RENDERED: APRIL 16, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000350-MR

ROB JONES AND
JASON ELLISON — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 06-CI-00593

OLDHAM COUNTY SHERIFF'S
DEPARTMENT AND OLDHAM
COUNTY SHERIFF'S MERIT BOARD — APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Rob Jones and Jason Ellison appeal from orders of the Oldham Circuit Court dismissing their due process and whistleblower actions

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

against the Oldham County Sheriff's Department and granting summary judgment in favor of the Sheriff's Department. The Oldham County Sheriff's Merit Board has also been included as a party on appeal for reasons that are unclear. As will be discussed in the body of this opinion, a hearing before the Merit Board was the subject of a request for injunctive relief that occurred earlier in this litigation; however, the record does not reflect that that matter is a proper subject of this appeal and Appellants have provided no grounds for us to conclude otherwise. Therefore, the appeal shall be dismissed as it pertains to the Merit Board by separate order entered this date. As to Appellants' remaining arguments against the Sheriff's Department, we: (1) affirm the circuit court's dismissal of Rob Jones's due process claim; (2) reverse the circuit court's entry of summary judgment in favor of the Sheriff's Department as to Jones's whistleblower claim; and (3) affirm the circuit court's entry of summary judgment in favor of the Sheriff's Department as to Jason Ellison's whistleblower claim.

**Facts and Procedural History**

At the time of the events leading to this litigation, Jones and Ellison were deputy sheriffs with the Oldham County Sheriff's Department, with Jones having been promoted to captain in 2005. According to Jones, Sheriff's Deputies Bob Button and Chuck Gadberry came to him with a variety of concerns that a number of deputies, including Ellison, had about Chief Deputy Sheriff Ron Jones.[2]

[2] According to the Appellants' brief Chief Deputy Ron Jones and Captain Rob Jones are not related.

These concerns included alleged violations of criminal law and of department policies and procedures.

According to Rob Jones, he told the deputies to talk with Oldham County Sheriff Steven Sparrow about the matter, and they were subsequently told by Sparrow to put their concerns in writing. Jones testified that he provided the deputies with some examples of inappropriate acts that Ron Jones had done, but he did not prepare a written list of complaints. This was instead done by another deputy, and the list was hand-delivered to Rob Jones in an envelope on March 5, 2006. Jones then provided the list to Sparrow the following day. Jones acknowledged in his deposition that he did not actually look at the list or read it before turning it over, noting that he "had no reason to." However, he indicated that he had previously seen drafts of the list before it was completed. Jones further testified that this list did not have signatures on it because the deputies told him that they feared retaliation by Ron Jones, who was acknowledged by Sherriff Sparrow to have a vindictive nature.

On March 15, 2006, Rob Jones was placed on administrative leave with pay pending investigation of allegations that he had made false statements under oath[3] and had improperly accessed the Law Information Network of Kentucky (LINK) for his own personal use in a non-criminal matter. This decision

[3] On November 3, 2005, the Oldham County Grand Jury charged Jones with false swearing in violation of KRS 523.010 and 523.040 for making false statements in an affidavit filed in support of a search warrant. This indictment was ultimately dismissed per an agreement with the Commonwealth after Jones completed an affidavit retracting some of the information contained in the original affidavit.

was formalized in a letter to Rob Jones from Chief Deputy Sheriff Ron Jones entitled, "PRE-TERMINATION OPPORTUNITY TO RESPOND."[4] The letter provided that the recommended action was that Jones be terminated from employment, but he was advised that he had an opportunity to respond to these charges before the Oldham County Sheriff on March 23, 2006. Jones was subsequently provided with an identical copy of this letter signed by Sheriff Sparrow instead of Ron Jones. The reason for this is unclear from the record. Contemporaneous with this notice, Rob Jones was relieved of his official duties and his badge, gun, and cruiser were taken from him. In the wake of this action, Jones and his counsel had at least two meetings with representatives from the sheriff's office.

On March 28, 2006, Rob Jones prepared a sworn complaint of misconduct asserting that Ron Jones had abused his authority on multiple occasions. Rob Jones admitted in his affidavit that this formal sworn complaint was prepared and filed only after he was placed on administrative leave with pay. At another point after Jones was placed on administrative leave, his attorney mailed Sheriff Sparrow a longer list of concerns similar to the one originally given to Sparrow by Jones. This version of the list contained signatures from four deputies, including Jones and Ellison.

On April 12, 2006, Ellison prepared a sworn affidavit of complaint against Ron Jones alleging that Jones had improperly disposed of a trace amount of

[4] Rob Jones testified that he did not receive this letter until March 23, 2006.

marijuana evidence at an airport sometime between August 26 and September 6, 2004. Ellison testified that he did not come forward before then because he feared that Jones would retaliate against him. Ellison also testified that in the weeks and months after Sheriff Sparrow was provided with the aforementioned complaints and concerns, he was written up on multiple occasions for disciplinary infractions. He also indicated that his work schedule was changed to a different shift. He believes that these all occurred in direct retaliation for his having filed complaints against Ron Jones.

On July 18, 2006, Rob Jones was terminated from employment with the sheriff's department. The listed grounds for the termination were: (1) making false statements under oath; (2) using LINK in an inappropriate manner; (3) making fraudulent misrepresentations regarding a real estate transaction; and (4) attempting to use his position as a law enforcement officer to convince a detective with the Louisville Metro Police Department to criminally investigate a person who had been involved in a personal transaction with him for the purpose of pressuring and intimidating that individual. Jones was advised that he could appeal this decision to the Oldham County Deputy Sheriff Merit Board, and he did so the following day. A hearing was subsequently set for September 12, 2006.

On August 23, 2006, Rob Jones and Ellison filed a complaint in the Oldham Circuit Court against the Oldham County Sheriff's Department in which they presented claims for damages under the Kentucky Whistleblower Act – KRS 61.101, *et seq.* They specifically claimed that they had been subjected to improper

retaliation by the Sheriff's Department for filing complaints against Ron Jones and for disclosing facts and information relating to mismanagement, waste, fraud, abuse of authority, and violations of law. Rob Jones also alleged that his right to due process under KRS 15.520 – the Kentucky Policeman's Bill of Rights – had been denied because he was terminated from his employment as a police officer without proper notice or the opportunity to have a hearing. He specifically claimed that pursuant to KRS 15.520(1)(h)(8), he should have been provided with a hearing within sixty days of being put on administrative leave with pay.

On September 6, 2006, Rob Jones filed a motion for a temporary restraining order in which he asked the circuit court for injunctive relief preventing the Oldham County Sheriff's Merit Board from conducting the scheduled administrative hearing regarding his termination. He argued that the charges were not properly before the board and effectively should be dismissed because he had not been provided with proper due process pursuant to KRS 15.520(1)(h)(8).[5] After conducting a hearing, the circuit court took the matter under submission and ultimately entered an order on September 11, 2006, denying the motion. Appellants subsequently filed a motion for reconsideration that was also denied. Rob Jones's hearing before the Merit Board took place as scheduled on September 12, 2006. The Merit Board subsequently affirmed Jones's termination from employment based on all of the grounds raised in the termination notice.

[5] The motion also included a request that the circuit court enjoin the sheriff's department from changing Ellison's work schedule. This request was later withdrawn.

On September 19, 2006, the Sheriff's Department moved to dismiss Rob Jones's procedural due process claim. The circuit court finally dismissed that claim on February 18, 2008. On October 16, 2008, the Sheriff's Department moved for summary judgment on Appellants' remaining claims under the Kentucky Whistleblower Act. That motion was granted on February 11, 2009. The present appeal followed.

**Standard of Review**

The standards for reviewing a trial court's entry of summary judgment are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> 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*[6] 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

[6] *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

> 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*.

*Id.* at 436 (internal footnotes and citations omitted).

**Analysis**

**1. Rob Jones's Due Process Claim**

We first address Rob Jones's contention that the circuit court erroneously dismissed his due process claim against the Sheriff's Department. Jones claims that he was denied a right to an administrative hearing before the Merit Board within sixty days of being placed on administrative leave with pay in March 2006, in violation of KRS 15.520(1)(h)(8). That provision states, in relevant part:

> Any police officer suspended with or without pay who is not given a hearing as provided by this section within sixty (60) days of any charge being filed, the charge then shall be dismissed with prejudice and not be considered by any hearing authority and the officer shall be reinstated with full back pay and benefits[.]

The Sheriff's Department argues in response that Jones was never "suspended" but was instead "placed on administrative leave with pay." Therefore, until he was actually charged with misconduct and terminated from employment, he had nothing to appeal.

In our view there is no practical difference between a deputy sheriff being "suspended with pay" and "placed on administrative leave with pay." Jones was relieved of his official duties and the emoluments of his office as deputy

sheriff as a result of the charges against him. We understand that law enforcement agencies are somewhat unique in that officers must sometimes be suspended with pay during the course of an investigation prior to the filing of formal charges – the event which triggers the 60-day period within which a hearing must be provided. But any contention that Jones's status during this period was something other than a "suspension with pay" within the meaning of the applicable statutes is nothing more than an exercise in semantics.

The Sheriff's Department further argues in response that Jones, as a deputy sheriff, is covered by the provisions of KRS 70.260, *et seq.* rather than the provisions of KRS 15.520, that Jones was only entitled to a hearing upon request pursuant to KRS 70.270(2), and that he was provided with a timely procedural due process hearing following his termination after making the required request.

KRS 70.260 gives counties the permissive authority of creating deputy sheriff merit boards "which shall be charged with the duty of holding hearings, public and executive, in disciplinary matters concerning deputy sheriffs." KRS 70.260(1); *see also McClure v. Augustus*, 85 S.W.3d 584, 585 (Ky. 2002). Oldham County has chosen to adopt such a merit system for its deputy sheriffs pursuant to this statute. *See* Oldham County Fiscal Court Ordinance No. 02-150-505. For all relevant purposes, the language of this ordinance mirrors that of KRS 70.260 to 70.273; therefore, we shall refer to those statutes in addressing the parties' arguments.

KRS 70.270(1) provides that "[a]ny deputy sheriff may be removed, suspended, or laid off by the sheriff for any cause which will promote the efficiency of the department" and that in most instances "the sheriff shall furnish a covered deputy with a written statement of the reason why the action was taken." KRS 70.270(2) further provides that "every action in the nature of a dismissal, suspension, or reduction made by the sheriff shall be subject to review by the board *at the request of* any deputy sheriff affected by the provisions of KRS 70.260 to 70.273." (Emphasis added).

To the extent that a conflict exists between the provisions of KRS 15.520 and KRS 70.260, *et seq.,* we agree with the Sheriff's Department that the provisions of the latter statute are controlling. "The applicable rule of statutory construction is where there is both a specific statute and a general statute seemingly applicable to the same subject is that the specific statute controls." *Meyers v. Chapman Printing Co., Inc.,* 840 S.W.2d 814, 819 (Ky. 1992). See also *Parts Depot, Inc. v. Beiswenger,* 170 S.W.3d 354, 360 (Ky. 2005). "This is especially true where the special act is later in point of time." *Morton v. Auburndale Realty Co.,* 340 S.W.2d 445, 446 (Ky. 1960), citing *Oppenheimer v. Commonwealth,* 305 Ky. 147, 202 S.W.2d 373 (1947), and *Shannon v. Burke,* 276 Ky. 773, 125 S.W.2d 238, 239 (1939). Even if there were no conflict, the later statute would control. *Shannon*, 126 S.W.2d at 239. Because we find the provisions of KRS 70.260, *et seq.* to be the controlling statutes, we find it

unnecessary to decide whether police officers covered by KRS 15.520 must request a hearing.

Thus, in counties that have chosen the option of creating a deputy sheriff merit board, a deputy sheriff is entitled to challenge his termination – or even suspension – via review by the merit board; however, he is expressly obligated by statute to request a review hearing before the board. In accordance with this requirement, Oldham County Sheriff Merit Board Rule 4.2 mandates that a party who wants a disciplinary action taken by the sheriff to be reviewed must request an appeal and hearing within ten working days of the action.

The record here reflects that Jones was terminated from employment on July 18, 2006, and requested a hearing on that decision the next day. A hearing was subsequently held on September 12, 2006 – within the sixty-day period claimed by Jones to be mandatory. Therefore, with respect to his termination, Jones received all of the due process to which he was entitled. We note that even if we were to accept that Jones was entitled to the due-process procedures outlined in both KRS 15.520 and KRS 70.260, *et seq.,* Jones was not deprived of a full-blown due-process hearing; it was only delayed – during which time he remained on the payroll of the Oldham County Sheriff's Office.

Dismissal of Jones's due process claim was appropriate and must be affirmed.

**2. Rob Jones's Whistleblower Claim**

Jones next argues that the circuit court erroneously granted the Sheriff's Department's motion for summary judgment as to his retaliation claim brought pursuant to the Kentucky Whistleblower Act – KRS 61.101, *et seq*. The circuit court concluded that Jones had failed to establish that he had made a good faith report or disclosure concerning Ron Jones's activities because he did not author, complete, or even examine the list of concerns presented to Sheriff Sparrow on March 6, 2006.

The purpose of the Kentucky 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." *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004), quoting *Meuwissen v. Dep't of Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000). To that effect, KRS 61.102(1) and (2) provide as follows:

> (1) 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 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.
>
> (2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section.

In order to demonstrate a violation of the Whistleblower Act, a plaintiff must establish the following four elements:

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

*Davidson*, 152 S.W.3d at 251. In addition, the plaintiff "must show by a preponderance of evidence that 'the disclosure was a contributing factor in the personnel action.'" *Id.*, quoting KRS 61.103(3). For purposes of a whistleblower action, "disclosure" means "a person acting on his own behalf, or on behalf of another, who reported or is about to report, either verbally or in writing, any matter set forth in KRS 61.102." KRS 61.103(1)(a). "Contributing factor" is defined in KRS 61.103(1)(b) as:

> any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision. It shall be presumed there existed a "contributing factor" if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action.

"Once a *prima facie* case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." KRS 61.103(3).

The parties agree that Jones clearly meets the first two elements of the *Davidson* test. The question then becomes whether he "made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority[.]" *Davidson*, 152 S.W.3d at 251. "In order to determine whether a report of a violation or suspected violation of law is made in good faith, we must look not only at the content of the report, but also at the reporter's activities in making the report." *Thornton v. Office of Fayette County Attorney*, 292 S.W.3d 324, 331 (Ky. App. 2009). The Sheriff's Department argues that Jones fails to satisfy this requirement because he did not actually author or complete the list of concerns presented to Sheriff Sparrow on March 6, 2006. Jones acknowledged in his deposition that he did not actually look at the list or read it before turning it over, noting that he "had no reason to." However, he indicated that he had previously seen drafts of the list before it was completed.

Jones also testified that he had provided the deputies with some examples of Ron Jones's inappropriate conduct, and that those were added to the written list of complaints. The record also reflects that following his placement on administrative leave – which was reflected in a letter signed by Ron Jones – Rob Jones and other deputies submitted additional complaints about Ron Jones to Sheriff Sparrow. Rob Jones was terminated from employment soon thereafter.

Ultimately, we believe the question of whether Jones made a "good faith" disclosure to be a close one and consequently conclude that it should not have been resolved via summary judgment. In reaching this conclusion, we note that as a general rule, a determination of whether a party acted in good faith is a question of fact that does not lend itself well to summary judgment. *Cf. Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). Jones was placed on administrative leave only days after providing Sheriff Sparrow with the concerns about Ron Jones; so the timing of the action is immediately suspect. *See* KRS 61.103(1)(b). Moreover, while Jones did not personally author the list, he was aware of its contents, provided examples of Ron Jones's conduct to be included therein, and delivered the list to the sheriff. At the very least, this would appear to support a claim pursuant to KRS 61.102(2) – at least for purposes of summary judgment – as that provision forbids an employer from subjecting to reprisal "any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section." Jones's actions here appear to satisfy this standard for purposes of our review.

The Sheriff's Department also argues – and the circuit court concluded – that it has already been established that any disclosure by Jones was not a material factor in his placement on administrative leave and ultimate termination from employment. In reaching this conclusion, the circuit court and Sheriff's Department rely on the fact that the Merit Board upheld Jones's termination after finding that he had violated a number of department policies and procedures. Therefore, the argument goes, his whistleblower claim must fail as a matter of law. We disagree.

While the aforementioned facts certainly go to the ultimate merits of Jones's claim, they do not defeat it for purposes of summary judgment. As noted above, Jones is required to prove by a preponderance of the evidence that his disclosure "was a contributing factor in the personnel action." KRS 61.103(3). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision." KRS 61.103(1)(b). Thus, as long as Jones's conduct was *a* contributing factor to the personnel action in question, his whistleblower claim is viable. It need not be the *only* factor in a personnel decision. Here, the circuit court effectively concluded as a matter of law that the subject personnel actions did not result – at all – from Jones's disclosures because his termination "was warranted on legitimate grounds." However, the question of whether this is the case clearly presents a genuine issue of material fact, and the circuit court consequently erred in reaching its own final decision on the matter – especially given the "clear and convincing evidence" standard under

which an agency must establish that a disclosure was not a material fact in a personnel action. KRS 61.103(3). For the foregoing reasons, we hold that the circuit court erred in dismissing Rob Jones's claim under the Kentucky Whistleblower Act. Therefore, that portion of the court's order must be reversed and the case remanded for further proceedings relating to that issue.

**3. Jason Ellison's Whistleblower Claim**

The final issue regards Jason Ellison's contention that the circuit court erroneously granted summary judgment to the Sheriff's Department as to his own whistleblower claim. As noted above, Ellison was one of the deputies who expressed concerns about Chief Deputy Sheriff Ron Jones's behavior, and he also filed a sworn affidavit of complaint against Jones alleging that Jones had improperly disposed of a trace amount of marijuana evidence at an airport sometime between August 26 and September 6, 2004. Ellison contends that after these complaints were made, his work shift was changed and he was written up on multiple occasions. He believes that such was done in retaliation for his complaints and that he has met the *Davidson* standard; therefore, summary judgment was inappropriate. The Sheriff's Department contends in response that even assuming that Ellison has satisfied the first three elements of the *Davidson* test, his whistleblower claim must fail as a matter of law because there is no evidence that he suffered any reprisal rising to the level of retaliation within the meaning of the Kentucky Whistleblower Act.

In his complaint, Ellison alleged that his work schedule had been changed "in an obvious attempt to run him off." However, he acknowledged in his deposition that the Sheriff's Department periodically assigned shift changes so that Oldham County had adequate coverage for the duties deputy sheriffs were obligated to perform since the county provided 24-hour coverage on patrol duties.

Ellison also contended in his deposition that he was retaliated against on August 17, 2006, when Ron Jones pulled him over on a routine traffic stop. At the time, Ellison and a friend were in an unmarked tan vehicle owned by the Sheriff's Department. He testified that he was in the vehicle because he had worked off-duty the night before and had been told that police were required to use an unmarked vehicle when working off-duty in this particular area. According to Ellison, Jones advised him that he was not allowed to drive an unmarked vehicle unless working off-duty, and he was instructed to take the vehicle back to the sheriff's department and to retrieve his regularly-assigned cruiser. Jones also asked questions about the person in the vehicle with Ellison. Ellison described Jones's demeanor as "intimidating" and "vengeful," but he acknowledged that Jones's statements and actions were consistent with department policy and that as Chief Deputy Sheriff, Jones had a right to know who was in a department-owned vehicle with Ellison. Ellison also acknowledged that he was not written up or terminated from employment as a result of this incident.

Ellison also contended that he was retaliated against that very same day when he was written up for "sick-time abuse." He acknowledged that "[t]he

reprimand was accurate" within the department's sick-time policy but believed that the policy was "unjust." Ellison further testified that he was written up for taking excessive breaks even though punishment for such was not a part of the department's policies-and-procedures manual. He acknowledged, however, that he was not otherwise punished or reprimanded. Ellison also claimed that he was retaliated against when the sheriff ordered him to be written up for not shaving one day, but he admitted that department policy required him to be clean-shaven when on duty and that he had not shaved that day.

Ellison additionally testified that he was retaliated against by having his off-duty driving privileges taken away due to a new department policy established on September 12, 2006. The policy set forth that due to rising fuel costs, off-duty use of police vehicles was limited to Oldham County. Officers living outside of Oldham County could only use their vehicles for on-duty purposes. Ellison explained that at the time the policy was created, he was the only officer living outside of Oldham County. He agreed, however, that fuel costs had been rising at that time and that it was a privilege to have an assigned vehicle and to be able to take it home. He also testified that he was allowed to drive his vehicle home. Ellison eventually left his employment with the Sheriff's Department in March 2007.

With these facts in mind, the question before us is whether Ellison presented sufficient evidence of reprisal to overcome summary judgment. Ellison testified that he was subjected to a change in his work schedule and was written up

on multiple occasions in the months after he filed his concerns about Ron Jones. However, the record reflects that Ellison experienced no reduction in his pay or responsibilities; moreover, it does not appear that he was subjected to any additional discipline for the incidents noted above other than simply being written up. Because of this, the circuit court concluded that Ellison had failed to establish a *prima facie* case under the Whistleblower Act because he did not demonstrate that he had suffered any materially adverse change in his employment circumstances. Ellison argues in response to this conclusion that the Whistleblower Act does not contain any requirement that reprisal against an employee be "materially adverse." Instead, KRS 61.102(1) prohibits employers from retaliating against employees "in any manner whatsoever" for reporting mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. Thus, the Whistleblower Act is intended to prohibit retaliation in its broadest terms.

The question, then, is whether an employee must establish a materially adverse change in his employment circumstances in order to have a viable whistleblower claim. Kentucky courts have not explicitly called for a materiality requirement in determining whether an employee has been subjected to reprisal for purposes of the Whistleblower Act. However, the issue has been examined in the context of retaliation claims under the Kentucky Civil Rights Act.

In *Brooks v. Lexington-Fayette Urban County Housing Authority*,

132 S.W.3d 790 (Ky. 2004), our Supreme Court addressed "the question of what level of retaliatory acts by an employer that a plaintiff must show to establish a *prima facie* retaliation claim" under the Kentucky Civil Rights Act, which is contained in KRS Chapter 344. *Id.* at 801. The statute in question in that case, KRS 344.280(1), makes it unlawful for one or more persons "[t]o retaliate or discriminate *in any manner* against a person . . . because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter." *Brooks*, 132 S.W.3d at 801, quoting KRS 344.280(1) (emphasis in original). Despite the fact that the language of KRS 344.280(1) expressly precludes retaliation "in any manner" against a person, the Supreme Court held that a plaintiff must establish "a materially adverse change in the terms and conditions of his employment" in order to state a valid claim for retaliation. *Id.* at 802, quoting *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999) (applying this standard to Title VII cases). The Court explained:

> A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

*Id.*, quoting *Hollins*, 188 F.3d at 662.[7]

[7] The United States Supreme Court has also recently clarified how serious the harm from an allegedly retaliatory action must be to sustain a claim under the anti-retaliation provision of Title

The anti-retaliation provisions of the KCRA and the Kentucky Whistleblower Act serve very similar purposes, and we consequently find it prudent to apply them in a similar fashion. Therefore, we hold – consistent with *Brooks* – that a plaintiff must establish a materially adverse change in the terms and conditions of his employment in order to state a valid claim for retaliation under the Whistleblower Act. "[A] personnel action is adverse within the meaning of the Whistleblower Act if it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act." *Montgomery County v. Park*, 246 S.W.3d 610, 614 (Tex. 2007). With this standard in mind, however, we note that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *White*, 548 U.S. at 69, 126 S.Ct. at 2415. Thus, the particular circumstances of each case must be considered in determining whether an employment action is materially adverse.

Here, Ellison established only that his work shift was changed and that he was written up for a number of minor infractions. However, his job duties were not diminished or reassigned, and he was not subjected to a reduction in pay or any other punishment for those infractions. Ultimately, reprisal for purposes of the Whistleblower Act "must be more disruptive than a mere inconvenience[.]"

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VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The Court concluded that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.*, 548 U.S. at 68, 126 S.Ct. at 2415 (internal quotations and citations omitted). The Court noted that a requirement of objective material adversity was necessary because "it is important to separate significant from trivial harms." *Id.*

*Brooks*, 132 S.W.3d at 802, quoting *Hollins*, 188 F.3d at 662. Based on the record before us, we do not believe that Ellison has been subjected to any material reprisal for purposes of the Kentucky Whistleblower Act.[8] Therefore, the circuit court's entry of summary judgment as to Jason Ellison's whistleblower claim was appropriate and must be affirmed.

**Conclusion**

For the foregoing reasons, we: (1) affirm the circuit court's dismissal of Rob Jones's due process claim; (2) reverse the circuit court entry of summary judgment in favor of the Sheriff's Department as to Jones's whistleblower claim; and (3) affirm the circuit court's entry of summary judgment in favor of the Sheriff's Department as to Jason Ellison's whistleblower claim.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Thomas E. Clay
Louisville, Kentucky

BRIEF FOR APPELLEE, OLDHAM COUNTY SHERIFF'S DEPARTMENT:

Robert T. Watson
Chris J. Gadansky
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[8] In reaching this conclusion, we cannot rule out the possibility that an instance could occur in which a shift change could be considered retaliatory in nature. However, we have been presented with no special facts in this case that would merit such a conclusion. Ultimately, we do not believe that the simple fact of a shift change – standing alone – is enough to constitute reprisal for purposes of the Whistleblower Act.