RENDERED: DECEMBER 14, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000204-MR

KATRICIA ROGERS APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 11-CI-00405

PENNYRILE ALLIED
COMMUNITY SERVICES, INC. APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

NICKELL, JUDGE: Katricia Rogers appeals from an order of the Perry Circuit Court entered December 12, 2011, granting summary judgment to Pennyrile Allied Community Services, Inc. (PACS), her former employer. She claims she was terminated as a consumer educator coordinator after confronting her supervisor about his trespass upon her private property. In its brief, PACS claims Rogers was

terminated during her probationary period for "insubordination and other reasons," none of which are identified in the material provided to us. Having reviewed the briefs, the record and the law, we reverse.

FACTS AND PROCEDURAL HISTORY

Rogers began working for PACS[1] in September 2010 as one of several consumer educator coordinators. Her job caused her to be away from the office much of the time teaching programs in area schools and in facilities of community partners.

Rogers' supervisor at the time of hire, Dennis Gibbs, occasionally drove by the homes of his employees to confirm they were not at home and presumably were working in the field. In February 2011, Gibbs made an unannounced visit to Rogers' home during work hours. There is no indication Rogers was at home or was not at her scheduled teaching assignment. During the visit, Gibbs' vehicle became stuck in Rogers' private driveway[2] and caused minor damage that Rogers' husband was able to repair. That same day, Gibbs acknowledged his actions to Rogers, but being a probationary employee, she did not question his authority to visit her private property without an invitation.

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[1] PACS is a private, non-profit, community action agency created as a special district under Kentucky Revised Statutes (KRS) 273.435. Its goal is to reduce and eliminate poverty through education, training and work. According to its website, *www.pacs-ky.org/aboutus.html*, portions of which are included in the record, PACS is "a unique, limited purpose unit of government created for and involved with its specific aspect of public service."

[2] Rogers' property is posted with a "private property" sign, thus evincing a desire to keep unwanted guests off her property. *Robinson v. Commonwealth*, 47 Va.App. 533, 548-49, 625 S.E.2d 651 (Va. App. 2006).

Sometime after Gibbs confirmed to Rogers that he had visited her property and damaged her driveway, Rogers inquired of a deputy sheriff whether Gibbs could enter her property without permission.[3] The deputy sheriff advised Rogers that one serving in the role of a supervisor did not acquire license or privilege to trespass on an employee's property.

In mid-April 2011, Rose Shields was hired as Rogers' immediate supervisor. Shields and Gibbs visited Rogers' property, uninvited, on or about April 21, 2011.

On May 4, 2011, during a regular staff meeting, Rogers asked Gibbs what he could and could not do in checking on employees. Gibbs responded that he could do as he wished, including looking in the windows of their homes. Rogers replied that she had discussed Gibbs' uninvited visit to her home with the sheriff's office, learned Gibbs was unauthorized to enter her private property, uninvited, and warned Gibbs that any future trespass on her property could result in criminal prosecution. This exchange was heard by Gibbs, Shields and several co-workers. The next day, May 5, 2011, PACS terminated Rogers. During discovery, PACS admitted the decision to terminate Rogers did not occur until after the May 4, 2011, exchange.

[3] We do not know what Rogers communicated to the deputy. For example, we do not know whether she identified Gibbs by name. Thus, we make no comment on whether Rogers' contact with the Perry County Sheriff's Office was sufficient to trigger the protection from reprisal afforded employees by KRS 61.102.

On July 21, 2011, Rogers filed a complaint alleging violation of KRS 61.101 *et seq.*, known as Kentucky's Whistleblower Act. PACS answered the complaint and after limited discovery moved for summary judgment alleging: Rogers did not make a disclosure as required by KRS 61.102(1); any disclosure Rogers made did not trigger the Whistleblower Act because it did not pertain to a matter of public concern; and, the Whistleblower Act did not apply because Rogers and Gibbs were not employee and employer. In opposing the summary judgment motion, Rogers argued PACS is a political subdivision of the state and therefore, she was a state employee; Rogers disclosed a suspected violation of state or local law (criminal trespass[4]) to the sheriff's department and to Shields, her new supervisor; KRS 61.102 does not require that a disclosure touch on a matter of public concern to trigger the Whistleblower Act, but if it does, disclosure of Gibbs' trespass qualified as a disclosure of abuse of power and government waste; and finally, PACS terminated Rogers because she disclosed that Gibbs had trespassed on her private property.

[4] KRS 511.080(1) specifies "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises." Criminal trespass in the third degree is a violation.

After the filing of briefs and a hearing,[5] the trial court entered a succinct order stating:

> IT IS HEREBY ORDERED that [PACS'] motion for summary judgment be, and same is hereby, granted. The Court rules that in order to make out a claim under KRS 61.102 [Rogers] must show that any disclosure she made touched on a matter of public concern. The Court also rules that the disclosure in this case, as plead and testified to by [Rogers], did not touch on a matter of public concern, but instead amounted to a personal grievance with her supervisor. Therefore, [Rogers'] action is hereby dismissed in its entirety with prejudice at [Rogers'] cost.

A subsequent motion to alter, amend or vacate[6] the grant of summary judgment was denied by separate order entered January 19, 2012. This appeal followed. Having determined summary judgment to have been improvidently granted, we reverse and remand for further proceedings.

ANALYSIS

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[5] This hearing was originally set to occur on November 18, 2011. It was rescheduled for November 28, 2011. We can only assume this hearing occurred because it is listed as a scheduled event on the trial court's docket, but any such hearing was not certified as part of the record on appeal. Thus, we know not what, if anything, transpired or was argued. The complete record on appeal consists of one volume of record and one deposition of Rogers. It was Rogers' duty, as appellant, to see that the record is complete on appeal. *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1967). "[W]e have consistently and repeatedly held that it is an appellant's responsibility to ensure that the record contains all of the materials necessary for an appellate court to rule upon all the issues raised." *Clark v. Commonwealth*, 223 S.W.3d 90, 102 (Ky. 2007). When the complete record is not before the appellate court, we are bound to assume that the omitted record supports the decision of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). We will not "engage in gratuitous speculation . . . based upon a silent record." *Id*.

[6] This motion, made pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, did not request specific additional findings. It simply urged the trial court to vacate its award of summary judgment because it had misapplied KRS 61.102 and had relied exclusively on a federal case.

This appeal is limited to Rogers' challenge of the trial court's award of summary judgment to PACS. As explained in *Davidson v. Commonwealth., Dept. of Military Affairs,* 152 S.W.3d 247 (Ky. App. 2004):

> Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. The standard of review on appeal of a 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 record must be viewed in the light most favorable to the party opposing the motion, and any doubts are to be resolved in his favor.

Id., at 251 (internal citations omitted). "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*." *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted). It is with these precepts in mind that we review KRS 61.102(1) to determine whether it is triggered only by reporting, disclosing, divulging or otherwise revealing information that "touches on a matter of public concern."

The relevant portion of KRS 61.102(1) states:

> No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the Executive Branch Ethics Commission, the General Assembly of the

> Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, **any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance** of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, **or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.** No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

(Emphasis added). For purposes of this appeal, we will focus on the highlighted language. Without citing any authority, the trial court concludes this provision is triggered only by disclosure of "a matter of public concern." The trial court appears to have based its decision on an unpublished federal case, *Barber v. Louisville and Jefferson County Metropolitan Sewer District,* 2006 WL 3772209 (W.D.Ky.) (Dec. 20, 2006), which cites the Supreme Court of Kentucky case of *Boykins v. Housing Authority of Louisville,* 842 S.W.2d 527, 529 (Ky. 1992),[7] for the proposition that, like a First Amendment protected speech case, all claims brought under Kentucky's Whistleblower Act "must involve a disclosure that concerns a public matter." *Barber,* at *5. For the reasons that follow, we disagree.

[7] Boykins, a terminable at-will employee of a housing authority, claimed she was terminated in retaliation for filing a lawsuit alleging her infant son was injured in an apartment owned, operated and managed by her employer. Our Supreme Court held Kentucky's Whistleblower Act does not apply to a simple negligence action even though Boykins characterized her suit as a "report of information regarding mismanagement and endangerment of public health and safety[.]" *Boykins,* 842 S.W.2d at 529.

First, we have not been cited to any case[8] rendered by a Kentucky state court, nor have we found one, specifying a disclosure must "touch on a matter of public concern" to trigger Kentucky's Whistleblower Act. Second, KRS 61.102 does not contain the words, "touch on a matter of public concern." It appears we are the first panel to address this issue.

Since this is a matter of statutory interpretation, our review is *de novo*. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

> Guided by KRS 446.080(1), we must construe all statutes "liberally . . . with a view to promote their objects and carry out the intent of the legislature. . . ." Furthermore, we must construe "[a]ll words and phrases . . . according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." KRS 446.080(4).
>
> Statutes express the General Assembly's intent. *Gateway Const. Co. v. Wallbaum,* 356 S.W.2d 247, 248 (Ky. 1962). To determine its intent, we must examine the precise language used in the statute without reading into it words that are not there, *Bohannon v. City of Louisville,* 193 Ky. 276, 235 S.W. 750, 752 (1921), or guessing what the General Assembly might have intended to say but did not. *Lewis v. Creasey*

[8] A Westlaw search of Kentucky cases revealed only one decision referencing both "a matter of public concern" and "KRS 61.102," but it did so in the context of a free speech claim under the First Amendment in a wrongful discharge action. *Pike County Fiscal Court v. Gibson*, 2006 WL 3039997, at *3-4 (Ky. App. 2006, unpublished). *Gibson* specifies, "[i]n striking the balance [between government employee rights and government employer interests], the protection afforded by the First Amendment is limited to speech on a matter of public concern." *Id.* *Gibson* is factually distinguishable from the case under review, and unpublished. Therefore, it is not dispositive. Furthermore, by its own terms, it is limited to a free speech claim.

Corporation, 198 Ky. 409, 248 S.W. 1046, 1048 (1923). *Com., Finance and Admin. Cabinet, Dept. of Revenue v. Saint Joseph Health System, Inc*., --- S.W.3d ---, 2011 WL 4633108 at *5-6 (Ky. App. 2011). "Put another way, 'courts must presume that a legislature says in a statute what it means and means in a statute what it says . . . [and][w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *McDowell v. Jackson Energy RECC,* 84 S.W.3d 71, 77 (Ky. 2002) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992)).

While lengthy, KRS 61.102 uses intelligible, ordinary words to describe a government employer's prohibited "response to an employee who in good faith reports or otherwise brings to the attention of an appropriate agency either violations of the law, suspected mismanagement, waste, fraud, abuse of authority or a substantial or specific danger to public safety or health." *Commonwealth, Dept. of Agriculture v. Vinson,* 30 S.W.3d 162, 164 (Ky. 2000). Interestingly, in holding Kentucky's Whistleblower Act to be neither void nor vague, and therefore, constitutional, our Supreme Court did not include the phrase "touch upon a matter of public concern" when paraphrasing KRS 61.102(1).

Applying the principles of statutory construction, we discern no reason to consult federal or sister state statutes or case law to interpret KRS 61.102. Its words are clear and unambiguous. Therefore, we reject PACS' drumbeat that government employees are insulated from employer reprisals only

when they report items that impact issues of public concern. Such a reading of Kentucky's statute would directly conflict with the legislature's use of the word "any" throughout KRS 61.102(1). If the General Assembly had intended to limit the types of reports and disclosures that trigger the Act, it would have been simple enough to write:

> . . . any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance [**touching on a matter of public concern**] . . . , or any facts or information **[touching on a matter of public concern]** relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.

But they did not include the foregoing bracketed language and we cannot supply those words for them.

In trying to isolate the genesis of this argument, we quote from PACS' response to Rogers' motion to vacate:

> First, although *Barber* is only persuasive because it's a federal case, *Barber* is directly on point and unquestionably supports this Court's decision herein. Second, as we explained in our original summary-judgment memorandum and in our summary-judgment reply, the touch-on-a-matter-of-public-concern rule is not unique to *Barber.* The rule is universal in state-law whistleblower cases outside of Kentucky. Third, as we also explained in our summary-judgment memoranda, courts universally apply the touch-on-a-matter-of-public-concern rule to cases under the federal whistleblower statute. That's critical here because the Kentucky Supreme Court has expressly held that Kentucky courts should apply cases interpreting the federal whistleblower statute in Kentucky whistleblower cases because the

> federal statute is similar in almost every respect" to KRS 61.102.

Only two Kentucky cases are mentioned in footnotes to the foregoing passage, one is *Barber*, the opening subject of the passage, and the other is *Vinson,* which we have previously quoted and will discuss more thoroughly. It is curious to us that if PACS is correct, and Kentucky's application of the "touch on a matter of public concern" phrase is adopted "universally," then why is it unwritten by Kentucky courts?

In *Vinson,* two supervisors were demoted[9] without reduction in salary or loss of fringe benefits following reorganization of the Department of Agriculture in 1993. They sought punitive damages and injunctive relief under Kentucky's Whistleblower Act. During discussion of whether a new version[10] of Kentucky's whistleblower statute should apply, *Vinson* states,

> [t]wo cases which involve amendments to the federal Whistleblower Statute are of persuasive significance here. The federal Act is similar to the Kentucky Act in almost every respect.

Vinson, 30 S.W.3d at 169. Closer reading of *Vinson* reveals discussion of the federal statute is limited to whether an amendment should be applied retroactively to events that preceded the effective date of the change. From this quote on a

[9] The information disclosed or reported by the employees is unclear from the opinion. The syllabus states the employees alleged they were removed "from supervisory positions in retaliation for their reporting of Department's law violations."

[10] The Department of Agriculture was reorganized and the two employees demoted on May 16, 1993. The two employees filed their complaint on June 18, 1993. The Act was amended effective September 16, 1993. Trial occurred in March 1997.

wholly unrelated topic, we will not conclude that Kentucky's Whistleblower Act only protects government employees who reveal wrongdoing that touches on a matter of public concern.

Despite Rogers' failure to provide a complete record, we can discern no arguments that could support the trial court's flawed interpretation of Kentucky's Whistleblower Act. Having determined the trial court misapplied an unpublished federal case and erroneously added language to KRS 61.102(1), the order of the Perry Circuit Court awarding summary judgment in favor of PACS is REVERSED and the case is remanded for further proceedings.

DIXON, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING. Respectfully, and reluctantly, I dissent from the majority's decision to reverse the trial court and remand for further proceedings. I must first emphasize that I completely agree with the majority's analysis of the Whistleblower Act. That statute clearly prohibits an employer from reprising against an employee who reports "any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance . . . ." KRS 61.102(1). PACS and the trial court try to incorporate language from the unpublished opinion of the United States District Court for the Western District of Kentucky in *Barber v. Louisville and Jefferson County Metropolitan Sewer District*, 2006 WL 3772209 (W.D. Ky. 2006). That case holds that the Act is

triggered only by a disclosure of "a matter of public concern". But as the majority correctly points out, there is nothing in the statute or Kentucky cases which includes that requirement. As a result, the incorporation of that additional requirement simply adds language which the General Assembly chose not to put there. Therefore, I agree with the majority that the trial court clearly erred by requiring Rogers to show that her disclosure involved "a matter of public concern".

Having reached this conclusion, I must point out that, as an appellate court, we may affirm the trial court for any reason appearing in the record. *See Fischer v. Fischer*, 348 S.W.3d 582, 591-92 (Ky. 2011). Despite the incorrect interpretation of the Whistleblower Act by the trial court, I am still not convinced that Rogers can get past summary judgment. It is well-established that an employer may terminate an at-will employee for any reason not specifically barred by law, even if it is for a reason that most people would find morally indefensible. *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). The Whistleblower Act (and similar legislation and policies) set out narrow exceptions to this rule.

KRS 61.102(1) prohibits an employer from reprising against an employee who makes a good faith report of misconduct or illegal activity to an appropriate agency. In this case, however, Rogers did not report an actual or suspected violation of the law. She informally asked a deputy if her supervisor was entitled to come on her property. Months later, she informally told her supervisor that she would press charges if it happened again.

I should also point out that I am appalled that a supervisor such as Gibbs would claim that he has the right to come on an employee's property whenever he feels like it and even look into her windows. And it is equally outrageous that PACS would back up Gibbs and fire Rogers for objecting to this. Nevertheless, I cannot find that Rogers' actions were protected under the Act.

Considering Rogers' first action, I do not believe that simply seeking advice from a law enforcement officer constitutes making a report of unlawful conduct. If Rogers had simply kept quiet, then taken out a warrant or even just called the sheriff if it happened again, then her actions would have been protected by the Act. But I cannot find that she is protected simply because she told Gibbs she would do these things if it happened again.

With regard to her second action, Rogers argues that her internal complaint about Gibbs' actions was sufficient to satisfy the "disclosure" element of a claim under the Act. In *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008), the Kentucky Supreme Court held that an internal report of a suspected violation of law would be sufficient to satisfy the "disclosure" element. *Id.* at 792. However, the Court stated that the Act specifically protects disclosures to any appropriate public entity with the power to remedy or report the perceived misconduct. *Id.* at 793.

If Rogers had complained about Gibbs' actions directly to his supervisor, or to any person or agency with supervisory or investigatory authority over the matter, then she would at least have a colorable claim under the Act as

interpreted in *Gaines*. However, her confrontation with Gibbs in front of her co-workers is not the type of disclosure addressed in *Gaines* or covered under the Act. Even accepting all of the facts as alleged in Rogers' complaint and pleadings, I find no way that she would be entitled to recover under the Whistleblower Act. Consequently, I must conclude that the trial court properly granted summary judgment for PACS, which I believe was for the wrong reason.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Anthony J. Bucher Covington, Kentucky	David E. Crittenden Robert D. Bobrow Louisville, Kentucky