentucky Supreme Court, however, held that the General Assembly made clear its intention to only narrowly and explicitly waive governmental sovereign immunity. We must agree with the logic in *Withers* and now reiterate its holding that "[w]e will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *See id*., *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464–65, 53 L.Ed. 742 (1909) (emphasis added).

Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Gov't, 270 S.W.3d 904, 907 (Ky. App. 2008).

Based upon our rulings hereinabove as well as the applicable case law, we hold that the circuit court properly dismissed Louisville Metro Government from the consolidated lawsuits as it was entitled to dismissal as a matter of law.

Regarding their due process claims, the appellants contend that they were not afforded their due process rights pursuant to a collective bargaining agreement.

However, in the first sentence of this argument, the appellants state that the circuit court did not address these claims. Accordingly, this argument is not properly before the Court to review, assuming that the appellants even raised this claim below. *See McBrearty v. Kentucky Community and Technical College System*, 262 S.W.3d 205, 213 n.12 (Ky. App. 2008) ("Failure to raise an issue to the trial court precludes consideration of such issue on appeal.").

From our review of the record and the parties' respective arguments, it is clear that the appellants have failed to establish that there are any disputed material facts in order to defeat the appellees' motions for summary judgment. Rather, the appellants' claims are based upon unsupported speculation and conjecture. Accordingly, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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