RENDERED: MARCH 20, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000994-MR

BOBBYE CARPENTER — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CI-04844

UNIVERSITY OF KENTUCKY;
JOSEPH MONROE; KENNETH CLEVIDENCE;
AND ALEXANDRA SILVER
MCCONNELL — APPELLEES

AND NO. 2012-CA-001429-MR

LISA SCHUCK;
LAURA MARCO; TUIA CHILTON;
GINA WILSON; AND LORI CREECH — APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CI-04844

UNIVERSITY OF KENTUCKY;
JOSEPH MONROE; KENNETH CLEVIDENCE;
AND ALEXANDRA SILVER
MCCONNELL — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

MAZE, JUDGE: The Appellants bring these consolidated appeals from orders of the Fayette Circuit Court on matters relating to their gender-discrimination and retaliation claims against the University of Kentucky (the University), Joseph Monroe, Kenneth Clevidence, and Alexandra Silver McConnell. Bobbye Carpenter appeals from a directed verdict dismissing her claims. Lisa Blankenship (now Lisa Schuck), Laura Marco, Tuia Chilton, Gina Wilson, and Lori Creech appeal from a summary judgment order dismissing their claims. In addition, all of the Appellants appeal from the trial court's denial of their motion for joinder and order requiring separate trials for each of their cases.

We conclude that the trial court erred by granting summary judgment on certain claims raised by Chilton and Marco. We also find that the trial court erred by denying their motion for joinder and precluding a joint trial on the remaining claims. For this reason, we conclude that Carpenter is also entitled to a new trial where her claims may be considered in context with the remaining Appellants. Finally, the trial court erred in finding that the remaining Appellants could not assert individual retaliation claims against Monroe and Clevidence. Hence, we affirm in part, reverse in part, and remand for further proceedings and a new trial in accord with this opinion.

## I. Facts and Procedural History

The Appellants are all women who were employed by the University Police Department (UKPD) between 2003 and 2007. Of the Appellants, only Bobbye Carpenter remained employed by the UKPD at the time of trial. The UKPD was generally under the supervision of Kenneth Clevidence, who served as Director of Public Safety until July 2007. The Appellants' allegations of gender discrimination arose during a period which the UKPD admits was a "difficult transition" in its leadership.

In 2003, Rebecca Langston retired as the UKPD Chief of Police in 2003. After Langston left, Captain Stephanie Bastin oversaw Operations and Carpenter oversaw Administration. In July 2003, Fred Otto was hired as the Chief of Police, but he left shortly thereafter based on inadequate performance. After Otto left, Kevin Franklin served as "Acting Chief" from July 2005 through March 2006.

During this period, there was an ongoing search for a new chief. Franklin, Bastin and Major Joseph Monroe were each contending for the position. In May 2005, Tuia Chilton and Lisa Shuck met with University President Lee Todd to discuss concerns they had about the UKPD. In particular, they wished to discuss rumors that Clevidence planned to hire Monroe as the new chief. They told President Todd that Monroe engaged in inappropriate behaviors such as taking officers whom he supervised to strip clubs, and that he showed favoritism to these officers.

In February 2006, MacDonald Vick was hired as Chief of Police. However, his tenure ended in July after it was discovered that he had been untruthful about the resolution of certain matters involving sexual harassment and discrimination complaints from his past. After Vick left, Monroe served as "Acting Chief." Clevidence supervised Monroe until Clevidence retired in July of 2007. Each of the captains over patrol, administration and hospital security reported directly to Monroe.

In July 2006, the University's Human Resources Department interviewed employees of the UKPD. The interviews were conducted by the Human Resources Department and were coordinated at the UKPD by Alexandra Silver McConnell, an administrative staff assistant. Prior to beginning the interview process, President Todd consulted with Carol Jordan, who at that time oversaw the University's Center for the Study of Violence Against Women. Jordan and her staff assisted in preparing a questionnaire for the interviews. Officially, the purpose of the interviews was to gather feedback from UKPD staff regarding the type of individual who would be most successful in the role of Police Chief. However, Jordan also included questions dealing with gender equity and fairness in the UKPD. The results of a number of surveys raised concerns about disparate treatment of female officers and a general "fraternity house state of mind" in the UKPD.

In March 2007, the Appellants and several other persons tendered a report of gender discriminatory practices to Terry Allen of the University's Equal

Employment Opportunity (EEO) Office. Allen conducted an investigation based on these complaints. On June 27, 2007, Allen wrote a letter to the Appellants' counsel stating that he found no violations of the University's EEO policy and that his investigation did not support pursuing charges of gender discrimination. However, he did make recommendations on operational improvements, greater employee satisfaction, and equity and fairness.

Sometime in late 2006, Stephanie Bastin filed a separate action alleging gender discrimination against the University and the UKPD. During a deposition in that action, Bastin mentioned the results of a polygraph examination which was administered to McConnell when she was initially hired. McConnell states that Monroe told her about that testimony, although Monroe denies this. In response, McConnell retained an attorney, who sent a letter to the Appellants' counsel (who was also representing Bastin), warning against any further discussion or dissemination of this information.

Thereafter, the Appellants filed a motion to intervene in the Bastin case. After that motion was denied, they brought the present action in October of 2007. We will address their individual claims of discrimination separately in this opinion. Generally, they assert claims of gender discrimination; retaliation in violation of KRS[1] 344.280; reprisal and retaliation in violation of the Kentucky Whistleblower Act, KRS 61.102; aiding and abetting discrimination and retaliation by Clevidence; retaliation by Monroe against Schuck; aiding and abetting unlawful

[1] Kentucky Revised Statutes.

employment practices by Monroe in causing Schuck's termination; and aiding and abetting retaliation by McConnell.

The University and the individual defendants filed motions for summary judgment, which the trial court denied. They also filed motions seeking separate trials, which the trial court initially denied but subsequently granted. The claims raised by Bobbye Carpenter were the first to go to trial. Prior to that trial, the court ruled that the other plaintiffs could testify regarding "disparate treatment which resulted from decisions by the same supervisors or decision makers and during the same time frame that Carpenter claims she was subjected to disparate treatment." However, the court excluded any unrelated evidence of other allegations of disparate treatment or discrimination.

At trial, Carpenter presented the following evidence: Carpenter started work at the UKPD in 1975. By 2003, she had risen to the rank of Captain. After the retirement of Chief Langston, Carpenter alleges that Clevidence began to marginalize her by significantly reducing her responsibilities. Although many of these duties were restored during Chief Vick's brief tenure, she states that Monroe repeatedly expressed opposition to giving her a leadership position within the department, even for short periods of time. She also alleges that Monroe began completing her evaluations in 2004 and unfairly downgraded her ratings for the years 2004-2007. Carpenter also states that she was moved from organizational planning and placed on patrol duties.

As noted above, Carpenter testified that she contacted University President Todd in 2005 to object to Monroe's candidacy for Chief. She also participated in the 2006 interviews conducted by the Human Resources Department. At that time, Carpenter raised raised issues about a male-dominated and discriminatory atmosphere within the UKPD.

The trial court limited Carpenter's testimony regarding specific instances of allegedly discriminatory conduct directed at other female officers. The trial court permitted Chilton, Creech and Schuck to testify regarding the claims against McConnell, and the fact that they had filed discrimination complaints against the University. However, the trial court did not allow them to testify regarding specific instances of discrimination directed at them.

Following the close of proof in Carpenter's case, the trial court granted a motion for directed verdict for the Appellees. The court found that Carpenter had failed to offer sufficient evidence upon which reasonable jurors could conclude that Carpenter was subjected to adverse or disparate treatment on account of her gender, that she was subjected to reprisal or retaliation for making a claim of discriminatory treatment, or that any of the Appellees had conspired to aide or abet such retaliation.

Thereafter, the Appellees moved for summary judgment on the remaining claims. The court concluded that the evidence supporting the retaliation claims by the other Appellants would be substantially similar to the evidence presented by Carpenter. The court also examined the evidence supporting each of

the Appellants' claims of discriminatory or disparate treatment. The trial court concluded that there were no genuine issues of material fact and that the Appellees were entitled to judgment on these claims as a matter of law. Consequently, the trial court granted the Appellees' motion for summary judgment.

Carpenter appeals from the trial court's directed verdict dismissing her claims. Carpenter also contends that the trial court erred by limiting the testimony of the other plaintiffs regarding their allegations of disparate and discriminatory treatment. The other Appellants appeal from the trial court's summary judgment dismissing their claims. In addition, all of the Appellants argue that the trial court erred by ordering separate trials. This Court directed that the appeals were to be heard together.

## II. Summary Judgments Dismissing Claims by Schuck, Wilson, Chilton, Creech, and Marco

The Appellants all argue that the trial court erred by denying their motion for joinder and ordering separate trials. They also contend that these orders led to the trial court's subsequent decision to restrict evidence of other allegedly discriminatory acts at Carpenter's trial and, ultimately, to the directed verdict at the close of Carpenter's case. But following Carpenter's trial, the trial court granted summary judgment dismissing the claims brought by Schuck, Wilson, Chilton, Creech, and Marco. If the trial court properly granted summary judgment on their claims, then the court's denial of the joinder motion is moot. Likewise, we would

then consider the directed verdict on Carpenter's claims without reference to the dismissed claims. Therefore, we must next address the summary judgment order.

**A. Disparate Treatment and Hostile Work Environment**

Under the Kentucky Civil Rights Act (KCRA), it is unlawful for an employer to discriminate against an individual because of that individual's sex, and it is unlawful for any person to retaliate against an individual because that person has opposed such an unlawful practice. KRS 344.040; KRS 344.280. Kentucky interprets the KCRA consistently with Title VII of the Federal Civil Rights Act. *American General Life & Acc. Ins. Co. v. Hall*, 74 S.W.3d 688, 691 (Ky. 2002).

The Appellants' claims of discrimination are based upon three general grounds: disparate treatment, hostile work environment, and retaliation. In the absence of direct evidence of discriminatory motivation, a plaintiff claiming gender discrimination with respect to a disparate-treatment claim must satisfy the burden-shifting test set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973). *Williams v. Wal–Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005). The first step of this test requires the plaintiff to establish a *prima facie* case of discrimination, presenting evidence that: (1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) "similarly situated" non-protected employees were treated more favorably. *Murray v. Eastern Kentucky Univ.*, 328 S.W.3d 679, 682 (Ky. App. 2009), *citing Peltier v. United States*, 388 F.3d 984, 987 (6th Cir.

2004). When determining what employees were "similarly situated," the plaintiff must find those that are similar to her in "all relevant aspects." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994); *see also Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998).

Once a plaintiff makes a *prima facie* case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the termination. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. If the employer has articulated a legitimate reason for its employment decision, the ultimate burden shifts back to the plaintiff to show that the explanation is merely pretextual and that the decision was actually motivated by a discriminatory intention. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). A plaintiff may meet this burden by direct evidence, or by circumstantial evidence showing that (1) the proffered reasons for the employment decision are false; (2) the proffered reasons did not actually motivate the decision; or (3) the reasons given were insufficient to motivate the decision. *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111, 116 (Ky. App. 2010), *citing Williams v. Wal–Mart Stores, Inc.*, 184 S.W.3d at 497.

A plaintiff asserting a hostile work environment claim is not required to meet the burden-shifting standard of *McDonnell-Douglas*. *Pollard v. E.I. DuPont de Nemours & Co.*, 213 F.3d 933, 943 (6th Cir. 2000), *rev'd on other grounds in Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 121 S. Ct. 1946, 150 L. Ed. 2d 62 (2001). However, for sexual harassment to be actionable, it

must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-67, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986). Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Ammerman v. Bd. of Educ. of Nicholas Cty.*, 30 S.W.3d 793, 797 (Ky. 2000), *quoting Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989). Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is not actionable. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993). Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and has no claim of a hostile work environment. *Id.*

In granting summary judgment, the trial court addressed each of the Appellants' claims separately. The court rejected most of their claims of disparate treatment, concluding that the Appellants had failed to establish either that they had been subject to an adverse employment decision or that they had been treated differently than similarly situated male officers at the UKPD. To the extent that each Appellant identified conduct which met her *prima facie* case, the trial court found that the UKPD had articulated a legitimate, non-discriminatory reason for the action, and each Appellant failed to present any evidence showing pretext.

Similarly, the trial court concluded that none of the Appellants had alleged that "any discrimination directed toward them individually or collectively created a hostile work environment which was so 'severe or pervasive' as to 'alter conditions' of their employment and 'create an abusive working environment.'" *Citing Harris*, 510 U.S. at 21, 114 S. Ct. at 370.

On review, the appellate court must determine "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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in her favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. *Id.*

With this standard in mind, we now turn to the Appellants' individual claims.

*1. Schuck*

Shuck was employed by UKPD from 1993 - 2007. In 2003, Schuck was given a temporary assignment to oversee hospital security. In 2004, she was demoted from that position. The trial court noted that Schuck did not have any experience in this field and that this led to a conflict with the hospital director. The

hospital director contacted Clevidence, who directed that Schuck be removed from the position. She was replaced with a male officer with more experience.

The trial court questioned whether this action amounted to an adverse employment decision because Schuck was only removed from a temporary assignment. The court also held that the UKPD had shown a legitimate non-discriminatory reason for the action, and that Schuck had failed to show those reasons were a pretext for unlawful discrimination. We find no basis in the record to refute these latter conclusions.

Schuck next alleges that she was subjected to disparate treatment in disciplinary actions, and was denied favorable assignments and training opportunities. The trial court noted that, while Monroe once threatened her with discipline over a minor matter, no disciplinary action was ever taken.[2] Although Schuck was reassigned from a favorable position at football games, the trial court pointed out that this position was assigned to another female officer. In addition, the court found no evidence that Schuck was denied training for radar certification, only that Monroe failed to respond to the request. Consequently, the trial court found no evidence that these actions adversely affected her work conditions, or amounted to disparate treatment based on her gender.

For the most part, we agree with the trial court that Schuck failed to show that she was subject to an adverse employment action in these matters.

[2] In contrast, Schuck and several other Appellants note that Monroe received only a light punishment for negligent discharge of his firearm, and was not disciplined following complaints about his management of the department.

However, we question the trial court's dismissal of her claim concerning the denial of her request of training for radar certification. Monroe's failure to respond to that request in a timely manner could easily be considered a denial of the opportunity. However, Schuck does not allege that she was treated differently than similarly situated male officers. Therefore, we agree with the trial court that Schuck failed to make her *prima facie* case on this matter.

Finally, Schuck alleges that she was terminated based on her gender. In 2005, Shuck suffered a work-related injury to her hand. Although she returned to work, Schuck's condition deteriorated, and the UKPD dismissed her in 2007 after denying work accommodations based on her physician's recommendations. The trial court noted Schuck had admitted that her hand injury limited her ability to perform her duties as a police officer. The trial court concluded that these restrictions amounted to a legitimate non-discriminatory reason for the employment decision. We agree with the trial court's analysis and conclude that the trial court properly dismissed Schuck's claims of disparate treatment.

*2. Wilson*

Wilson was employed by UKPD from 2002 - 2008. She states that she was disciplined for an incident in 2005 for failing to secure the door of a transport vehicle. The trial court found no evidence that she was subject to harsher discipline than male officers, including Monroe, with similar misconduct. Wilson also claims that in 2006, she was incorrectly accused of damaging a parking gate.

She states that the male officer who was found responsible was not disciplined. However, the trial court found no evidence that she was actually disciplined in this instance. We agree with the trial court that Wilson failed to establish a *prima facie* case of disparate treatment regarding these matters. Likewise, during the 2006 interviews, Wilson did not identify any conduct which would amount to a pervasively hostile work environment directed toward her.

*3. Chilton*

Chilton was employed by the UKPD from 1995 - 2008. In 2006, while she was on pregnancy leave, the UKPD reassigned Chilton from first to second shift, and replaced her with a male officer who had less seniority. In 2007, Chilton requested a change from second shift to first shift. The first shift position was given to a male officer with less seniority. The UKPD acknowledges that the 2006 decision was a departure from the standard practice of generally assigning shifts in order of seniority and preference. However, the UKPD contends that shift changes were made throughout the entire department at the time, and that Chilton was not singled out for disparate treatment. Franklin and Monroe also stated that Chilton was needed on the second shift due to her experience and leadership skills. They also stated that the first shift position was given to the male officer in 2007 because they wanted him to be supervised by more senior staff. The trial court found no evidence that these explanations were pretextual.

In this matter, we conclude that Chilton clearly established her *prima facie* case of disparate treatment. On the other hand, the UKPD articulated a

legitimate non-discriminatory reason for the decisions. However, given the evidence existed which showed that these decisions were a departure from established practice, we conclude that Chilton presented sufficient evidence to create a genuine issue of material fact supporting an inference of pretext. Therefore, the trial court erred in concluding that these allegations were not actionable.

Chilton next states that in 2006 and 2007, she was reassigned to traffic duty and guarding the ticket booth at football games. In prior years, she was part of the detail transporting President Todd. She states that this was a significant demotion in duties for someone with her experience and command responsibilities. However, the trial court noted that the transport duties were assigned to another female officer, and that the change in football assignments did not constitute a materially adverse change to her employment.

We disagree, considering the evidence that it was uncommon to assign a command officer to such duties. However, the UKPD notes that Chilton's prior responsibilities were assigned to another female officer, Carpenter. Although these matters may be relevant to the retaliation claim, we agree with the trial court that Chilton failed to make a *prima facie* case of disparate treatment.

Chilton also claims her command authority was undermined in several disciplinary matters involving a male officer. She states that Officer Turner damaged a clock in her office but was not disciplined for the incident. She also states that she cited Officer Turner for violation of three general orders, but he was

not disciplined over the matter. The trial court noted that Monroe verbally reprimanded Turner over the clock incident and required him to apologize. The trial court also noted that Turner pursued a grievance procedure and the citations were set aside as part of that process.

As a general rule, a plaintiff cannot prevail on a discrimination claim merely by questioning the soundness of the employer's business judgment or practices. *Flock*, 344 S.W.3d at 117, *citing Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987). Chilton has alleged that her disciplinary complaints or citations were treated differently than those from any similarly situated male officer. Therefore, we agree with the trial court that this matter was not actionable as disparate treatment.

Furthermore, Chilton raised a number of complaints that she was subject to different disciplinary standards than male officers. The trial court noted that most of these matters were comparatively minor, and involved application of policies which were directed toward all employees of the UKPD. Chilton also testified that, in 2007, she began receiving unsolicited mail in her work mailbox, including Playboy magazines and mail for sex-related tourism.

The trial court made a conclusory finding that none of these matters constituted an unreasonably offensive or abusive work environment that interfered with Chilton's ability to her job. For the most part, we agree with the trial court's assessment. However, we are particularly concerned about the incidents involving the unsolicited mail. Although it remains to be shown whether this matter was

instigated by Chilton's co-workers or tolerated by the University or the UKPD, such behavior could be considered as sufficiently humiliating so as to create a hostile work environment. Furthermore, a determination of whether a work environment is hostile must be based on the totality of the circumstances rather than separately analyzing individual circumstances. *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601, 605 (Ky. 2005). When considered with the other actionable conduct, we conclude that the trial court erred by dismissing Chilton's claims.

*4. Creech*

Creech was employed by UKPD from 2004-2007. In 2005, the UKPD denied Creech's request to attend a training class. The trial court found that the UKPD denied her request because too many other officers were out that week, and that this explanation amounted to a legitimate, non-discriminatory reason for the decision. We agree with the trial court's analysis on this point.

Creech also alleges that Monroe subjected her to closer scrutiny than male officers and frequently eavesdropped on her conversations. And in 2006, Creech applied for a promotion to sergeant and performed well on the interview. However, a male superior called her performance an "aberration." The promotion was given to a male officer. The trial court noted that the male officer had more training and seniority.

We agree with the trial court that these actions were not sufficient to establish a *prima facie* case of disparate treatment. Likewise, we agree with the

trial court that Creech failed to allege sufficient conduct suggesting a pattern of behavior creating pervasively hostile work environment. Therefore, we conclude that the trial court properly granted summary judgment on this aspect of Creech's claim.

*5. Marco*

Marco was employed by UKPD from 2004-2006. She testified that Monroe asked her out several times in 2004 and she declined. Thereafter, she alleges that she was subjected to unfavorable treatment within the UKPD. She alleges that she was subject to closer scrutiny than other officers; that she was the subject of a rumor campaign alleging improper conduct on duty; and she routinely failed to receive timely backup from other officers. In 2005, Marco and Wilson were disciplined for failing to secure the door of a transport vehicle. Marco contends that they both received harsher punishment than Monroe, who was disciplined around the same time for negligent discharge of a firearm. Marco also states that she was denied a schedule change request in 2005, and that she was denied requests for Spanish Immersion and Radar Certification classes. In addition, Marco states that several male officers suggested she leave the department because she had no future there.

The trial court found that none of this conduct amounted to a materially adverse change to Marco's employment conditions. The court pointed out that the scrutiny and rumors diminished after Marco complained to her superiors. The trial court also rejected Marco's allegation that she was subject to

different disciplinary standards, noting that Monroe was also disciplined for his misconduct. In addition, Marco admits that she did not complain about the lack of backup from other officers. The trial court also found that the UKPD articulated a legitimate reason for denying Marco's request for a shift change. And as with Schuck, the trial court stated that Marco was never explicitly denied an opportunity for additional training – only that her superiors failed to respond to her requests.

We disagree with the trial court's assessment on the disparate treatment and hostile work environment claims. Marco has alleged that she was treated differently within the department after she rebuffed Monroe's approach. Although some of the conduct she complains of was comparatively minor, when considered as a whole, we conclude that Marco presented sufficient evidence to establish a *prima facie* case of disparate treatment. In addition, the nature of this disparate treatment was sufficiently apparent to attract the comments of other officers. Finally, while the UKPD presented evidence to show that some the decisions were made for legitimate, non-discriminatory reasons, we find that Marco presented sufficient evidence to show that those reasons were pretextual.

We also find that the overall circumstances surrounding Marco's employment were sufficient to show a hostile work environment. In addition to the matters discussed above, Marco testified that she personally witnessed male officers discussing trips to strip clubs and viewing pornography on work computers. These practices ended after she complained, but none of the officers

involved were disciplined. Given the totality of the circumstances, we conclude that the trial court erred by dismissing Marco's hostile work environment claim.

**B. Retaliation**

The Appellants also argue that the UKPD and the University retaliated against them in violation of KRS 344.280. A *prima facie* case for retaliation requires a plaintiff to demonstrate that (1) he engaged in protected activity; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 803 (Ky. 2004).

We agree with the trial court that Schuck, Wilson, Creech, and Marco failed to establish a *prima facie* case of retaliation. As noted above, Schuck was terminated in 2007 due to an injury that impaired her ability to perform the duties required by a police officer. Wilson and Creech did not show any adverse action taken against them after they raised complaints in 2007. And Marco left the department in 2006, before making any formal complaints. Therefore, summary judgment was appropriate on these claims.

However, we disagree with the trial court's decision to dismiss the retaliation claims brought by Chilton. She alleges that she and Schuck were subjected to retaliation after their 2005 meeting with President Todd during which they raised concerns about Monroe. As noted above, Chilton presented evidence

that her responsibilities were downgraded and her command authority was undermined after that meeting. While this evidence does not raise an overwhelming inference of retaliation, we conclude it was sufficient to establish a *prima facie* case. Consequently, the trial court erred in granting summary judgment on this claim.

We also conclude that the trial court erred in finding that Carpenter and Chilton cannot maintain retaliation claims against Monroe and Clevidence individually. As noted by the Sixth Circuit in *Morris v. Oldham Cnty. Fiscal Court*, 201 F.3d 784, 794 (6th Cir. 2000), KRS 344.280 prohibits "a person, or for two (2) or more persons to conspire" to retaliate against an employee for filing a discrimination complaint. *Id.* Contrary to the trial court's conclusion, the statute does not always require a showing of conspiracy to impose individual liability.

Similarly, we find that the trial court erred by dismissing Carpenter's and Chilton's individual retaliation claims against Monroe and Clevidence under the Kentucky Whistleblower Act, KRS 61.102. The trial court concluded that Monroe and Clevidence were not an "employer" under the Act. However, KRS 61.101(2) defines "employer" to include "any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions, with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees…." We find that Monroe and Clevidence meet this definition of employer and were thus subject to individual liability.

On the other hand, we agree with the trial court that none of the Appellants made a *prima facie* case of retaliation based on the actions by McConnell. There is no evidence that McConnell wrote the letter to the Appellants in retaliation for bringing discrimination complaints. Neither the University nor the UKPD took any adverse action against the Appellants based on that letter. Rather, McConnell only wrote the letter based upon an understanding that her confidential information had been released in the Bastin litigation. There was no evidence that she took this action on behalf of Clevidence, Monroe, or anyone at the University. Consequently, the Appellants failed to show a causal connection between their protected activity and McConnell's response.

## III. **Denial of Motion for Joinder/Order Requiring Separate Trials**

Since we have found the trial court erred by granting summary judgment on certain claims brought by Chilton and Marco, we must now consider whether the trial court erred by denying their motion for joinder with Carpenter's claims and by ordering separate trials. The Appellants argue that joinder was proper because their claims alleged a pattern and practice of gender discrimination by UKPD as well as common issues of law and fact. The trial court, however, found that each of the Appellants' claims were based on separate and independent facts, and involved different circumstances and supervisors. As a result, the trial court concluded that separate trials were warranted.

In reaching this conclusion, the trial court relied upon *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). As in the current

case, *Dukes* involved claims of gender discrimination by multiple plaintiffs. However, the *Dukes* plaintiffs were seeking class certification pursuant to FRCP[3] 23. The United States Supreme Court focused on the "commonality" requirement of FRCP 23(a), which requires that all members of the proposed class suffered the same injury. The Court acknowledged that all members of the class alleged that the employer engaged in a pattern of discrimination. However, the Court noted that the proposed class involved nearly one and a half million plaintiffs, some 3,400 separate store locations, and thousands of supervisors spread across the country. In the absence of any allegations showing a common reason for the allegedly discriminatory actions, the Court concluded that each claim would necessarily require different proof. Hence, the Court determined that class action certification was not appropriate.

The trial court in this case acknowledged that the plaintiffs were not seeking class action certification, but concluded that the same principles apply to a motion for joinder under CR[4] 20. As in *Dukes*, the trial court reasoned that it is not enough for the plaintiffs to allege a pattern or practice of discrimination. While CR 20.01 does not require that all questions of law and fact be common, the court concluded that all the plaintiffs must allege at least some common question of law or fact. Since each of the Appellants' claims was based upon separate and

[3] Federal Rules of Civil Procedure.

[4] Kentucky Rules of Civil Procedure.

independent facts, the trial court held that they must be tried separately and with reference only to facts which their claims have in common.

The Appellants argue that the trial court's application of the *Dukes* analysis conflicts with the language of CR 20. CR 20.01 permits persons to join in one action as plaintiffs "if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." The Appellants point out that a permissive joinder, unlike a class action claim, does not require that common issues of fact or law predominate. Rather, the rule allows joinder if there is any common question of law or fact. *See also Hughes v. Lawrence-Hightchew*, 440 S.W.3d 390, 392 (Ky. App. 2013).

We agree with the Appellants that the trial court erred by applying the higher standard for determining commonality of issues set out in *Dukes*. Under the federal counterpart to CR 20.01, FRCP 20(a), the requirements for permissive joinder are "liberally construed in the interest of convenience and judicial economy in a manner that will secure the just, speedy, and inexpensive determination of the action." *Maverick Entm't Grp., Inc. v. Does* 1-2,115, 810 F. Supp. 2d 1, 12 (D.D.C. 2011). "[T]he impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; [and] joinder of claims, parties, and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 724, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966).

The rule regarding permissive joinder is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits. *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974). A determination on a question of joinder is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Id.* In this case, the test for abuse of discretion turns on the evidence supporting the necessary findings for joinder under CR 20.01.

Permissive joinder is not applicable in all cases, and is appropriate if the court finds both that the plaintiffs' claims arise out of the same transaction or series of transactions, and any question of law or fact common to all of the plaintiffs will arise in the action. *Id.* at 1333; *see also Kalie v. Bank of Am. Corp.*, 297 F.R.D. 552, 557 (S.D.N.Y. 2013). In determining the meaning of the terms, "occurrence," "transaction," and "series of transactions," many courts have applied the "logical relationship" test. That is, courts are to look to the logical relationship between the claims and determine "whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Kalie*, at 557, *citing United States v. Aquavella*, 615 F.2d 12, 22 (2d Cir. 1979). *See also Gruening v. Sucic*, 89 F.R.D. 573, 574 (E.D. Pa. 1981)

In *Mosley v. General Motors*, *supra*, ten plaintiffs alleged that General Motors and the union had engaged in a general policy of discrimination against African-American employees. The trial court ordered severance of the claims,

concluding that the allegations did not arise out of the same series of transactions, nor did they present question of law or fact common to all plaintiffs sufficient to sustain joinder. *Mosely*, 497 F.2d at 1332. The Eighth Circuit reversed. The Court noted that the plaintiffs claimed that they had all been injured by the same general policy of discrimination on the part of General Motors and the union. *Id.* at 1333. Likewise, the Court found that the discriminatory nature of the policies at issue presented common questions of fact and law. "The fact that each plaintiff may have suffered different effects from the alleged discrimination is immaterial for the purposes of determining the common question of law or fact." *Id.* at 1334. Consequently, the Eighth Circuit concluded that the trial court abused its discretion by disallowing joinder and ordering separate trials. *Id.*

In the current case, the Appellants assert that the UKPD engaged in a practice of institutional gender discrimination, and that the University routinely sanctioned that practice. In contrast, the Appellees argue that each of the plaintiffs' claims involve distinct matters involving different circumstances and supervisors. The Appellees contend that the Appellants' claims do not allege any concerted action or policy of discrimination, but merely individual claims of disparate treatment, discrimination and retaliation. Consequently, the Appellees maintain that the trial court properly severed the actions.

In order to determine whether the plaintiffs have alleged a common pattern of discrimination sufficient to warrant joinder of their claims, we must examine the factual basis for each of their claims. Carpenter, Chilton, Creech, and

Marco each allege that the management of the UKPD generally favored male officers over female officers. They allege that male officers routinely viewed internet pornography and discussed visits to strip clubs at work, but those officers were not subject to discipline. Each Appellant further alleges that she was subject to discriminatory and disparate treatment by the UKPD. With the exception of Marco, who left in 2006, they also allege that this disparate treatment increased after they began raising concerns about gender equity during the hiring process for Chief of Police.

The trial court concluded that these claims were not sufficiently related to warrant joinder. The court found that the plaintiffs' claims were based on separate and independent facts, involving different shift commanders and positions. We agree with the trial court that each Appellant had varying levels of experience and the employment decisions involved different circumstances. However, we disagree with the trial court that these claims cannot be considered as a logically related series of transactions. Despite their varying individual circumstances, each of the Appellants has asserted they were affected by a common pattern or practice of discrimination and disparate treatment against female employees of the UKPD.

As noted above, the trial court erred in concluding that the logical relationship test had been superseded by the higher standard for class actions set out in *Dukes*. Generally, a company-wide policy purportedly designed to discriminate against a protected group in employment arises out of the same series

of transaction or occurrences. *Mosley*, 497 F.2d 1334 (1974). *See also Blesedell v. Mobil Oil Co.*, 708 F. Supp. 1408, 1421 (S.D.N.Y. 1989). Furthermore, the employment decisions at issue took place during a comparatively short period of time and mostly involve the same group of decision makers. Given this evidence, we conclude that the existence of such an allegedly discriminatory practice or pattern amounts to a common issue of law and fact. *Mosley*, 497 F.2d at 1334. Consequently, we must conclude that the trial court abused its discretion by directing separate trials in this case.

## IV. Directed Verdict in Carpenter's case

Since we have found that the trial court erred in granting summary judgment on Chilton's and Marco's claims, and we have found that the trial court abused its discretion in denying their motion for joinder, we must set aside the directed verdict which the trial court entered at the close of Carpenter's case. The remaining Appellants were entitled to a joint trial, at which their respective claims could be considered as part of a pattern of disparate treatment or creation of a hostile work environment toward female officers. Because the trial court limited this evidence at Carpenter's trial, we conclude that she and the remaining Appellants are entitled to a new trial at which these claims may be jointly considered. However, we take no position on the trial court's limitations on the specific responses to the surveys conducted in 2006. The trial court must determine the admissibility of that evidence based on the circumstances at the new trial.

## V. Conclusion

Based on the foregoing, we find that the trial court properly granted summary judgment on all claims brought by Schuck, Creech, and Wilson. We also find that the trial court properly granted summary judgment on the the retaliation claim brought by Marco. However, we conclude that the trial court erred in granting summary judgment on Chilton's claims and Marco's disparate treatment and hostile work environment claims. With respect to these remaining Appellants, including Carpenter, we conclude that the trial court erred by dismissing the claims against Clevidence and Monroe individually. On the other hand, we find that the trial court properly dismissed the claims against McConnell.

We next conclude that the trial court erred by denying the motion for joinder and instead ordering separate trials for each Appellant. The remaining Appellants were entitled to pursue their claims at a joint trial. For this reason, we must set aside the directed verdict granted at Carpenter's trial, and remand for a new trial on all remaining claims.

Accordingly, the judgment and orders of the Fayette Circuit Court are affirmed in part, reversed in part, and remanded for further proceedings and a new trial consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Robert L. Abell
Lexington, Kentucky

BRIEF FOR APPELLEES:

Barbara A. Kriz
Lexington, Kentucky