UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 09-5119
ELECTRONICALLY FILED

MELVIN KINDLE, BRADLEY SILVERIA, DIEDRA ADKINS

Plaintiffs-Appellants

v.

CITY OF JEFFERSONTOWN, KENTUCKY; CLAY FOREMAN, Mayor, individually and in his Official capacity; JEFFERSONTOWN CIVIL SERVICE COMMISSION

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Kentucky at Louisville
Civil Action No. 07-158
Hon. Charles R. Simpson

BRIEF FOR APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 25, Plaintiffs-Appellees Melvin Kindle, Bradley Silveria and Diedra Adkins make the following disclosures:

1. Are any of said parties a subsidiary or affiliate of a publicly owned corporation?

RESPONSE: No.

2. If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

RESPONSE: See the Response above.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

RESPONSE: See Response above.

/s/ Robert L. Abell
Robert L. Abell
Counsel for Appellants

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully suggest that oral argument would be helpful to the Court in this case.

STATEMENT OF JURISDICTION

Melvin Kindle, Bradley Silveria, and Diedra Adkins filed their complaint in Kentucky state court pleading causes of action pursuant to 42 U.S.C. § 1983 and Kentucky state law. (RE 1-2, Complaint). Defendants removed the case to the United States District Court for the Western District of Kentucky at Louisville, which had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

On January 9, 2009, the court below entered an order granting defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment. (RE 63, Order). Appellants timely filed their notice of appeal on January 29, 2009. (RE 64, Notice of Appeal). The district court's order is properly appealable to this court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the City of Jeffersontown is a "political subdivision" of the state of Kentucky and an "employer" under the Kentucky Whistleblower Act.

2. Whether plaintiffs' speech regarding the City of Jeffersontown police department addressed a matter of public concern and was protected by the First Amendment.

3. Whether Foreman, in his individual capacity, is entitled to qualified immunity.

4. Whether the Jeffersontown Civil Service Commission is a necessary party under Fed.R.Civ.Pro. 19.

STATEMENT OF THE CASE

Melvin Kindle, Bradley Silveria, and Diedra Adkins were employees of the City of Jeffersontown, Kentucky police department. Their employment was terminated because of a written report they tendered regarding misconduct, policy violations and irregularities in the police department that were materially affecting its efficiency and operations and posing threats to public safety.

After plaintiffs were terminated, they filed suit alleging claims under the Kentucky Whistleblower Act, the First Amendment pursuant to 42 U.S.C. § 1983 and for wrongful discharge under Kentucky state tort law. The court below granted

defendants' motion for summary judgment, its ruling turning principally on two issues: (1) whether the City of Jeffersontown, a municipality, is a "political subdivision" of the state of Kentucky and therefore an "employer" under the Kentucky Whistleblower Act; and, (2) whether plaintiffs' report addressed a matter of public concern. This appeal followed.

STATEMENT OF FACTS

Kindle was employed as a police officer, Silveria and Adkins as dispatchers by the Jeffersontown police department. They were well-regarded employees.

On or about October 27, 2006, Kindle, Silveria, and Adkins tendered a written report to defendant Hon. Clay Foreman, the Mayor of Jeffersontown, Fred Roemele, who was then the chief of the Jeffersontown Police Department, Peggy Emington, who was then assistant chief of the Jeffersontown Police Department, and all eight members of the Jeffersontown City Council. (RE 45-3, Fred Roemele depo. ex. 8).[1] This report disclosed and reported on

[1] "RE" is an abbreviation of record entry and correlates to the record entry number on the district court's docket sheet. "Depo." is an abbreviation for deposition.

matters, incidents, and events material to the efficiency and operations of the Jeffersontown Police Department including the following:

- Violation of federal and state wage and hour laws
- Excessive use of overtime and waste of taxpayers' money
- Potential dangers to public health and safety caused by violation of dispatch staffing policies
- Violation of state wage and hour laws regarding contributions to employee retirement accounts
- Improper use and access to KASPER, a controlled access state-maintained database regarding controlled substance prescriptions
- Failure by Assistant Chief Emington to meet department standards of qualifications regarding firearms
- Various and miscellaneous acts of mismanagement and abuse of authority that violate department policies and undermine its performance and respect in the community

(*Id.*).

As the court below correctly noted, "[i]t is undisputed that Plaintiffs were terminated *because* of the report; it is disputed, however, *why* and *how* the report led to Plaintiffs' termination." (RE 62, Memorandum Opinion at p. 2)(emphasis in original).

Plaintiffs' report followed a number of prior actions and communications regarding issues in the police department, both by them and others. In September 2006, both Silveria and Adkins informed Roemele that misconduct and abusive mismanagement by Emington had caused them to go on medical leave. Roemele advised both that he could not act to curb Emington, because his hands were "politically tied." (RE 31-4, Silveria depo. at p. 27; RE 31-5, Adkins depo. II at p. 43). Roemele advised both to seek legal counsel. (*Id.*) Roemele confirmed telling Silveria that his hands were "politically tied" regarding Emington and that his past efforts to curb her misconduct had been stymied by Foreman. (RE 31-3, Roemele depo. at pp. 13-15).

Other police department personnel made similar reports to Roemele. Specifically, on October 3, 2006, seven sergeants and two corporals met with and informed Roemele of Emington's misconduct and abusive mismanagement, according to Major Steve DeBell, who was also present for the meeting. (RE 51, Steve DeBell depo. at p. 9). DeBell's assessment of the meeting was affirmed by one of the sergeants present, David Hogue (RE 31-7,

Affidavit of David Hogue ¶ 4 at pp. 1-2). Sgt. Hogue elaborated that the group advised Roemele that Emington's misconduct "was seriously affecting morale, negatively impacting the job performance of the Jeffersontown police department and its service to the public." (*Id.* at p. 2). Roemele recognized a big problem for the department centered on Emington, resolved to investigate but was barred from doing so by Mayor Foreman. (RE 31-3, Roemele depo. at p. 31).

A few days later, on October 10, 2006, Foreman met at a McDonald's restaurant with Kindle, Silveria, Adkins, and another man, Jim Hensley, who was a former police department employee. Foreman acknowledges that Kindle, Silveria, and Adkins all reported to him numerous violations of department policy by Emington. (RE 31-8, Foreman depo. at p. 59).

Kindle, Silveria, and Adkins also informed Foreman that they had been in contact with a lawyer and that they were considering filing a protected report regarding issues and matters in the police department. (*Id.* at p. 60). Foreman urged them not to do so, because, as he pointed out, his reelection would be voted

on in early November and any report that plaintiffs might make would be used against him by his political opponents. (*Id*. at pp. 60-61). He further cautioned plaintiffs that their making of any report or engaging in First Amendment activity of reporting issues to the media would "complicate things." (*Id*.)

Plaintiffs tendered their written report more than two weeks later on October 27, 2006.

Defendants' Admissions Regarding Plaintiffs' Protected Report

Foreman acknowledged that public safety components served by the police department made its operations a vital concern to the public and further acknowledged that conduct of individuals employed within it is likewise of public concern:

> Q: Now, the police department is, would you agree one of the most visible departments in the City of Jeffersontown government?
>
> A: I would agree with that.
>
> Q: And not only is it most visible, but because it has a public safety component, its operations are very vital to the services the city provides its constituents. Is that fair to say?
>
> A: Yes.

> Q: Would you agree that given the centrality of the police department to the constituents of Jeffersontown, that its operations and procedures are a matter of public interest and concern?
>
> A: Yes.
>
> Q: Would you agree beyond just the general operations of the police department that the conduct of the individuals employed in the police department are matters of public interest and public concern?
>
> [Objection by defense counsel].
>
> A: Are they – the conduct, is it a matter of a public concern?
>
> Q: Yes. I think it is to the extent that it is conduct of that person while they were on duty or on the clock, if you will.

(RE 36, Foreman depo. at pp. 9-10).

Fred Fischer, Jeffersontown's city attorney, acknowledged that plaintiffs' report concerned not just Emington but the entirety of the police department:

> ... Not only was Lieutenant Colonel Emington a subject of [plaintiffs' report] the entire police department was, the Jeffersontown Police Department.

(RE 31-9, Fred Fischer depo. at p. 35).

Mr. Fischer amplified his testimony as follows:

> Q: Regarding the protected report filed by my clients, Mr. Fischer, would you agree that it reports possible misconduct within the Jeffersontown Police Department?
>
> A: It alleges it, yes.

(*Id.* at pp. 40-41).

Fischer also acknowledged that plaintiffs reported on wasteful practices in the Jeffersontown Police Department. (*Id.* at p. 41).

Roemele viewed plaintiffs' report as so serious that he intended to have conducted an investigation by the department's criminal investigators or intelligence and narcotics units. (RE 45, Fred Roemele depo. at p. 41; RE 45-4, Roemele depo. ex. 9). However, Foreman informed Roemele that he was prohibited from conducting such an investigation. (RE 45-4, Roemele depo. ex. 10).

Steven DeBell, a major in the Jeffersontown police department, viewed the plaintiffs' report as regarding issues affecting the operations and efficiency of the Jeffersontown Police Department. (RE 51, DeBell depo. at p. 9).

The Retaliation Against Plaintiffs

Jeffersontown's retaliatory response to plaintiffs' report was swift and direct. After barring Roemele from investigating plaintiffs' report, Foreman illegally ordered the city to pay a lawyer to represent Emington. (RE 31-8, Foreman depo. at pp. 71-73, ex. 8). There exists no legal authority for this arrangement as Fischer, the city attorney, conceded in his deposition.

Fischer admitted that no Jeffersontown ordinance authorized the city to pay a lawyer to represent Emington. (RE 31-9, Fischer depo. at p. 34). Although Fischer had earlier asserted in a letter that such an arrangement was authorized by section 31.17 of the Jeffersontown ordinances, he conceded under oath the opposite:

> Q: Exhibit No. 9, Mr. Fischer, is a copy of section 31.17 of the Jeffersontown codified ordinances, correct?
>
> A: Yes, sir.
>
> Q: And it talks about the circumstances in which appointment of an attorney for a city employee is authorized, correct?
>
> A: Yes.

> Q: Okay. And notwithstanding your reference to section 31.17 in your letter of November 6, 2006 to Mr. Clay, you will agree that section 31.17 does not provide authority for appointment of a lawyer to represent Ms. Emington with regard to the Board of Ethics matter –
>
> A: Yes.
>
> Q: -- correct?
>
> A: Yes.

(RE 31-9, Fischer depo. at pp. 37-38).

Foreman caused further retaliation against plaintiffs by reversing a long-standing policy allowing police officers to transfer their accrued but unused vacation time for the benefit of civilian employees. Roemele testified that he had started the practice and had donated substantial time through the years to civilian employees. (RE 31-3, Roemele depo. at 36-38). Dave Hogue, who worked for 25 years in the Jeffersontown police department before retiring in January 2008, affirms that such donations were a common and long-standing practice. (RE 31-7, Hogue affidavit ¶ 8 at p. 3). Nonetheless, just days after submission of their report, Foreman, upon notice of impending additional donations to

Silveria and Adkins, ordered the practice stopped. (RE 31-8, Foreman depo. at p. 87, exs. 11-12).

Foreman made an unfounded assertion that Jeffersontown's ethics board had sole and exclusive jurisdiction over plaintiffs' report. (*Id.*). When asked at his deposition if an ordinance established the board's exclusive jurisdiction and after going through Chapter 32 of the Jeffersontown ordinances, Fischer, the city attorney, testified as follows:

> Q: … is there anything – any language in Chapter 32, the Jeffersontown ordinances, that you read as prohibiting the Jeffersontown Police Department from conducting an investigation into the information set out in [plaintiffs' report]?
>
> A: No.

(RE 38-2, Fischer depo. at pp. 28-29).

As further and more punitive means of retaliation, Emington on November 28, 2006 and with Foreman's support caused proceedings toward termination of plaintiffs' employment to be initiated before Jeffersontown's civil service commission. (RE 31-8, Foreman depo. at 90, ex. 13). There can be no dispute that the civil service commission charge initially filed by

Emington regarded solely and only plaintiffs' report, as Foreman conceded at his deposition. (RE 31-8, Foreman depo. 108-109). Roemele did not approve the effort to have plaintiffs fired and did not participate in any way. (RE 31-3, Roemele depo. at 54).

Following Roemele's retirement on January 5, 2007, Foreman fully and officially threw Jeffersontown's full weight and support behind the drive to terminate plaintiffs' employment. (RE 31-8, Foreman depo. ex. 14). Jeffersontown terminated plaintiffs' employment following proceedings before its civil service commission. (*Compare* RE 53, Amended Complaint ¶ 64 at p. 13; RE 55, Answer to Amended Complaint ¶ 1 at p. 1).

In an unusual twist, Foreman, despite having earlier thrown the city's full support behind them, condemned the civil service commission proceedings as a conduit to terminate plaintiffs' employment. Specifically, Foreman in his deposition (and Jeffersontown in its supplemental discovery answers) asserted that plaintiffs would not have been fired had they waived their rights to a jury trial and presented both their whistleblower and First Amendment claims for adjudication by the Jeffersontown

Civil Service Commission. (RE 36-2, Foreman depo. at pp 115-121; RE 31-12, Jeffersontown's Supplemental Discovery Responses at p. 3).

Plaintiff's Complaint and Amended Complaint

Plaintiffs' complaint pleaded causes of action against Jeffersontown and against Foreman, in both his individual and official capacities, alleging that their terminations (1) violated the Kentucky Whistleblower Act, Ky.Rev.Stat. § 61.102; and, (2) violated their First Amendment rights to speak on matters of public concern. (RE 1-2, Complaint at pp. 6-7). Plaintiffs also named the Jeffersontown Civil Service Commission (JCSC) as a defendant-party. In accordance with applicable Kentucky law, plaintiffs pleaded that JCSC's actions relative to their terminations were "arbitrary and capricious, unfounded in fact and contrary to law." (RE 1-2, Complaint ¶ 26 at p. 6). Plaintiffs sought lost pay and benefits, damages, both compensatory and punitive, and reinstatement to their employment. (*Id*. at pp. 7-8).

Plaintiffs filed an amended complaint adding claims that their terminations violated their First Amendment rights to speak

on matters affecting elections and, based on this Court's decision in *Murphy v. Cockrell,* 505 F.3d 446 (6th Cir. 2007), that their terminations constituted a wrongful discharge under Kentucky law. (RE 53, Amended Complaint at pp. 16-17).

The Ruling by the Court Below

The court below noted that this case presented "no genuine issues of material fact, only competing interpretations of undisputed facts." (RE 62, Memorandum Opinion at p. 9).

The court below dismissed the case based principally on two legal rulings. First, the court below examined "whether Jeffersontown is a "political subdivision" of the Commonwealth of Kentucky because only as a "political subdivision" of the state could the city be an "employer" under the Whistleblower Act. (*Id.* at p. 10). The court below asserted that "[t]he Whistleblower Act does not define 'political subdivision,'" that it must "look beyond the plain language of the statute in considering the issue," and that "[a]pplication of the traditional textual canons provides little assistance." (*Id.* at pp. 10-12). The court below concluded that the definition of "political subdivision" under the Whistleblower Act

did not include a municipality because municipalities are not afforded sovereign immunity under Kentucky law. (*Id.* at p. 12).

Second, the court below ruled that plaintiffs' report did not address a matter of public concern, asserting that "by and large the allegations in the report deal with issues that only indirectly affected Plaintiffs' jobs and had no impact on the safety and welfare of the people of Jeffersontown." (*Id.* at p. 17). The court added that "[t]hough Plaintiffs specifically allege deprivation of free expression affecting elections, Plaintiffs' report cannot fairly be considered to have significantly contributed to the political or social discourse." (*Id.).*

The district court also ruled that Foreman was entitled to qualified immunity in his individual capacity based on the ruling that plaintiffs' speech did not address a matter of public concern. (RE 62, Memorandum Opinion at 16). Additionally, the court ruled that plaintiffs "failed to present any material evidence that would give rise to a claim against Foreman, individually." (*Id.*).

The court below dismissed plaintiffs' claim against Foreman

in his official capacity as duplicative of their claim against Jeffersontown. (*Id.* at p.17).

The court below also dismissed the Jeffersontown Civil Service Commission, ruling that it was not a suable entity and that "Jeffersontown is the proper target of Plaintiffs' complaint against JCSC and Foreman, officially." (*Id.*).

Therefore, the court below granted defendants' motion for summary judgment and denied plaintiffs' motion for partial summary judgment. (RE 63, Order).

SUMMARY OF ARGUMENT

The court below erred in ruling that the City of Jeffersontown was not a "political subdivision" of the state of Kentucky and not an "employer" under the Kentucky Whistleblower Act. The central basis for the court below's ruling – that a "political subdivision" of the state within the meaning of the statute is an entity entitled to sovereign immunity under state law – is contrary to Kentucky case law, which the court below neither addressed nor considered. Furthermore, the court below disregarded numerous observations by this Court and by

Kentucky appellate courts that a municipality is a "political subdivision" of the state of Kentucky. Furthermore, the Kentucky Supreme Court has ruled that the Kentucky Whistleblower Act is an ameliorative statute aimed at protecting public employees that make disclosures regarding public agencies and its exclusions must be most narrowly construed.

The plaintiffs' speech regarding policy violations, misconduct, violations of law, and other circumstances affecting the efficiency and operations of the Jeffersontown Police Department addressed a matter of public concern. The court below disregarded the admissions by defendants' agents regarding plaintiff's speech and the precedents from this and other courts whose application compels the conclusion that plaintiffs' speech addressed a matter of public concern.

Foreman is not entitled to qualified immunity. First, plaintiffs' report did address a matter of pubic concern, was entitled to First Amendment protection and the law recognizing this protection was clearly established. Second, plaintiffs

presented sufficient evidence for a jury to find Foreman liable, in his individual capacity, for the violations of plaintiffs' rights.

The Jeffersontown Civil Service Commission is a necessary party for purposes of relief. JCSC proceedings were had related to plaintiffs' termination. This Court has held that civil service status does not attach absent civil service commission action. Since plaintiffs seek reinstatement, JCSC is a necessary party pursuant to Fed.R.Civ.Pro. 19.

ARGUMENT

1. The City of Jeffersontown Is a "Political Subdivision" of Kentucky and an "Employer" Under the Kentucky Whistleblower Act

The City of Jeffersontown, a municipality, is a "political subdivision" of Kentucky and an "employer" under the Kentucky Whistleblower Act. Traditional principles of statutory construction compel this conclusion. Accordingly, the court below erred and should be reversed.

Whether Jeffersontown is a "political subdivision" of Kentucky under the Whistleblower Act is an issue of statutory construction, a legal question that this Court reviews *de novo*. *See*

United States v. Brown, 915 F.2d 219, 223 (6th Cir. 1990). The Court applies Kentucky principles of statutory construction. *See Krugh v. Miehle Co.,* 503 F.2d 121, 124-125 (6th Cir. 1974).

The Kentucky Whistleblower Act is found at Ky.Rev.Stat. §§ 61.101-103. Ky.Rev.Stat. § 61.102 prohibits retaliation by an "employer" against an employee who engages in whistle-blowing activity as follows:

> 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... 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.

Ky.Rev.Stat. § 61.101(2) defines "employer" as follows:

> ... The Commonwealth of Kentucky or any of its political subdivisions.

The Whistleblower Act, as the district court correctly observed, does not specifically define "political subdivision." However, the court below disregarded applicable and controlling principles of statutory construction under Kentucky law. These principles compel the conclusion that Jeffersontown, a municipality, is a "political subdivision" of Kentucky under the Whistleblower Act.

"In Kentucky, statutes are to be 'liberally construed with a view to promote their objects and carry out the intent of the legislature....'" *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792–93 (Ky. 2008), *quoting* KRS 446.080(1). "[S]tatutes which are remedial in nature should be liberally construed in favor of their remedial purpose." *Gaines, supra, citing Kentucky Ins. Guar. Ass'n. v. Jeffers ex rel. Jeffers,* 13 S.W.3d 606, 611 (Ky. 2000). The purpose of the Whistleblower Act "is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Gaines, supra, citing Davidson v.*

Commonwealth, Dept. of Military Affairs, 152 S.W.3d 247, 255 (Ky.App. 2004). "The Act has a remedial purpose in protecting public employees who disclose wrongdoing." *Gaines*, 276 S.W.3d at 796. "It serves to discourage wrongdoing in government, and to protect those who make it public." *Id.* "The purpose of the Whistleblower Act is clear, and it must be liberally construed to serve that purpose." *Id.*

These principles of statutory construction align with traditional principles of statutory construction that the Supreme Court and this Court have applied. "[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). "Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly." *Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 559 (6th. Cir. 2006).

The court below erroneously disregarded these principles. First, the purpose of the Kentucky Whistleblower Act is to protect

public employees, like plaintiffs, that disclose wrongdoing. More specifically, its purpose is to protect public employees, like plaintiffs, that disclose "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." Second, this remedial and ameliorative purpose commands that its protections be broadly construed. Both of these principles the court below dismissed with the assertion that "traditional textual canons provide[ ] little assistance." (RE 62, Memorandum Opinion at p. 12).

Kentucky law recognizes a municipality as a "political subdivision" of the state. In *Mansbach Scrap Iron Co. v. City of Ashland,* 30 S.W.2d 968, 969 (Ky. 1930), the court noted "that a city is a political subdivision of the state, created as a convenient agency for the exercise of such government powers as may be

intrusted to it." The same was stated in *City of Pineville v. Meeks,* 71 S.W.2d 33, 35 (Ky. 1934): "Municipalities are creatures of the law and are political subdivisions of the state created as a convenient agency for the exercise of such powers as are conferred upon them by the Legislature." These authorities led this Court to conclude in *Smith v. Board of Education of Ludlow, Ky.,* 111 F.2d 573 (6th Cir. 1940), as follows: "the law appears to be well-settled in Kentucky that a municipality is a political subdivision of the State."

Kentucky law describes a municipality as a "political subdivision" of the state in almost precisely the same language as used by the Supreme Court: "[t]he city is a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted to it." *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185–86 (1923); *see also United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 215 (1984)("More fundamentally, a

municipality is merely a political subdivision of the State from which its authority derives.").

The significance of these repeated and long-standing judicial descriptions of a city as a "political subdivision" of its state is found in the principle of statutory construction that legislatures are presumed to be cognizant of judicial constructions of terms and to incorporate those into statutes. As the Supreme Court elegantly observed in *Morissette v. United States,* 342 U.S. 246, 263 (1952): "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'" Kentucky also recognizes this principle of statutory construction. *T. M. Crutcher Dental Depot v. Miller*, 64 S.W.2d 466, 467 (Ky. 1933)("It is to be presumed the Legislature enacted this amendment with a full knowledge of the existing conditions

of the common law and of statutes with respect to the subject-matter."). Accordingly, it should be presumed that the Kentucky legislature intended for a municipality to be considered a "political subdivision" for purposes of the Whistleblower Act.

The principal rationale relied upon by the court below – that a "political subdivision" of Kentucky under the Whistleblower Act includes only entities entitled to claim sovereign immunity – is contrary to the Kentucky Court of Appeals decision in *Davis v. Powell's Valley Water District*, 920 S.W.2d 75 (Ky.App. 1995). In *Davis*, the Kentucky Court of Appeals held that a special district was a "political subdivision" of the state within the meaning of Ky.Rev.Stat. § 61.101 and therefore an "employer" subject to the prohibitions of Ky.Rev.Stat. § 61.102. Since the Kentucky Supreme Court ruled in *Calvert Investments, Inc., v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 805 S.W.2d 133, 136-37 (Ky. 1991) that a special district is not entitled to sovereign immunity as a matter of Kentucky law, it follows that the definition of a "political subdivision" within the meaning of KRS 61.101 does not turn on whether or not such entity is entitled to

claim sovereign immunity under Kentucky state law. Accordingly, the court below's analysis and ruling is erroneous.

The language of Ky.Rev.Stat. § 61.102 also indicates an intent to include cities within its scope. The statute protects an employee that discloses violation of an "ordinance." "In its most common meaning, the term [ordinance] is used to designate the enactments of the legislative body of a municipal corporation." *Black's Law Dictionary* at 989 (5th Ed.). Terms in Kentucky statutes are to be given their common legal meaning. KRS 446.080(4). It is respectfully submitted that it is paradoxical to conclude that KRS 61.102 forbids an employer from retaliating against one of its employees that discloses a violation of a municipal "ordinance" while yet not including the municipality as such an employer. It would evade the statute's purpose to conclude that a state cabinet is prohibited from retaliating against one of its employees for disclosing a violation of a City of Jeffersontown ordinance, while Jeffersontown itself is not prohibited.

The court below's reliance on the unpublished decision of *Baker v. McDaniel,* 2008 WL 215241 (E.D. Ky. 2008), is misplaced. First, both *Baker* and the court below's decision preceded the Kentucky Supreme Court's command in *Gaines* that the Whistleblower Act's purpose of protecting public employees is paramount and the Act must be liberally construed to serve that purpose. Furthermore, *Baker* does not include any extended analysis of Kentucky law and its reliance on the availability of sovereign immunity was likewise erroneous.

The Court should reverse the court below and hold that the City of Jeffersontown, a municipality, is both a "political subdivision" of Kentucky and an "employer" within the meaning of the Kentucky Whistleblower Act. This ruling would be consistent with applicable and controlling principles of statutory construction and assure that the Act's paramount purpose – the protection of public employees that disclose wrongdoing – is served.

2. Plaintiffs' Speech Addressed a Matter of Public Concern

Statements by public employees regarding the efficiency and operations of law enforcement or other public agencies are statements demanding strong First Amendment protections; indeed, public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law. Because plaintiffs' report addressed the entirety of the Jeffersontown police department, as its city attorney observed, and, more specifically, issues that have been recognized by this and other courts as matters of public concern, the court below erred and should be reversed.

Whether a public employee's speech addresses a matter of public concern is a question of law. *Chappel v. Montgomery Co. Fire Prot. Dist. No. 1,* 131 F.3d 564, 574 (6th Cir. 1997). Accordingly, this Court reviews the district court's determination *de novo*. *Rodgers v. Banks,* 344 F.3d 587, 596 (6th Cir. 2003).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record." *Connick v.*

Myers, 461 U.S. 138, 147-48 (1984); *Chapell, supra,* 131 F.3d at 574. In order to conclude that speech addresses a matter of public concern, "this Court must be able to fairly characterize the expression as relating to any matter of political, social, or other concern to the community." *Rahn v. Drake Center, Inc.*, 31 F.3d 407, 412 (6th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995).

This Court has held that speech regarding the efficiency and operations of a public agency addresses a matter of public concern. *See See v. City of Elyria*, 502 F.3d 484, 493 (6th Cir. 2007)(statements regarding "alleged corruption in police department investigations, grand jury procedures, funding, and dealing with the press" addressed a matter of public concern); *Solomon v. Royal Oak Township*, 842 F.2d 862, 865 (6th Cir. 1988)(statements that senior police commander's decision not to prosecute an arrestee whom he later hired for his private security company was "for his own personal gain," amounted to "an obstruction of justice" and "was totally ridiculous" addressed matter of public concern); *Mahronic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986)(speech regarding unlawful billing practices

addressed a matter of public concern); *Chappel, supra,* 131 F.3d at 576-577 (speech regarding fire department's financial mismanagement, nepotism, and need for SOPs and training addressed matter of public concern). To the same effect this Court has favorably cited decisions from other courts. *See O'Brien v. Town of Caledonia,* 748 F.2d 403, 406-408 (7th Cir. 1984)(speech regarding dismissal of charges as possibly motivated by "political considerations" addressed a matter of public concern); *Rookard v. Health & Hosps. Corp.,* 710 F.2d 41, 46 (2d Cir. 1983)(report of "corrupt and wasteful practices" at a municipal hospital addressed a matter of public concern).[2] Finally, this Court held in *Graham v. City of Mentor,* 118 Fed.Appx. 27, 30 (6th Cir. 2004), that speech regarding fixing of parking tickets, that police chief's bonus was undeserved, that police chief improperly took comp time and that he "was unqualified to carry a weapon" addressed a matter of public concern.

Plaintiffs' report encompassed numerous issues and instances recognized by the foregoing cases to be a matter of

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[2] This Court cited both *O'Brien* and *Rookard* in *See.* 502 F.3d at 493.

public concern. At its most general level, it addressed issues and incidents affecting the operations and efficiency of the Jeffersontown police department. Notably, Jeffersontown's city attorney, Fred Fischer, observed that plaintiffs' report encompassed the entirety of the police department. (RE 31-9, Fischer depo. at 35). Indeed, plaintiffs' report regarded such substantial issues that Roemele, the police chief at the time, resolved to launch an investigation by his department's criminal investigation or narcotics and intelligence divisions. (RE 45, Roemele depo. at p. 41; RE 45-4 Roemele depo. ex. 9). Accordingly, plaintiffs' reported substantial issues encompassing the entirety of the police department and therefore addressed a matter of public concern as recognized by the above-cited cases.

More particularly, plaintiffs reported unlawful employment practices (violation of wage and hour laws) and excessive use of overtime and waste of taxpayers' monies. These matters are of public concern. *Mahronic v. Walker, supra*; *Chappel, supra*; *Rookard, supra*; *Graham, supra*. The plaintiffs reported favoritism and its possible impact on public safety. This report too addressed

a matter of public concern. *Chappel, supra.* Plaintiffs reported assistant chief Emington's lack of firearms qualifications, a report that this Court held in *Graham* addressed a matter of public concern. Plaintiffs' report of Emington's improper use and access of the KASPER database also addressed a matter of public concern. *City of Elyria, supra.* The plaintiffs' report of various and miscellaneous acts of mismanagement and abuse of authority that undermined the department's standing and respect in the community also embraced a matter of public concern. *Chappel, supra.*

Plaintiffs' report cannot be written off as isolated complaints from a few disgruntled employees. Seven sergeants and two corporals had met with Roemele prior to plaintiffs' report to voice similar concerns. (RE 31-3, Roemele depo. at p. 31; RE 51, DeBell depo. at p. 9; RE 31-7, Hogue affidavit ¶ 4 at pp. 1-2). Clearly, plaintiffs, along with others, raised serious and substantial issues, which led Roemele, the police chief, to resolve to investigate.

There was much emphasis placed in the court below on plaintiff's motives in making their report. A public employee's

motives for his or her speech addressing a matter of public concern is not dispositive, as this court held in *Chapell*, 131 F.3d 574-575. The fundamental issue, as this Court also recognized in *Chapell*, is "the distinction between *matters* of public concern and *matters* only of personal interest, not civic-minded motives and self-serving motives." *Chapell*, 131 F.3d at 575 (emphasis in original).

The court below did not consider whether plaintiffs' First Amendment rights outweighed Jeffersontown's interests in suppressing their speech, which is the usual second step of the analytical process. Neither did Jeffersontown (or the other appellees) raise the issue in their summary judgment filings. (*See* RE 30, Defendants' Motion for Summary Judgment; RE 30-2, Memorandum Supporting Defendants' Motion for Summary Judgment; RE 47, Defendants' Reply Memorandum In Support of Defendants' Motion for Summary Judgment). Appellees' principal argument on the First Amendment issue to the court below was that plaintiffs' claim was barred by the Supreme Court's holding in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), an argument that the

district court quite rightly rejected. (RE 62, Memorandum Opinion at p. 13).

Plaintiffs' reported issues and instances materially affecting the efficiency and operations of the Jeffersontown police department including unlawful employment practices, favoritism that potentially impacted public safety, lack of Emington's firearms qualifications, which also raised issues of public safety, improper use of and access to the restricted KASPER database, and other instances of misconduct impairing the department's standing and service to the community. As such, plaintiffs reported on a matter of public concern and the court below erred in concluding otherwise. Accordingly, the court below should be reversed.

3. Foreman Is Not Entitled to Qualified Immunity

The district court ruled that Foreman, in his individual capacity, was entitled to qualified immunity. That ruling rested on two points: (1) plaintiffs' report did not address a matter of public concern and thus garnered no First Amendment protection; and, (2) that plaintiffs "failed to present any material evidence

that would give rise to a claim against Foreman, individually." On both the court below erred and accordingly should be reversed.

This Court reviews a grant of summary judgment *de novo*. *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178 (6th Cir.1996). "Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (quoting Fed.R.Civ.P. 56(c)). "In deciding upon a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the non-moving party." *Nat'l Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997). Finally, "[b]ecause the doctrine of qualified immunity is a legal issue, its application by the district court is reviewed *de novo*." *Ahlers v. Schebil,* 188 F.3d 365, 369 (6th Cir.1999).

Qualified immunity analysis involves three inquiries: (i) "whether, based upon the applicable law, the facts viewed in the

light most favorable to the plaintiffs show that a constitutional violation has occurred;" (ii) "whether the violation involved a clearly established constitutional right of which a reasonable person would have known;" and (iii) "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Feathers v. Aey,* 319 F.3d 843, 848 (6th Cir.2003). Qualified immunity must be granted if the plaintiff cannot establish each of these elements. *Williams ex rel. Allen v. Cambridge Bd. of Educ.,* 370 F.3d 630, 636 (6th Cir.2004).

The Court has further advised that "[t]he ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity." *Rich v. City of Mayfield Heights,* 955 F.2d 1092, 1095 (6th Cir. 1992). Claims of qualified immunity are assessed on a fact-specific basis to ascertain whether the particular conduct of the defendant [public official] infringed a clearly established federal right of the plaintiff, and whether an objective reasonable official would have believed that his conduct was lawful under extant federal law. *Anderson v. Creighton,* 483

U.S. 635, 641 (1987). Although the application of qualified immunity comprises a legal issue, summary judgment is inappropriate when conflicting evidence creates subordinate predicate factual questions which must be resolved by a fact finder at trial. *See Johnson v. Jones,* 515 U.S. 304, 313-15 (1995).

To establish the personal liability of defendant Foreman in his individual capacity under 42 U.S.C. § 1983, plaintiffs must each show that Foreman deprived them of a federal right while acting under color of state law. *Wagner v. Metropolitan Nashville Airport Auth.,* 772 F.2d 227, 229 (6th Cir.1985). The individual liability of a public official under 42 U.S.C. §1983 is based on whether their own unconstitutional behavior violated the plaintiffs' constitutional rights. *Leach v. Shelby County Sheriff,* 891 F.2d 1241, 1246 (6th Cir.), *cert. denied,* 495 U.S. 932 (1990). Ultimately, the question is whether plaintiffs' have presented sufficient probative evidence that Foreman's actions were improperly motivated strong enough to support a jury verdict in their favor. *Hull v. Cuyahoga Valley Joint Vocational School Dist.*

Bd. of Educ., 926 F.2d 505, 512 (6th Cir.), *cert. denied,* 501 U.S. 1261 (1991).

The foregoing authorities reduce to the following questions:

(1) Whether plaintiffs' speech addressed a matter of public concern and was entitled to First Amendment protection;

(2) If plaintiffs' speech was entitled to First Amendment protection, whether their right to engage in such protected activity without being subject to retaliation – the termination of their employment – was clearly established at the time Foreman acted; and,

(3) If the answers to the first two questions are affirmative, whether plaintiffs presented strong enough proof to support a jury's verdict that Foreman's actions were motivated by intent to retaliate against them for their protected First Amendment activity.

The answer to all these three questions is affirmative and Foreman is not entitled to qualified immunity. First, as set forth under Point 2 of this Brief, plaintiffs' report addressed a matter of public concern and was entitled to First Amendment protection.

Second, that a public employee has First Amendment protection against retaliation for speech on matters of public concern has been clearly established since at least since this Court's holding in *Williams v. Kentucky,* 24 F.3d 1526, 1533-38 (6th Cir.), *cert. denied*, 513 U.S. 947 (1994), if not much earlier. Indeed, Foreman acknowledged in his deposition that plaintiffs each had a constitutional right to speak on matters of public concern regarding police matters. (RE 36, Foreman depo. at pp. 9-10). Accordingly, Foreman like "[a]ll public officials [is] charged with knowing that public employees may not be disciplined for engaging in speech on matters of public concern." *Chappel,* 131 F.3d at 580.

Third, plaintiffs presented probative evidence strong enough to support a jury's verdict finding that Foreman's actions were motivated by intent to retaliate against them based on their First Amendment activity. A jury could first find that Foreman cautioned plaintiffs against any First Amendment activity, because he feared political repercussions for himself and further advised plaintiffs that such activity would "complicate things."

(RE 31-8, Foreman depo. at pp. 60-61). Furthermore, after plaintiffs tendered their report, Foreman took a number of actions that a jury could view as evidence of his intent to retaliate against plaintiffs for their First Amendment activity including forbidding Roemele from having plaintiffs' report investigated by the police department investigators, making the unfounded claim that Jeffersontown's ethics board had exclusive jurisdiction over plaintiffs' report thereby barring the investigation Roemele proposed, causing Jeffersontown to illegally hire and pay a lawyer to represent Emington with regard to plaintiffs' report, and reversing the long-standing policy allowing police officers to donate their unused vacation time for the benefit of Silveria and Adkins. This Court has held that such deviations from long-standing practices specifically to prejudice plaintiffs are the type of actions supporting an inference of retaliation. *Birch Run Welding & Fabricating, Inc. v. NLRB,* 761 F.2d 1175, 1181 (6th Cir. 1985).

Finally and perhaps most significantly, after Roemele had retired on January 5, 2007 (and keeping in mind that Roemele

informed both Silveria and Adkins that his hands were "politically tied" by Foreman vis-à-vis Emington), Foreman caused the full weight of the Jeffersontown municipal government to support the civil service commission proceedings initiated by Emington and which, inevitably, resulted in plaintiffs' termination. In sum, a jury could find that Foreman acted to retaliate against plaintiffs because of their First Amendment activity because he viewed it as harmful to his own individual political interests, harmful to Emington, his political ally, and, in furtherance of his aim, took both illegal and irregular steps culminating in plaintiffs' termination in furtherance of that unconstitutional purpose. Accordingly, it is respectfully submitted that Foreman is not entitled to qualified immunity and the court below erred in so ruling.

4. The Jeffersontown Civil Service Commission Is A Necessary Party

Plaintiffs included the Jeffersontown Civil Service Commission (JCSC) as a defendant-party, as they explained to the court below, because "it is a necessary and indispensable party for purposes of affording complete relief, as plaintiffs seek

reinstatement to employment." (RE 42, Plaintiffs' Response to Defendants' Motion for Summary Judgment at pp. 25-26). The district court did not consider or discuss this point in its memorandum opinion.

This Court reviews a district court's ruling as to whether a party is necessary for an abuse of discretion. *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 200 (6th Cir. 2001), *cert. denied*, 537 U.S. 815 (2002). When applying an abuse-of-discretion standard, this Court must affirm the district court's Rule 19(a) analysis unless we are "left with a definite and firm conviction that the trial court committed a clear error of judgment." *Cincinnati Ins. Co. v. Byers,* 151 F.3d 574, 578 (6th Cir.1998).

This Court held in *Christophel v. Kukulinsky,* 61 F.3d 479 (6th Cir.1995), that an employee did not gain civil service status without action recognizing same by an appropriate civil service commission, that mere placement in a position subject ordinarily to civil service protections did not necessarily bestow such protection. Plaintiffs seek reinstatement to their employment, which included status as civil service employees. Based on this

Court's ruling in *Christophel* this remedy may not be achievable unless the JCSC is a defendant-party subject to the district court's jurisdiction and its orders to fully reinstate plaintiffs' employment status with Jeffersontown.

The court below gave no consideration regarding whether the JCSC was a necessary party for purposes of plaintiffs' achieving complete relief. This was an error of judgment. Accordingly, the summary judgment and order dismissing the JCSC should be reversed.

CONCLUSION

For all the foregoing reasons, this Court should reverse the court below and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Sixth Circuit's electronic filing system this 23d day of April 2009, that notice will be sent electronically by that system to All Counsel of Record.

/s/ Robert L. Abell
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CERTIFICATION OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(B)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 7,486 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 09-5119

MELVIN KINDLE, BRADLEY SILVERIA, DIEDRA ADKINS

Plaintiffs-Appellants

v.

CITY OF JEFFERSONTOWN, KENTUCKY; CLAY FOREMAN, Mayor, individually and in his Official capacity; JEFFERSONTOWN CIVIL SERVICE COMMISSION

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Kentucky at Louisville
Civil Action No. 07-158
Hon. Charles R. Simpson

DESIGNATION OF DISTRICT COURT DOCUMENTS
PURSUANT TO 6 CIR. R. 30

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Amended Complaint	53

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Fred Roemele deposition (exhibits 9-10)	45-4
Steven DeBell deposition	51

Counsel's Certification

I hereby certify that the foregoing documents are included in the district court's electronic record.

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