

COMMONWEALTH OF KENTUCKY
48th JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT – DIVISION I
CIVIL ACTION NO. 13-CI-1413

LESLIE THOMAS

PLAINTIFF

vs. **Memorandum Contra Defendants’ Motion To Dismiss or In the
Alternative for Summary Judgment**

BOARD OF REGENTS OF KENTUCKY
STATE UNIVERSITY, et al

DEFENDANTS

* * * * *

Defendants’ motion should be overruled in its entirety. Defendants offer at best perfunctory arguments, bothering to cite only two cases, one of which is non-final and pending before the Kentucky Supreme Court.

The lack of developed argument presented by defendants waives the issues their motion presents. “[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to ... put flesh on its bones.” *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997), quoting *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm’n*, 59 F.3d 284, 293–94 (1st Cir.1995). This rarely-applied doctrine applies here to defendants’ motion.

Defendants do not seek any relief with respect to Count 1 of Thomas’ complaint.

A motion for discretionary review is pending before the Kentucky Supreme Court in the case *Cowing v. Commare* that defendants cite in support of their motion as to Count 2. It is Kentucky Supreme Court case no. 2016-SC-549. Thomas brought this case to the Court's and defendants' attention last September in her *Memorandum Opposing Defendants' Motion for Summary Judgment* at 16. *Cowing* is not precedential and controlling as it is not final; accordingly, it cannot provide the support for defendants' motion that they claim.

Defendants' argument regarding Count 3 of Thomas' complaint – aiding and abetting the tort of wrongful discharge – misapprehends both the tort and how it is pleaded. First, defendants assert that “Thomas was an employee at will and could be terminated without cause.” Defendants' memo at 2. The tort of wrongful discharge is an exception to the at-will employment doctrine. *Firestone Textile v. Meadows*, 666 S.W.2d 730 (Ky. 1983). Accordingly, even were Thomas an at-will employee, her wrongful discharge claim would not be barred as a matter of law. Second, defendants assert mistakenly that “the only legal bases for wrongful discharge that could be alleged are those for discrimination and retaliation by the University for whistleblowing.” Defendants' memo at 2. This is neither the law nor what is pleaded in Thomas' complaint.

A wrongful discharge claim arises where an employee is fired contrary to public policy. *Grzyb v. Evans*, 700 S.W.2d 399, 400-01 (Ky. 1985). Public

policy can be violated where an employee is fired because she refused to violate a law in the course of her employment and/or because she exercised a right granted her by statute. *Id.* at 402.

KRS 164.350 imposes on Thomas, as a member of the university's Board of Regents, a fiduciary-like duty to diligently oversee its governance, operations and efficiencies. Inherent to discharge of this duty is seeking and requesting pertinent information such as detailed budgetary information and information regarding student enrollment and retention rates, especially where the Board member possesses information causing her to call into question what is being presented. Thomas had not only a right to seek this information; she had a duty imposed by statute. A failure of diligence would be a breach of Thomas' duty. As events have proved, Thomas' concerns regarding the budgetary state and student enrollment at KSU were well-founded.

The record indicates that a jury could find that Sias was supportive of Thomas up to the time that Thomas began serving on the Board of Regents and raising issues that disturbed Sias, such as the state of the budget and actual student enrollment. As with her race discrimination claim, Thomas need only show that her actions as a Board member were a but for factor in her firing, not the only or even the primary factor and even if mixed with other factors. *Powell v. Asbury Univ.*, 486 S.W.3d 246, 259-60 (Ky. 2016). The record indicates that Sias substantially assisted Thomas's termination.

Wrongful discharge, unlike aiding and abetting discrimination in violation of KRS 344.280(2), is a common-law tort. Because wrongful discharge is a common-law tort, the holding in *Cowing, supra*, which is based on KRS Chapter 344, could not help defendants in any event. “It is well established that an agent for a corporation is personally liable for a tort committed by him although he was acting for the corporation.” *Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420, 425 (Ky. App. 1978), citing *Peters v. Frey*, 429 S.W.2d 847 (Ky. 1968); *Small v. Bailey*, 356 S.W.2d 756 (Ky. 1962). While *Cowing* may have limited individual liability under KRS Chapter 344, it cannot be read so broad as to overrule decades of tort law as recognized by the above authorities. Finally, *Cowing* disregards plain, unambiguous statutory language; it would seem not destined to last, being contrary to “the first rule of statutory interpretation ... that the text of the statute is supreme.” *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016).

As to Count 4, defendants are correct that the holding in *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425 (Ky. 2005), bars individual civil liability for Sias, Esters and Gibson under the Kentucky Whistleblower Act. *Cummings* at present is good law; whether it will remain so will likely be addressed in the Kentucky Supreme Court’s forthcoming decision in *Univ. of Kentucky, et al v. Carpenter, et al*, 2015-SC-384, which was argued on February 9.

KRS 164.350 imposes, as discussed above, fiduciary-like duties on members of the Board of Regents. The capacity of the Board to exercise effective independent oversight of the university and its administration is compromised if Board members' livelihood can be terminated merely by their termination from employment without cause whatsoever.

The public policies served by the oversight responsibilities of a university board of regents is no less important than those served by teacher or university faculty tenure, both of which require cause for termination of employment. KRS 161.790; KRS 164.230. Accordingly, as defendants did not attempt to establish cause for Thomas' termination, her termination was unlawful and contrary to public policy. Defendants' motion as to Count 5 should be overruled.

Conclusion

There are fact issues for a jury to decide and defendants' motion to dismiss and/or for summary judgment should be overruled.

Respectfully submitted,

By: /s/ Robert L. Abell

Robert L. Abell
ROBERT ABELL LAW
120 N. Upper Street
Lexington, KY 40507
859.254.7076
859.281.6541 fax

Robert@RobertAbellLaw.com
COUNSEL FOR PLAINTIFF

Certificate of Service

I hereby certify that on the 15th day of February 2017, the foregoing document was electronically filed with the Clerk of this Court using the KY eCourts eFiling system.

I further certify that a true copy of the foregoing was mailed, postage prepaid, this 15th day of February 2017 to the following:

William E. Johnson
Johnson Bearnse LLP
326 West Main St.
Frankfort, KY 40601

Mark Brengelman
306 W. Main St., Suite 503
Frankfort, KY 40601

/s/ Robert L. Abell
Counsel for Plaintiff

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/s/ Robert L. Abell
Counsel for Plaintiff