THE STATE OF AT-WILL EMPLOYMENT: EXCEPTIONS OVERTAKING THE RULE

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# TABLE OF CONTENTS

The Presenters .................................................................................................................................................. i

Private Employment and the Employment At-Will Doctrine:  
Is the "Exception" Now the Rule? ...................................................................................................................... 1

Private Employment Statutory Exceptions to At-Will Doctrine .................................................................... 9

Public Employment and the At-Will Doctrine ................................................................................................. 25
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I. **INTRODUCTION**

Kentucky has long followed the "employment at-will" doctrine. *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983). Pursuant to this doctrine, an employer or an employee may terminate an employment relationship at any time, with or without notice, for any reason, or for no reason at all. If this doctrine of employment at-will was applied universally, however, there would be no need for employment lawyers in Kentucky because an employer would never have any liability for ending a work relationship with an employee. Obviously, this is not the case in Kentucky. Rather, as most of you know, the employment at-will doctrine is subject to many exceptions. Many state and federal statutes regulate the employment relationship. These include discrimination statutes prohibiting the ending of the employment relationship based upon the employee’s race, sex, age, national origin, religion, disability and other protected categories specifically mentioned in the statute. In Kentucky, KRS Chapter 344 contains these discrimination exceptions. Other Kentucky statutes also contain exceptions to the employment at-will doctrine, including KRS Chapter 341 and 342: wage and hour provisions and workers’ compensation protections.

Another exception to the employment at-will doctrine can be found in written contracts and most collective bargaining agreements when an employer’s right to terminate a relationship is measured by whether there is "just cause" for ending it. This means the employer must prove some misconduct, incompetence, or rule infraction on the part of the employee.

A final exception has arisen from case law in Kentucky in which courts have expanded the at-will exceptions to include the "public policy exception." This exception is based on the theory that an employee may not be discharged if the discharge violates public policy. What constitutes a discharge that violates public policy is a question that courts have struggled with and continue to struggle with.

II. **CONTRACTUAL EXCEPTIONS TO EMPLOYMENT AT-WILL**

A. Introduction

The simplest exception to the employment at-will doctrine is the "contract exception." Clearly, an employer and an employee can, by contract, change the "at-will" rule. Little needs to be said about the written contract exception. Some employees have written employment agreements which discuss terms such as wages and benefits and when the employment relationship may be terminated. These written agreements most often resemble the collective bargaining agreements and usually have a "just
cause provision which call for misconduct or documented poor performance of some kind.

B. Job Offer Letters

An often-seen legal argument is that a contract has arisen from a written job offer letter. Some courts have held that such letters can constitute an employment for a fixed term. This happens when the letter does not include the typical employment at-will disclaimer that the acceptance of an offer made in the letter does not create a fixed term of employment. Offer letters are also the subject of litigation when they state an "annual" salary.

Most recent case: Carlozzi v. Perkins Law Group, 2007 WL 2893661 (Ky. App. Oct. 5, 2007). Carlozzi received a job offer letter from PLG containing the following terms: Annual salary of $40,000, contingent monthly bonus, health care benefits, paid parking, vacation time, and other benefits and options to vest at certain time periods of the employment. The job offer letter did not set out any specific duration for the employment of Carlozzi. Carlozzi was terminated in December 2001. The primary issue was whether an enforceable employment contract existed, with Carlozzi arguing that the job offer letter constituted such an agreement. Carlozzi was able to get a summary judgment reversed as to whether he had an enforceable employment agreement. Carlozzi referred to the language in the agreement relating to the long term plans of PLG. Coupled with an affidavit in which he referred to oral promises made to him by a PLG partner concerning "the guarantee of employment as long as he wished to remain," and Carlozzi was able to prevail on this argument.

C. Handbooks

Just about every employer in Kentucky now has an employee handbook. It is the first item requested in employment litigation because it is the employer’s written statement of their policies. It is like taking the deposition of the employer without ever having questioned them. The handbook most always will contain a summary of disciplinary policies, and, just as often, will set out any reasons for termination of employment. Just as the employer’s lawyer thought those policies were being drafted to aid an employer in terminating an employment relationship by specifically spelling out the rules of the road, an employee’s lawyer will use those written policies to argue that the rules were not specifically followed and therefore, the termination is unlawful.

Kentucky courts have provided guidance on this issue. See Norris v. Filson Care Home Ltd., 1990 WL 393903 (Ky. App. Jan. 26, 1990); Nork v. Fetter Printing Company, 738 S.W. 2d 824 (Ky. App. 1987). Where a handbook has plainly stated that it is not a contract of employment, and that the relationship remains at-will, Kentucky courts have enforced the disclaimer and have ruled the handbook not a binding contract. A safe bet for an employee handbook is to contain express language that its
provisions are guidelines only, which the company may attempt to follow but reserves the right to change, and that nothing therein will alter the employment at-will relationship. Individual signed acknowledgements of handbooks which indicate that the employment can be terminated at-will are also a must.

D. Employment Applications

A disclaimer in the employment application itself that employment can be terminated at-will by either side has proven useful in litigation and has been relied upon by the Kentucky Court of Appeals in dismissing a wrongful discharge claim. Norris v. Filson Care Home, Ltd., 1990 WL 393903 (Ky. App. Jan. 26, 1990).

E. Case Law Interpreting Written Materials of the Employer

Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983) is the most well-known case involving contractual exceptions. Shah, an engineer, was recruited to work for a Kentucky business and left another employment where he had eleven years of service. He alleged that the human resources manager told him that after a ninety day probation period, he would become a "permanent" employee who could be discharged only "for cause." The Kentucky Supreme Court ruled in Shah’s favor, holding that a company and employee may enter into a contract of employment that can be terminated only for cause, even where it is not in writing and the only obligation on the part of the employee is to provide future services. Language from Shah at page 490:

The duration of the employment contract must be determined by the circumstances of each particular case, depending upon the understanding of the parties as ascertained by inference from their written or oral negotiations and agreements, the usage of business, the situation and objectives of the parties, the nature of the employment, and all circumstances surrounding the transaction.

Norris v. Filson Care Home, Ltd., 1990 WL 393903 (Ky. App. Jan. 26, 1990). Employee fills out application for nursing home aide. Employee handbook talks in terms of probationary period, where employee could be terminated for any reason, yet the handbook was confusing as to what would happen after three months of employment. Court held claim had been made.

Nork v. Fetter Printing Co., 738 S.W. 2d 824 (Ky. App. 1987). Court held three different claims involving employee handbook did not change the at-will relationship.

Jackson v. JB Hunt Transport, Inc., 384 S.W.3d 177 (Ky. App. 2012). Court refused to expand the wrongful discharge cause of action to a case
in which an employee was discharged pursuant to an employer’s substance abuse policy. JB Hunt’s employment materials are replete with references to the fact that it is an employment at-will employer. These references are contained in its applications, handbooks and substance abuse policy. JB Hunt implemented a substance abuse policy pursuant to federal law which did not mandate the establishment of such policy, but indicated if it were established, it should comply with the federal guidelines. JB Hunt implemented the policy which allowed a driver to self report substance abuse, without the fear of termination. Jackson self reported cocaine abuse, began the rehabilitation program, and then tested positive for cocaine while in the program. JB Hunt terminated Jackson after the positive test and he brought this lawsuit. Jackson alleged he had been wrongfully discharged and first attempted to argue the "contractual exception" to the at-will doctrine. The Court held that JB Hunt had placed a specific disclaimer in its substance abuse policy, as well as in its handbook as a whole. Jackson then attempted to tie his termination to a statutory provision as related to the voluntary self-reporting program. The Court found that the exception did not apply because there was no evidence that Jackson had been asked to violate a statutory or constitutional provision.

Kallick v. U.S. Bank National Ass'n., 2012 WL 5178152 (E.D. Ky. Oct. 18, 2012). This case involved a realtor who left a lucrative practice to become a banker. He began training for the job, surrendered his practice, and within three months was terminated. Kallick alleged a contractual exception to the at-will doctrine existed based upon his circumstances. The Court refused to apply an execution, stating there had been no offer of employment for an indefinite period with a covenant not to fire without just cause.

III. PUBLIC POLICY EXCEPTIONS TO THE AT-WILL DOCTRINE

Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985) is the Kentucky Supreme Court decision which outlined the public policy exception to the at-will doctrine. The employee had been allegedly terminated for socializing with a female employee. The employee claimed that such a termination violated public policy because it denied him his constitutional right to freedom of association. The Kentucky Supreme Court rejected his argument, but stated that under certain limited circumstances an employee may pursue a public policy wrongful discharge claim.

The Grzyb Court determined that such an action may proceed where (1) the discharge is contrary to a fundamental and well-defined public policy (2) that is set out in either a constitutional or statutory provision. The Court further held that "public policy" protects employees from wrongful discharge in only two narrow circumstances:

- Where the employee’s termination is caused by his or her refusal to violate a law while employed; or
Where the discharge resulted from the employee’s exercise of rights conferred by well-established legislative enactments.

Wrongful discharge cases based upon the public policy exception have been litigated many times over the years since Gryzb.

Case Law Interpreting the Public Policy Exception

Gadladge v. Winters & Yonker, Attorneys at Law, P.S.C., 2012 WL 777290 (W.D. Ky. Mar. 8, 2012), refused to expand the basis for a wrongful discharge claim to a situation involving a discharged attorney. The issue was whether a violation of a Kentucky Supreme Court Rule could form the basis for a wrongful discharge case as a public policy exception to the employment at-will doctrine. Gadladge argued that the Kentucky Supreme Court Rules could be tied to both the Kentucky Constitution and the Kentucky Revised Statutes and that a violation of those Rules would be contrary to (1) a fundamental and well-defined public policy (2) that is set out in either a constitutional or statutory provision. Judge Heyburn specifically rejected the arguments, noting that the Kentucky Supreme Court Rules are neither statutes nor constitutional provisions.

**Gadladge** did note that there was an unpublished Jefferson Circuit Court decision, Rigor v. Isaacs & Isaacs, PSC, No. 05-CI-7688 (9th Div. Oct 18, 2010), in which the Jefferson Circuit Court held that the Kentucky Supreme Court Rules do embody public policy and that an attorney discharged for refusing to violate a Rule can make a claim for wrongful discharge. Judge Heyburn did not view this decision as binding since it was an unpublished decision and his obligation was to look to the law of the highest court of the state.

Jones v. Metal Management of Nashville, LLC, 2009 WL 1852737 (W.D. Ky. Jun. 25, 2009), involved a commercial truck driver who refused to perform an additional drive because he was fatigued and believed it to be an unlawful request since he would exceed the daily number of hours he could drive. Jones was discharged for refusing to make the drive. Jones alleged wrongful discharge, claiming KRS 281.730 provided the authority to the Transportation Cabinet to adopt safety rules. The Court refused to expand the exception.

Burke v. Shelby Energy Co-op, Inc., 2012 WL 1649107 (Ky. App. May 11, 2012), involved a wrongful discharge claim in which the Court refused to extend the exception to an employee who provided confidential documents to a terminated employee who had sued the employer. In a novel argument, the newly terminated employee argued that she had been fired for exercising her right to assist in the filing of a complaint. The Court noted that there is no whistleblower claim in private employment.

Mendez v. University of Kentucky Bd. of Trustees, 357 S.W.3d 534 (Ky. App. 2011), involved an attempt by a former computer technician to extend the exception to a dismissal allegedly based upon his speech concerning cartoons of the prophet Mohammed in the Danish press. The Court found the speech concerning the cartoons was not constitutionally protected.
Combs v. Administrative Office of the Courts, 2010 WL 1404366 (Ky. App. Apr. 9, 2010), involved the discharge of a long term, twenty-three year employee, who served as a pretrial release officer. Combs claimed she was terminated when preferential treatment was given to the son of a Kentucky Supreme Court Justice. The Court refused to extend the exception to her argument that the Kentucky Court of Justice Personnel Policies or Judicial Conduct Code provided her with a basis for wrongful discharge.

Miller v. Reminger Co., L.P.A., 2012 WL 2050239 (W.D. Ky. Jun. 6, 2012) is another case involving the legal arena. Miller left one law firm to join a second one. Shortly, thereafter, Miller claimed one of his clients approached him complaining of billing irregularities. Miller claimed that he then complained about the way the billing to his clients was being handled. Later on, a number of comments were allegedly made at a November 2010 retreat, followed by Miller being told that the law firm was parting ways with him for "cultural reasons." A number of claims were brought, including a public policy wrongful discharge claim. The Court went through the regular analysis and refused to dismiss the claim, instead finding that Miller's claim he had been terminated for refusal to violate the law of theft by deception stated a claim.

Jackson v. JB Hunt Transport, Inc., 384 S.W.3d 177 (Ky. App. 2012). This case was bought under both the contract exception and public policy exception to the at-will doctrine. Court refused to expand the wrongful discharge cause of action to a case in which an employee was discharged pursuant to an employer's substance abuse policy. JB Hunt's employment materials are replete with references to the fact that it is an employment at-will employer. These references are contained in its applications, handbooks and substance abuse policy. JB Hunt implemented a substance abuse policy pursuant to federal law which did not mandate the establishment of such policy, but indicated if it were established, it should comply with the federal guidelines. JB Hunt implemented the policy which allowed a driver to self-report substance abuse, without the fear of termination. Jackson self-reported cocaine abuse, began the rehabilitation program, and then tested positive for cocaine while in the program. JB Hunt terminated Jackson after the positive test and he brought this lawsuit. Jackson alleged he had been wrongfully discharged and first attempted to argue the "contractual exception" to the at-will doctrine. The Court held that JB Hunt had placed a specific disclaimer in its substance abuse policy, as well as in its handbook as a whole. Jackson then attempted to make a public policy argument. He attempted to tie his termination to a statutory provision as related to the voluntary self-reporting program. The Court found that the exception did not apply because there was no evidence that Jackson had been asked to violate a statutory or constitutional provision.

Hill v. Kentucky Lottery Corp., 327 S.W. 3d 412 (Ky. 2010), holding that the statutory provision which establishes the "public policy" does not have to be directly related to protecting an employee or conferring rights on an employee when the claim is the employee was fired for refusing to violate the statute. This claim was based on an employee's refusal to violate a perjury law. This case contains an excellent analysis of the wrongful discharge "public policy" exception in Kentucky.
Mitchell v. University of Kentucky, 366 S.W.3d 895 (Ky. 2012). In a well-known case, a UK employee, who had a license to carry a concealed weapon, was terminated for having the weapon in his vehicle, in his glove compartment, which was parked on a university parking lot at Commonwealth Stadium. UK terminated the employee pursuant to its policy that prohibited the possession of deadly weapons on UK property while conducting UK business.

The Court addressed the narrow question of whether any fundamental and well-defined public policy limited UK from controlling the possession of weapons on its campus. The Court focused on the language of the concealed weapons statute and concluded UK had violated Mitchell’s right to bear arms with his termination, provided he had kept the weapon stored in his vehicle.
Private employers are charged with complying with a large and growing number of federal and state statutes which provide employees grounds for challenging adverse employment actions, including termination, as discriminatory or retaliatory. The statutes typically prohibit treating employees differently because of a particular protected characteristic such as gender or race, and protect employees from retaliation. The following is designed to provide (1) an overview of federal and state statutory exceptions to the at-will doctrine\(^2\), (2) the general legal framework employed in discrimination and retaliation cases, and (3) recent trends.

I. STATE AND FEDERAL LAWS

Some of the most common federal and state laws protecting employees are set forth below.

In addition, state and federal laws often provide overlapping protections which can result in preemption issues that limit common law claims. For example, the National Labor Relations Act (NLRA) prevents employers from retaliating or discharging an employee because they have engaged in union activity. The Kentucky Supreme Court has held that a claim of wrongful discharge based on participation in union organizing activities falls squarely under 29 U.S.C. §§157 and 158; and therefore, exclusive jurisdiction resides with the National Labor Relations Board. Methodist Hospital of Kentucky, Inc. v. Gilliam, 283 S.W.3d 654, 656-657 (Ky. 2009). Similarly, some statutes provide only for an administrative remedy and do not provide an employee with a civil cause of action. For example, both Kentucky OSHA and federal OSHA contain anti-retaliation provisions. KRS 338.121; 29 U.S.C. §660(c). Both statutes also require employees to first file administratively within specific time limits. Significantly, failure to file within the time limits bars later common law claims. Lawrence v. Bowling Green-Warren County Community Hospital Corp., 2003 WL 22359518 (Ky. App. 2003), citing Hines v. Elf Atochem North America, Inc., 813 F.Supp. 550 (W.D. Ky. 1993), aff'd, 47 F.3d 1169 (6th Cir. 1995) (finding that OSHA and KOSHA preempts a claim of wrongful discharge in violation of public policy because both provide a structure for employees to pursue alleged violations).

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\(^1\) Kentucky common law exceptions are addressed in additional materials submitted as part of this presentation.

\(^2\) “Ordinarily an employer may discharge [an] at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.” Grzyb v. Evans, 700 S.W.2d 399, 400 (Ky. 1985).
A. State Laws

1. Kentucky Civil Rights Act, KRS Chapter 344 et seq. – prohibits discrimination and retaliation based on color, religion, sex, disability, familiar status and national origin, and includes protection for smokers.

2. Kentucky Wage and Hour Act, specifically KRS 337.990(9) – prohibits discrimination or retaliation against an employee who makes a complaint or participates in enforcement proceedings. KRS 337.415 prohibits discharge of an employee for taking time off to appear at an administrative tribunal or hearing.

3. Kentucky Equal Pay Act (KEPA), KRS 337.423 – prohibits discrimination in payment of wages on the basis of sex and retaliation against an employee for invoking or assisting in enforcement of KEPA.

4. Workers’ Compensation Retaliation, KRS 342.197(1) – prohibits retaliation against an employee who has invoked the protections under the Workers’ Compensation Act.

5. Garnishment, KRS 427.140 – prohibits discharge because the employee's earnings have been subjected to garnishment for any one (1) indebtedness.

6. KRS 237.106(4) – provides a civil cause of action for discharge or retaliation to an employee who is lawfully exercising a right to possess a firearm. See Mitchell v. Univ. of Kentucky, 366 S.W.3d 895 (Ky. 2012).

7. Occupational Health and Safety, KRS 338.121 – prohibits retaliation against an employee who has raised health and safety concerns in the workplace.

B. Federal Law


4. Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(d) – prohibits discrimination based on age or retaliation against an employee who makes a charge, testifies, assists, or participates in
any manner in any investigation, proceeding or litigation related to the ADEA.


5. The Family and Medical Leave Act (FMLA), 29 U.S.C. §2601(b)(1)-(5) – prohibits discrimination and retaliation because an employee invokes the leave benefits under the FMLA.

6. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4311(a) and (b) – provides discrimination and retaliation protections for members of the military.

7. The Equal Pay Act (EPA), 29 U.S.C. §206 – prohibits discrimination in payment of wages on the basis of sex and retaliation against an employee for invoking or assisting in enforcement of the EPA.

8. Fair Labor Standards Act (FLSA), 29 U.S.C. §215(a)(3) – prohibits an employer from discharging or discriminating against an employee for asserting rights under the FLSA.

9. National Labor Relations Act, 29 U.S.C. §§157 and 158 (a)(2) – provides right to organize and join unions and makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights, including right to engage in concerted activities for the purpose of collectively bargaining and other mutual aid or protection.

10. Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. §2000ff to 2000ff-11 – prohibits discharge or discrimination based on individual's genetic information or retaliation against an employee who has opposed any act or practice made unlawful by GINA, or participated in a proceeding under the law.

11. Sarbanes-Oxley Act of 2002, 29 U.S.C. §§1021, 1131, 1132 – prohibits discharge or retaliation against an employee who provides evidence of fraud or assists in an investigation regarding any conduct which the employee reasonably believes to violate the law relating to securities or fraud against shareholders.

12. Patient Protection and Affordable Health Care Act, 29 U.S.C. §218c(a)(1)-(5) – effective 2014, protects employees from discrimination based on receipt of tax credits and subsidies. Furthermore, the FLSA, as amended by the Health Care Reform Act, protects employees who provide information regarding potential violations of the law, testify or about to testify in a proceeding, assist in a proceeding or object to or refuse to partici-
pate in any activity, policy, practice or assigned task that they reasonably believe to be in violation of the law, or any order, rule, regulations.


18. Surface Transportation Assistance Act of 1982, 49 U.S.C. §31105(a) – protects employees of interstate trucking firms, including drivers and mechanics, from adverse employment actions for refusing to operate an unsafe truck (has a reasonable apprehension of serious injury to themselves or the public because of the vehicle's unsafe condition) or for alleging that their employers have failed to comply with state or federal safety laws.

II. LEGAL FRAMEWORK GENERALLY APPLICABLE TO STATUTORY CLAIMS

A. The McDonnell Douglas\(^3\) Burden Shifting Test

A plaintiff seeking to recover based on a violation of an employment-related statute must utilize either a direct evidence or a circumstantial evidence approach. Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492 (Ky. 2004); Blair v. Henry Filters, Inc., 505 F.3d 517, 523 (6th Cir. 2007). When a plaintiff establishes discrimination or retaliation through direct evidence, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive. Minadeo v. ICI Paints, 398 F.3d 751, 763 (6th Cir. 2005). In contrast, circumstantial evidence is proof that does not on its face establish discriminatory animus, but does allow a fact finder to draw a reasonable inference that discrimination occurred. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 570 (6th Cir. 2003).

Direct evidence has been defined by the Sixth Circuit as evidence that proves the existence of a fact without requiring any inferences. Blair, 505 F.3d at 523. Although statements by employers can constitute direct evidence of discrimination, not every such statement amounts to direct evidence. "[T]o prevail based on direct evidence, plaintiff must show that the defendant employer acted on its discriminatory animus, not just that it possessed one." Suits v. The Heil Co., 192 Fed. Appx. 399, 403 (6th Cir. 2006) (citing DiCarlo v. Potter, 358 F.3d 408, 415 (6th Cir. 2004); Hein v. All America Plywood Co., 232 F.3d 482, 488 (6th Cir. 2000)). The Sixth Circuit recognizes that stray comments, ambiguous statements, and assertions that are unrelated to the decisional process do not constitute direct evidence of discrimination. See Coburn v. Rockwell Automation, Inc., 238 Fed. Appx. 112, 118 (6th Cir. 2007) ("There is a vital difference between comments which demonstrate a discriminatory animus in the decisional process and stray remarks made by non-decisionmakers.") (citation omitted); Rowan v. Lockheed Martin Energy Sys., Inc., 360 F.3d 544, 550 (6th Cir. 2004) ("Statements by non-decisionmakers, or statements by decision makers unrelated to the decisional process itself cannot suffice to satisfy the plaintiffs' burden . . . .") (citation omitted); Phelps v. Yale Sec., Inc., 386 F.2d 1020, 1025 (6th Cir. 1993) ("Isolated and ambiguous comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of . . . discrimination."). Kentucky courts have held similarly. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 710 (Ky. App. 2004); Plucinski v. Cmty. Action Council, 2012 WL 1139319 (Ky. App. Apr. 6, 2012) ("Plucinski admits in her brief that the phrase 'cultural differences' may be interpreted in many ways. Certainly, a phrase that is open to interpretation cannot meet the definition of direct evidence to establish Plucinski's disparate treatment claim. Rather, the phrase constitutes no more than circumstantial evidence, at best. Therefore, we reject Plucinski's claim that she has established direct evidence of discrimination.").

Absent direct evidence, a plaintiff must establish a prima facie case of discrimination via circumstantial evidence. In order to establish a prima facie case, a plaintiff must prove that: (1) he/she is in a protected category; (2) he/she was qualified for her job; (3) he/she was subjected to an adverse employment action; and (4) there is a nexus between the protected characteristic and the adverse employment action. Tysinger v. Police Dept. of City of Zanesville, 463 F.3d 569, 573 (6th Cir. 2006). In order to establish a prima facie case of retaliation, a plaintiff must establish that: (1) he/she engaged in activity protected by the statute; (2) his/her employer knew about her engagement in protected activity; (3) thereafter, his/her employer took adverse employment action against her; and (4) there is a causal connection between the protected activity and the adverse employment action. See Russell v. Univ. of Toledo, 537 F.3d 596, 609 (6th Cir. 2008). See also Brooks v. Lexington-Fayette Urban County Housing Auth., 132 S.W.3d 790, 803 (Ky. 2004). If a plaintiff is able to establish a prima facie case, the burden of production then shifts to the defendant, who must articulate a legitimate, non-discriminatory reason for its actions. Russell, 537 F.3d at 609. Upon a defendant's articulation of a reason, a plaintiff bears the burden of persuasion
throughout the remainder of the entire process and must demonstrate that the defendant's proffered reason was pretextual. 4  Id.

III. RECENT TRENDS

A. Retaliation Claims: What Is Protected Activity?

A threshold question in any retaliation claim is whether the employee engaged in protected activity. Mistaken belief, or an employee whose report is not substantiated, does not prevent liability under most retaliation statutes.


At oral argument, the Government said that a complaint is "filed" when "a reasonable, objective person would have understood the employee" to have "put the employer on notice that [the] employee is asserting statutory rights under the [Act]." Tr. of Oral Arg. 23, 26. We agree. To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.

However, under the FLSA, an employee does not engage in protected activity when he or she complains of an alleged FLSA violation, if making such a complaint is in furtherance of his or her job duties. McKenzie v. Renberg's Inc., 94 F.3d 1478 (10th Cir. 1996).

The Sixth Circuit and Kentucky law also hold that employees do not need to file formal charges in order to establish they have engaged in protected activity, but they must do more than make a vague charge of discrimination.

We are mindful that "an employee need not file a formal EEOC complaint to engage in protected activity – rather it

4 Because the KCRA mirrors Title VII, courts use the federal standards for evaluating discrimination and retaliation claims. See Smith v. Leggett Wire Co., 220 F.3d 752, 758 (6th Cir. 2000). See also Brooks, 132 S.W.3d 790 at 797 (applying federal standards to plaintiff's discrimination claim brought pursuant to the KCRA); Mountain Clay, Inc. v. Comm'n on Human Rights, 830 S.W.2d 395, 396 (Ky. App. 1992). Because the KCRA is virtually identical to the Federal Civil Rights Act of 1964, Kentucky courts may consider how federal law has been interpreted. Jefferson County v. Zaring, 91 S.W.3d 583 (Ky. 2002), citing Harker v. Federal Land Bank of Louisville, 679 S.W.2d 226 (Ky. 1984).
is the assertion of statutory rights that triggers protection under the [Act]'s anti-retaliation provision." Fox v. Eagle Distributing Co., Inc., 510 F.3d 587, 591 (6th Cir. 2007). In Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1313 (6th Cir. 1989), the Court explained: An employee may not invoke the protections of the Act by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employee inserting a charge of discrimination.

Even viewed most favorably to Walthall, we cannot conclude that her statements to Alexander were statements made in opposition to a discriminatory employment practice. Because Walthall was not engaged in an activity protected by the KCRA, she failed to establish a prima facie case of retaliation pursuant to KRS 344.280(1).


A person may also be deemed to have engaged in protected activity as a result of their close association with a person who has filed a charge or engaged in protected activity. Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868 (U.S. 2011). In Thompson, the employee filing suit against his former employer was, at the time of his discharge, engaged to a co-worker who had filed a complaint of discrimination against the employer. The U.S. Supreme Court upheld his claim, finding that he was a "person aggrieved" who fell within the "zone of interests" protected by Title VII.

The anti-retaliation provision of Title VII forbids an employer from "discriminat[ing] against" an employee because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. See 42 U.S.C. §2000e-3(a); KRS 344.280 ("opposed a practice declared unlawful by this chapter...").

In contrast, Title VII's antiretaliation provision prohibits an employer from "discriminat[ing] against any of his employees" for engaging in protected conduct, without specifying the employer acts that are prohibited. Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, at 62 (quoting §2000e-3(a) (emphasis deleted)). Based on this textual distinction and our understanding of the antiretaliation provision's purpose, we held that "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Id., at 64. Rather, Title VII's antiretaliation provision prohibits any employer action
that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.*, at 68, (internal quotation marks omitted).

As explained above, we adopted a broad standard in *Burlington* because Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text.


B. Retaliation: What Is an Adverse Action?

To be actionable as retaliation under the KCRA, "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." *Brooks*, 132 S.W.3d 790 at 802. Under the teachings of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), for conduct to become actionable retaliation, "[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.* at 68. "[N]ormally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id.* *James v. Metropolitan Gov. of Nashville, et al.*, 243 Fed.App'x 74 (6th Cir. 2007), is similar.

However, it is also true that none of these things James complained about significantly affected her professional advancement. James continued to work and she received the same pay despite her Title VII claims. She also continued to receive the bad evaluations, but those were not markedly worse than earlier ones and the evaluations did not affect her earnings. Her employment conditions were essentially unchanged after she filed with the EEOC. James' allegations are not actionable because they failed to significantly impact her professional advancement....

*Id.*, at 79. See also *Hunter v. Secretary of United States Army*, 2009 WL 1361924 (6th Cir. 2009) (four alleged acts of retaliation deemed of a *de minimus* nature and amount to nothing more than petty slights); *Lahar v. Oakland County*, 304 Fed. App'x 354 (6th Cir. 2008) (no adverse action where plaintiff failed to show lowered evaluation or reprimand affected wages or prospects for advancement).

Similarly, *Burlington Northern* also provides that, the proper standard is the "reactions of a reasonable employee," in view of the "uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's subjective feelings." *Burlington Northern*, 548 U.S. 53 at 68-69.
The case of Watson v. City of Cleveland, 202 Fed. App'x 844 (6th Cir. 2006), is illustrative.

Under the circumstances of this case, Watson was not subjected to an adverse employment action. Watson lost responsibility for two EEO investigations, was excluded from some meetings, and did not receive a raise. In context, these actions would not dissuade a reasonable employee from invoking the protections of Title VII. A reasonable employee would not have found these actions materially adverse. A reasonable employee would have realized that Watson's responsibility for the two EEO investigations was taken away to prevent a conflict of interest and that Watson's exclusion from meetings was an oversight or reflected that the meetings were unrelated to Watson's work for the City. Likewise, a reasonable employee would have realized that Watson did not receive a raise because raises were given in conjunction with promotions or in commemoration of long-term service to the City. Given that a reasonable employee would not have found the actions Watson complains of materially adverse, the defendants are entitled to summary judgment on her retaliation claim.

*Id.* at 855. In addition, the Kentucky Court of Appeals, in a 2010 unpublished case, echoes the standards articulated in *Burlington Northern* and the Sixth Circuit.

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 the chapter." (Emphasis added). Unlawful retaliation under the KCRA is consistent with the interpretation of unlawful retaliation under federal law. Under federal law, a "plaintiff must identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII." *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999). 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 *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993). Further, 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."


C. New Federal Legislation Includes Whistleblower Protections

The U.S. Department of Labor launched a "Whistleblower Protection Advisory Committee" in late 2012 to advise, consult and make recommendations to the secretary of labor and the assistant secretary of labor for occupational safety and health on ways to improve the fairness, efficiency, effectiveness and transparency of OSHA’s whistleblower protection programs. Significantly, OSHA enforces the whistleblower provisions of OSHA and twenty-one other statutes protecting employees who report reasonably perceived violations of various workplace, commercial motor vehicle, airline, nuclear, pipeline, environmental, rail-road, public transportation, maritime, consumer product, health care reform, corporate securities, food safety and consumer financial reform regulations. Additional information is available at http://www.whistleblowers.gov.

Providing for whistleblower protections in new federal laws has quickly become the norm.

1. Patient Protection and Affordable Health Care Act

In 2010, President Obama signed into law the Patient Protection and Affordable Health Care Act (Health Care Reform Act). Among other things, the Health Care Reform Act extended employee protections under the FLSA. The Act protects from discrimination employees who receive a credit under §36B of the Internal Revenue Code of 1986, or a subsidy while enrolled in a qualified health plan through a health-insurance exchange. According to the DOL, "Certain large employers who fail to offer affordable plans ... may be assessed a tax penalty if any of their full-time employees receive a premium tax credit through the Exchange. Thus the relationship between the employee's receipt of a credit and the potential tax penalty imposed on an employer could create an incentive for an employer to retaliate against an employee." 78 _Fed. Reg._ 13222, Feb. 27, 2013

In addition to the protections for employees who receive tax credits and subsidies, §218c protects employees who provide information regarding potential violations of the Health Care Reform Act's Title I which includes a range of insurance company accountability policies such as: [t]he prohibition of lifetime dollar limits on coverage, the requirement for most plans to cover recommended preventative services with no cost sharing, etc. Employees also are protected if they: testify or are about to testify.
in a proceeding concerning a violation of Title I; assist, participate, or are about to assist or participate in such a proceeding; or object to or refuse to participate in any activity, policy, practice, or assigned task that they reasonably believe to be in violation of Title I, or any order, rule, regulation, standard, or ban under the title. 29 U.S.C. 218(c)(a)(3)-(5).

An employee seeking to enforce his or her rights under this law may seek relief in accordance with the procedures, notifications, burdens of proof, remedies, and statutes of limitation set forth in the whistleblower protection portion of the Consumer Product Safety Act, 15 U.S.C. §2087(b). See also 29 C.F.R. Part 1984. Employees have 180 days from the date of the violation to file a complaint with the Secretary of Labor. If, after several intervening administrative steps, the secretary determines that a violation occurred, the person who committed the violation must take affirmative action to abate the violation; reinstate the complainant to his or her former position, with back pay; and pay compensatory damages. In the event that the complaint was found to be frivolous or was brought in bad faith, the secretary may require the employee to pay the employer a reasonable attorneys' fee, up to $1,000.

If the secretary does not issue a final decision within 210 days after the filing of the complaint, or within ninety days after receiving a written determination, the complainant may file an action in the appropriate United States District Court. The district court may grant all relief necessary to make the employee whole, such as injunctive relief and compensatory damages, including reinstatement, back pay with interest, and special damages. Unless the complainant brings an action in federal court, any person adversely affected by the secretary's final order may obtain review in federal appeals court.


The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203), which became effective July 22, 2010, was enacted in an effort to reform the financial services industry. A part of this reform included providing more elaborate and effective whistleblower provisions so as to encourage whistleblowing and provide better protection for whistleblowers who report fraud and other illegal activities in the commodity and stock exchanges.

Under §748 of the Act, any whistleblower who (1) voluntarily (2) provides "original" information (3) that leads to a successful enforcement action or actions in federal court or before an agency (4) in which overall recovery totals over $1,000,00.00 is entitled to an award equal to no less than 10 percent and no more than 30 percent of the monetary sanction collected in the action. 15 U.S.C. §78u-6.
There are exemptions for certain employees – such as attorneys, auditors, and internal compliance officer – from eligibility for an award. But exceptions to this rule include situations where the attorney-client privilege has been waived or if disclosure is permissible under applicable state laws or ethics laws. 17 C.F.R. §240.21F-4(b)(4)(v).

Dodd-Frank expands the Sarbanes-Oxley (SOX) Act whistleblower protection. Under 18 U.S.C. §1514A, employers are prohibited from discharging, demoting, suspending, threatening, harassing, or in any manner discriminating against a whistleblower who has provided information to the SEC; initiated, testified or assisted in any investigation or judicial or administrative action of the SEC; or made disclosures that are required or protected under the Sarbanes-Oxley Act of 2002. If an employee is the victim of retaliation, there is a new private right of action allowing the employee to bring a claim against his or her employer in federal court with a right to a jury. The employee may seek remedies in the form of reinstatement, double back pay with interest, and compensation for litigation costs, expert witness fees, and attorneys' fees. Dodd-Frank also amends the Sarbanes-Oxley Act by increasing the amount of time that an employee alleging retaliation has to file a complaint with the Secretary of Labor from ninety days to 180 days.

The Act also adds three new causes of action. It protects employees who report potential violations of the Commodity Exchange Act to the CFTC (7 U.S.C. §26), and employees who report potential violations of federal banking laws to their employers, the newly created Bureau of Consumer Financial Protection, or other government authorities (12 U.S.C. §5567). Finally, it provides protection to employees who (a) report potential violations to the SEC or cooperate with an investigation, (b) make any disclosures "required or protected" under any statute or rule dealing with securities (including SOX), or (c) provide law enforcement officials with "any truthful information relating to the commission or possible commission of any federal offense". 18 U.S.C. §1513(c).

Commentators have noted the substantial benefits to bringing retaliation claims under Dodd-Frank rather than SOX. An increased statute of limitations, ability to immediately file in federal court, recovery of double back pay, a provision that prevents employers from enforcing confidentiality agreements to prevent whistleblower employees from cooperating with the SEC, and the potential for enforcement action by the SEC.
D. National Labor Relations Board's Increased Involvement in Non-Union Private Employment Settings

The National Labor Relations Board (NLRB) is showing increased interest in private non-union employers' activities which it believes infringes on employees' Section 7 rights. 29 U.S.C. §157. Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." As such, overbroad work rules, including social media policies and at-will policies, as well as disciplinary actions based on those work rules, can be challenged under the NLRA.

1. Disciplinary action based on Facebook or other social media postings.

An employer runs the risk of violating the NLRA when disciplining an employee for negative remarks made about the organization or company on a blog, message board, or other social media outlet because such communications could be deemed protected "concerted activity."

For example, the first such case and one that was eventually was settled, involved an employee who was fired after posting negative remarks on her Facebook page about her supervisor. The employer claimed the employee's posting violated its policy on blogging and internet use. However, National Labor Relations Board's Hartford, Conn., office issued an unfair labor practice complaint alleging that the company policy was overly broad because it prevented employees from engaging in protected concerted activity. Am. Med. Response of Conn., NLRB Reg. 34, No. 34-CA-12576 (2010).

Although the employee's remarks about her supervisor were extremely negative, the employee did not lose protection of the Act because the Facebook posting did not interrupt any work, the posting was done outside of work, and the online discussion employees had about supervisory action was clearly protected activity. Also, the employee's negative comments were not verbally or physically threatening and the board found that the employee's reaction was prompted by an unfair labor practice committed by the employer. Id.

Another example is the case of Karl Knauz Motors Inc., 358 N.L.R.B. No. 164, (September 28, 2012). In this case, the NLRB held that a car salesman's Facebook postings about his employer were not protected. The BMW dealership held an event, after which, the salesman in question posted a series of comments regarding the type of food served at the event and ridiculed management. The following week, the salesman posted
photographs of an accident that occurred on the premises. The postings regarding the sales event were protected, but the Board found that the discharge was the result of the potentially serious accident. The latter had no connection to any of the employees' terms and conditions of employment. Therefore, the discharge was lawful.

2. Overbroad work rules.

The NLRB's Office of the General Counsel issued an operations memorandum on May 30, 2012 reporting on social media and related issues. Memorandum OM 12-59 provides the following:

As explained in my previous reports, an employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to determine if a work rule would have such an effect. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. *See University Medical Center*, 335 F.3d 1079 (D.C. Cir. 2003). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful. *See Tradesmen International*, 338 NLRB 460, 460-462 (2002).

Memorandum OM 12-59 also provides examples of problematic provisions in social media or at-will policies:

- Don't release confidential guest, team member or company information. . . .

According to the Acting General Counsel, this instruction that employees not "release confidential guest, team member or company information" would reasonably be interpreted as prohibiting
employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves—activities that are clearly protected by Section 7.

- Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.

- Watch what you say. Don't have conversations regarding confidential information in the breakroom or in any other open area. Never discuss confidential information at home or in public areas. Unauthorized access to confidential information: If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information. . . . We’re serious about the appropriate use, storage and communication of confidential information. A violation of [Employer] policies regarding confidential information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.

According to Memorandum OM 12-59, the provisions instructing employees not to share confidential information with coworkers unless they need the information to do their job, and not to have discussions regarding confidential information in the breakroom, at home, or in open areas and public places are overbroad. Employees would construe these provisions as prohibiting them from discussing information regarding their terms and conditions of employment. Indeed, the rules explicitly prohibit employees from having such discussions in the breakroom, at home, or in public places—virtually everywhere such discussions are most likely to occur.

The memorandum also finds unlawful the provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. Those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since those rules were unlawful, the reporting requirement is likewise unlawful.
In addition, the NLRB recently found that at-will or confidentiality policies can also have a chilling effect on employees' NLRA rights. On July 20, 2012, the NLRB issued Banner Health System d/b/a Banner Estrella Medical Center, 358 NLRB 93 (2012), which held that an employer may not maintain a blanket policy forbidding employees from discussing ongoing investigations of employee misconduct. Two recent cases have also focused on at-will disclaimers. On February 1, 2012, an administrative law judge found that the American Red Cross – Arizona Blood Services Region's employment manual (which stated that the at-will relationship couldn't be amended, modified or altered) violated Section 7 because it could discourage employees from organizing to challenge their at-will status. American Red Cross Arizona Blood Services Region, Case 28-CA-23443. Following this decision, the Acting General Counsel issued a complaint in a case against Hyatt Hotels Corp., Case 28-CA-061114, alleging that the hotel's at-will statement, which advised employee that the only way to alter their at-will statute was through a signed writing between the employee and either Hyatt's executive vice president or president, violated Section 7. This case settled prior to decision on May 24, 2012.
Public employment is generally subject to the same "at-will" doctrine that applies to private employment. There are exceptions that limit the application of the "at-will" doctrine where: (1) a right to continued employment is recognized under state law; (2) where liberty interests are implicated by the manner in which a termination occurs; or (3) where substantive constitutions rights are adversely effected.

I. PROTECTED PROPERTY INTERESTS AND DUE PROCESS

A recognized exception to public "at-will" employment occurs when the employee has a protected property interest in the job. Protected property interests in employment are only created by state law.

A. Scope of Fifth and Fourteenth Amendment Protected Interests

Fifth Amendment provides that no person may be "deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569-570 (1972).

B. Look to State Law for Scope of Protected Interests


Such interests do not arise from the Constitution itself, but rather, 'are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'

Id. at 564 (quoting Roth, 408 U.S. at 577) and see, Albrecht v. Treon, 617 F.3d 890, 894 (6th Cir. 2010).
C. Sources of Protected Property Interests

The "independent source" of the protected property interest may be found in state law rules or understandings. Bishop v. Wood, 426 U.S. 341, 344 n. 7 (1976).

If such an interest is recognized by state law, then the employee possesses a property interest. The public employer then may not properly deprive the employee without providing procedural protections mandated by due process. See Bishop, 426 U.S. at 344.

D. Cases Finding Protected Interest in Continued Employment

1. State classified employees.

Martin v. Corr. Cabinet of Com., 822 S.W.2d 858, 860 (Ky. 1991) (unclassified employee entitled to Personnel Board hearing where political motivation alleged)

An unclassified employee is a political employee, not a merit employee, and may be discharged for any reason, including a bad reason, no reason or for political reasons so long as there is no statutory authority for a protest. K.R.S. 18A.140 specifically prohibits political favoritism in the classified service and Martin could be found to be correct in her decision to investigate the apparent violation of the statute. K.R.S. 18A.095(23)(a) refers in part to "political opinions" and grants relief if the appointing authority is found to have taken action "in violation of laws prohibiting favor for, or discrimination against, or bias with respect to" political opinions. Martin's claim may qualify for relief under this subsection.


Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984).

In Oklahoma the provisions of an employee handbook can constitute a contract between the employer and employee and define the employer-employee relationship for as long as those provisions are in effect and the employee provides consideration for the benefits provided by the handbook. The consideration can be quite small and can even consist of the employee continuing to work and foregoing the option of quitting. Langdon v. Saga Corp., 569 P.2d 524, 526-28 (Okl. Ct. App. 1976). In Langdon, the employee handbook provided for severance and vacation pay upon termination. In holding that those provisions constituted part of the employment contract, the court held that "the [p]ersonnel [m]anual . . . became a . . . contract which defined the employer-
employee relationship during the period the policy was in effect and the employee performed." *Langdon*, 569 P.2d at 528.

*Smith v. Kerrville Bus Co. Inc.*, 709 F.2d 914, 919-20 (5th Cir.1983). In this case, the Court found that reasons for discharge enumerated in the employee handbook, create a legitimate expectation for continued employment. The employer was restricted to discharging employees only for cause.

a. Kentucky.


In *Shah*, the legal presumption of at-will employment may be defeated by showing a "clear statement" from his employer not to fire him without cause. *McNutt v. Mediplex of Ky. Inc.*, 836 F.Supp. 419, 421 (W.D. Ky. 1993) (*citing Shah, supra*, at 492).


The rationale behind *Shah* was that an employer's covenant not to terminate without cause modifies the at-will relationship into a for-cause relationship, creating a contract without any consideration beyond the employer's expectation of the employee's services, and the employee's performance of those services. *Shah, supra*, at 492. Under *Shah*, therefore, an employee seeking to prove the existence of a "for-cause" employment contract must show that he was offered employment for an indefinite period of time with a covenant not to terminate without cause.

*And see, Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005), where the Court held that an employee handbook could constitute a contract for employment. "[A]n express personnel policy can become a binding contract 'once it is accepted by the employee through his continuing to work when he is not required to do so.'" *Id.* at 362 (*quoting Hoffman–La Roche, Inc. v. Campbell*, 512 So.2d 725, 733 (Ala. 1987)). Note that the personnel policies at issue did not contain the typical disclaimer language, such as "this does not create a contract."
Cf., Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95, 99 (Ky. Ct. App. 2000). (Handbook disclaimer that this manual "is not a contract" undercuts a "clear expression" of intent to take the relationship outside the "at will" context even though no "at will" language appeared in the manual.)


b. Other jurisdictions.


Thus, resolutions and employee handbooks such as those at issue here may "convert an at-will employment agreement into a protectable property interest," but only if they contain specific and "unequivocal language demonstrating the employer's intent to be bound by the handbook's provisions."

Id. at *8. Nevertheless, the Court concluded that a detailed police grievance procedure in the Police Manual setting out a list of "causes" for termination was sufficient to create an at-will exception. A city resolution trumped the manual. Id. at *8-*9.

3. Police and fire fighters.


For police officers and firemen in Kentucky, KRS §95.450 curtails their suspension and termination to instances of "inefficiency, misconduct, insubordination or violation of law or of the rules adopted by the legislative body." KRS §95.450(1). The language acts as an assurance that police officers will not be disciplined without "just cause." See Schmidt v. Creedon, 639 F.3d 587, 596 (3d Cir. 2011) (where a Pennsylvania statute prevented suspension or termination of police officers absent specific conduct, "just cause" was required for
discipline). Thus, Martin enjoys a constitutionally protected interest in his continued employment.

*Id.* at 908.

4. Graduate professor.

*Gunasekera v. Irwin*, 551 F.3d 461, 467 (6th Cir. 2009). The Sixth Circuit accepted a Graduate Professor's assertion that "Graduate Faculty status" is "a right intrinsic" that a professor maintains so long as he or she satisfies the four criteria the University requires of its Graduate Faculty. *Id.* He argues that because these criteria limit the University's discretion to name Graduate Faculty and because "[i]n actual practice . . . professors retain their appointment so long as they satisfy those criteria," he has a property interest in his Graduate Faculty status.

E. Cases Finding No Protected Interest in Continued Employment


"A regular status employee may be dismissed only for cause and normally, though not necessarily, only after at least one written warning pointing out areas of deficiency and establishing a reasonable time limit for improvement."

*Id.* at *2

Thus, an employer's statement of policy can create contractual rights in an employee even if the statement was not signed by either party, makes no reference to the specific employee, and can be amended unilaterally by the employer.

*Id.* at *3.

The portions of the Redbook and the personnel policies which have been provided in the record and set forth above contain sufficiently specific and contractual language to create an implied contractual obligation under *Beiswenger*.

*Id.* at *4

BUT, the Court held that the policy created an implied contract and not a written contract, which it found necessary to waive
sovereign immunity. *Id.* at *5 [Note: no §1983 claim involved in that case.]

- Language insufficient to overcome at will

*Brown v. City of Niota, Tenn.*, 214 F.3d 718, 721 (6th Cir. 2000).

In *Brown*, a City regulation that read, "[a] city employee may be terminated for any just cause at the discretion of the board." The Court found this insufficient to escape the employment at will doctrine otherwise applicable in Tennessee.

We accept the plaintiffs' contention that these rules and regulations, like employee handbooks, could modify an employment relationship. Tennessee courts have "recognized that an employee handbook can become a part of an employment contract." *Rose v. Tipton County Pub. Works Dept.*, 953 S.W.2d 690, 692 (Tenn. Ct. App. 1997). "In order to constitute a contract, however, the handbook must contain specific language showing the employer's intent to be bound by the handbook's provisions." *Id.* We do not believe the language of these rules and regulations shows the specific intent of the city to be bound by their terms.

2. PVA clerk.

*Murphy v. Cockrell*, 505 F.3d 446, 454 (6th Cir. 2007).

The district court held on summary judgment that Murphy had no reasonable expectation of continued employment in her position with the PVA's office, and thus had no protected property interest under the Fourteenth Amendment. The district court reached this conclusion based on the fact that Murphy was an at-will employee who, according to Kentucky law, could "be discharged for any reason, including a bad reason, no reason or for political reasons. . . ." *Martin v. Corr. Cabinet of Com.*, 822 S.W.2d 858, 860 (Ky. 1991). Accordingly, her §1983 claim for violation of her rights under the Fourteenth Amendment was dismissed.


The Sixth Circuit held that Tennessee law created a protected property interest for the benefit of police officers, but only if the adverse job action was termination, suspension, or demotion, or a like sanction. It provided no protection against reassignment to a clerical position.
The officers rightly cite the Tennessee civil service statutes as creating a property interest in civil service employees. "Employees who have successfully completed their probationary period have 'property right' to their positions. Therefore, no suspension, demotion, dismissal, or any other action which deprives a regular employee of such employee's 'property right' will become effective until minimum due process is provided as outlined below." Tenn. Code Ann. §8-30-331 (2012) . . . . Tennessee courts have interpreted the meaning of "any other action which deprives" employees of their property rights. In Armstrong v. Tennessee Department of Veterans Affairs, 959 S.W.2d 595 (Tenn. Ct. App. 1997), the state had attempted to reclassify plaintiff's position from the regular service to the executive service. Id. at 598. As the civil service protection did not apply to positions in the executive service, this would have deprived the plaintiff of the property right not to be suspended, demoted, or dismissed. Hence, the court held this reclassification to fall within the any-other-action exception. Ibid.

Id.

In the present case, the officers were reassigned, not suspended, demoted, or dismissed. Nor were they made subject to "any other action which deprives a regular employee of such employee's "*property right."" Even after the transfer, they would continue to enjoy the protection against suspension, demotion, or dismissal. As the general Tennessee civil service statute does not create a property interest against reassignment, they were not deprived of a property right protected by that statute.

Id. at 786.

The Court then found no other statutory or common law protection from punitive reassignment, and thus concluded there was no deprivation of a protected property interest. Id. at 786.

Note that the Court also found that the fact that a specific position was listed in their employment contract was insufficient to create a protected interest in that position. Id. at 787.
4. Public employees collective bargaining agreement.


In Greer security services were farmed out to a private agency, resulting in termination of security guards who were working under a collective bargaining agreement. The Court in Greer held that, while the CBA’s disciplinary process provided a property interest in employment as to discipline, it afforded no interest in continued employment as to no disciplinary terminations.

5. Non-tenured teachers.


Nor can Plaintiffs maintain a due process claim with regard to the employment of Wendy and Lonnie Nixon. It is undisputed that both were non-tenured teachers. By definition, therefore, they do not have a protected property interest in continued employment. Therefore, they cannot claim a violation of due process with regard to their employment.

Id. at *5

F. Procedural Protections where Property Interest Exists

1. What process is due – Loudermill.

The due process clause requires that, prior to termination, a public employee, with a property interest in his or her public employment, be given oral or written notice of the charges against him or her, an explanation of the employer’s evidence, and an opportunity to present his or her side of the story to the employer. Id. (citing Loudermill, 470 U.S. 532, 544-45 (1985)). . . . Loudermill established the minimal protections afforded to a public employee in a pretermination proceeding.

Buckner v. City of Highland Park, 901 F.2d 491, 494 (6th Cir.1990).
2. Procedural protections – dictated by federal law.

While property interests are defined by state law, the procedures required to deprive someone of those rights are dictated by federal constitutional principles.

[minimum procedural requirements are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.


The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."


3. Procedural protections mandated by due process prior to termination.

In the public employment setting procedural due process requires at a minimum, (1) adequate notice of the charges against the employee and (2) a meaningful opportunity to be heard _before_ the deprivation occurs. _Cleveland Bd. of Educ. v. Loudermill_, 470 U.S. 532, 542 (1985). Although, the employer may still have the option of suspending with pay. _id._ at 544-545.

a. The notice.

An employee with a protected interest in employment is entitled to a notice that provides a meaningful description of the charges and evidence against him. This is necessary to provide the employee with a fair opportunity to respond.

The due process clause requires that, prior to termination, a public employee, with a property interest in his or her public employment, be given oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story to the employer.

_Buckner v. City of Highland Park_, 901 F.2d 491, 494 (6th Cir.1990); _Loudermill_, 470 U.S. at 546.
Where the notice is too general to fairly advise the employee of the reasons for the adverse job action, or does not include all the reasons for the action, it will be constitutionally deficient.

The Notice sent to Plaintiff mentioned a general charge of "neglect of duty," but also listed specific charges of "attendance pattern," "failure to remain in classroom," and "excessive personal calls on work time." Each of these three specific charges can be viewed as falling under the general charge of "neglect of duty." At the hearing, Plaintiff responded to those specific charges.

However, following the hearing, Plaintiff was discharged for a "pattern of neglect of duty" that included specific charges that she lacked lesson plans, lacked student behavior plans, and inappropriately disciplined students. As none of those charges were mentioned in the Notice sent to Plaintiff, Plaintiff had no opportunity to respond to those charges prior to her termination.


b. The pre-termination hearing.

The pre-termination hearing need not be a full adversarial proceeding with the usual complete array of procedural protections, if those safeguards are afforded after the decision to terminate.

The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.


. . . The pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions-essentially, a determination of whether there are reasonable grounds to believe that the charges
against the employee are true and support
the proposed action.

Loudermill 470 U.S. at 545-46. The Court further noted
that "The opportunity to present reasons, either in person
or in writing, why proposed action should not be taken is a
fundamental due process requirement." (Emphasis added).
Id. 470 U.S. at 546.

Thus, the Court simply requires an opportunity to respond
prior to the adverse action so long as full procedural
protections attend a post-deprivation hearing.

We conclude that all the process that is due
is provided by a pretermination opportunity
to respond, coupled with post-termination
administrative procedures as provided by
the Ohio statute.

Loudermill 470 U.S. at 547-48. See also, Mitchell v.
Fankhauser, 375 F.3d 477,482-84 (6th Cir. 2004)

II. PROTECTED LIBERTY INTERESTS IN PUBLIC EMPLOYMENT

Public employers may not constitutionally deprive their employee of a liberty
interest without affording certain procedural protections.

[A] person’s reputation, good name, honor, and integrity are
among the liberty interests protected by the due process clause of
the fourteenth amendment.

Chilingirian v. Boris, 882 F.2d 200, 205 (6th Cir.1989) (citing Roth, 408 U.S. at
573). The Sixth Circuit later explained the scope of this protection:

'When a state fires an employee for stated reasons likely to make
him all but unemployable in the future, by marking him as one
who lost his job because of dishonesty or other job-related moral
turpitude, the consequences are so nearly those of formally
excluding him from his occupation that the law treats the state's
action the same way, and insists that due process be provided.'
(Emphasis added)

Lisle v. Metro. Gov’t of Nashville & Davidson County, Tenn., 73 Fed. Appx. 782,
788 (6th Cir. 2003), quoting, Lawson v. Sheriff of Tippecanoe County, 725 F.2d
1136, 1138 (7th Cir.1984) (Posner, J.); see also Joelson v. U.S., 86 F.3d 1413,
1420 (6th Cir.1996); see generally Codd v. Velger, 429 U.S. 624 (1977).

Note that a liberty claim may exist even in the absence of a protected property
interest claim. Lisle, 73 Fed. Appx. at 788.
But defamation by the employer of itself is not sufficient to state a liberty interest claim. "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." Siegert v. Gilley, 500 U.S. 226, 233 (1991); and see Lisle, 73 Fed. Appx. at 788.

The interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. . . . And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws.


A. Elements

To establish a deprivation of a protected liberty interest in the public employment context, a plaintiff must show a stigmatizing governmental action:

1. That conveys false information about the employee;
   It must be more than "merely improper or inadequate performance, incompetence, neglect of duty or malfeasance . . ." Brown v. City of Niota, 214 F.3d 718, 722–23 (6th Cir. 2000).

2. That is made public voluntarily;

3. That negatively affects employee's reputation;
   Such that it effectively forecloses the opportunity to practice a chosen profession.

4. That is made in connection with the employee's termination.

See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 573-74 (1972). regarding (a) through (c); and Lisle v. Metro. Gov't of Nashville & Davidson County, Tenn., 73 Fed.Appx. 782, 788 (6th Cir. 2003). regarding (d) (where the Court held "In every case upholding a liberty claim, termination was a necessary pre-condition."); citing Chilingirian v. Boris, 882 F.2d 200, 205 (6th Cir.1989). See also, Brown v. City of Niota, 214 F.3d 718, 722–23 (6th Cir. 2000).

See also Ferencz v. Hairston, 119 F.3d 1244, 1249 (6th Cir. 1997) (where "the publication complained of, even if defamatory, was not accompanied by the deprivation of any more tangible interest such as continued employment, the publication did not deprive the plaintiffs of a liberty interest."); and see, Felder v. Oliverio, 1996 WL 1089867 (N.D.Ind.1996). (concluding that a police chief's demotion back to the ranks was
insufficiently "degrading" as to form the basis of a liberty claim under Law.

But see Gustafson v. Jones, 117 F.3d 1015, 1020 (7th Cir. 1997) (a transfer from a police department's prestigious Tactical Enforcement Unit "to an office file clerk or the equivalent" as an example of a reassignment that could violate a liberty interest under Law).

The law in the Sixth Circuit remains unambiguous: any liberty interest claim regarding public employment must be accompanied by a termination. "We today decline the opportunity to follow the Seventh Circuit and extend our precedents to constitutionalize the job assignment policies of public employers throughout this jurisdiction." Lisle, 73 Fed.Appx. at 789.

See Wesley v. Campbell, 2010 WL 3120204 (E.D. Ky. Aug. 5, 2010) (A school counselor’s claim failed because stigmatizing statements and termination were "not coincident." Stigmatizing statements were not published in conjunction with employment, they were published in conjunction with an investigation by the Cabinet for health and Family Services.)

B. Deprivation only if Employee Requests and Is Denied Name Clearing Hearing

While the reputation of a public employee can enjoy due process protection, a deprivation occurs in the Sixth Circuit only where the employee requests and is denied a name clearing hearing.

The Court specifically held that a plaintiff is entitled to notice and opportunity to be heard in a name-clearing hearing when he requests a hearing. Id. at 410. In noting that a name-clearing hearing is required only if the plaintiff requests one, this Court cited two opinions from the Fifth Circuit. Id. at 410 (citing Gillum v. City of Kerrville, 3 F.3d 117, 121 (5th Cir. 1993); Rosenstein v. City of Dallas, 876 F.2d 392, 395 (5th Cir. 1989), rehearing granted and opinion reinstated in relevant part by, 901 F.2d 61 (5th Cir. 1990)).

Quinn v. Shirey, 293 F.3d 315, 321 (6th Cir. 2002); see also Brown v. City of Nio, 214 F.3d 718, 723 (6th Cir. 2000), and Garner v. City of Cuyahoga Falls, 311 Fed.Appx. 896 (6th Cir. 2009).

Simply asking the employer to wait on a discharge decision until after audits and investigations were complete did not constitute a request for a name clearing hearing. Quinn at 324. His failure to request a review "through an established appeals process of the decision to terminate him" was fatal. Id. at 324-325; accord, Carroll v. Knox County Bd. of Educ., 2010 WL 2507046 (E.D. Tenn. June 17, 2010).
See also Jenkins v. City of Russellville, 2007 WL 3025062, *2 (W.D. Ky. Oct. 15, 2007). ("Although the Plaintiff does claim that she requested an investigation into her termination, she does not claim that she specifically asked for a name-clearing hearing following her termination, as is required by Quinn to establish a due process violation.")

C. Entitlement to Notice of a Right to a Name Clearing Hearing

In Quinn the employee argues that it was the public employer’s burden to first show that it advised the employee of a name clearing hearing. The employee contended that it was improper for courts to infer a waiver of a constitutional right where the employee had not been advised of such a right, i.e., that the implied waiver was "unknowing."

The Sixth Circuit appeared to have little sympathy for that argument noting that, "this Court has never imposed an affirmative duty on an employer to apprize the employee of his right to a name-clearing hearing."

Ultimately the Court avoided a direct ruling by noting that, as to the 12(b)(6) motion, the plaintiff had not alleged that he was unaware his entitlement to such a hearing. Id. at 323.

D. Notice of Hearing Required

Other Circuits have held that notice of the right to the hearing is also constitutionally required.

We hold that a public employer is required to provide the opportunity for a post-termination name-clearing hearing when stigmatizing information is made part of the public records, or otherwise published. Notice of the right to such a hearing is required.

Buxton v. City of Plant City, Fla., 871 F.2d 1037, 1046 (11th Cir. 1989).

In re Selcraig, 705 F.2d 789 (5th Cir. 1983) (state need only inform stigmatized employee that the opportunity to clear his name exists upon request; pre-termination hearing is not a prerequisite to publication).

E. Name Clearing Hearing – Post Discharge

1. Post discharge.

"Because it is provided simply to cleanse the reputation of the claimant, the hearing need not take place prior to his termination or to the publication of related information adverse to his interests." Campbell v. Pierce County, Georgia, 741 F.2d 1342, 1345 (11th Cir.1984).
See also Rodriguez de Quinonez v. Perez, 596 F.2d 486 (1st Cir. 1979) cert. denied, 444 U.S. 840 (1979). (pre-termination hearing not required but post-termination hearing necessary in case involving liberty interest); White v. Thomas, 660 F.2d 680 (5th Cir. 1981) cert. denied 455 U.S. 1027, (1982). (post-termination hearing proper remedy for employee deprived of liberty interest during termination)


Gunasekera v. Irwin, 551 F.3d 461, 469 (6th Cir. 2009). "We have held that "a name-clearing hearing need only provide an opportunity to clear one's name and need not comply with formal procedures to be valid"." quoting, Chilingirian v. Boris, 882 F.2d 200, 206 (6th Cir. 1989); see also Feterle v. Chowdhury, 148 Fed. Appx. 524, 531-32 (6th Cir. 2005).

3. Must be public.

Because the nature of the stigma is public, name clearing hearing must also be "public."

Following this conclusion, the Second Circuit held that: "Requiring the [employer] to address such risk by offering plaintiff the opportunity to publicly refute the charges made against him or publicizing his refutations itself, does not place an undue burden upon the government's interest in terminating [employees] who either are not performing to expected standards or are behaving in an unacceptable fashion." Id. We agree with the Second Circuit that requiring that name-clearing hearings involve some form of publicity would not necessarily put an undue burden on the government.

If a name-clearing hearing has no public component, it may not be able to serve its function of curing the public stigma that necessitated the hearing. With respect to the third prong, government interests will shape the nature of the publicity required.

Gunasekera, at 470. Although privacy concerns may dictate the nature of the public venue. Id. at 471.

4. Scope of hearing dictated by facts of particular case.

In order to satisfy due process, the university is required to offer Gunasekera a name-clearing hearing that is adequately publicized to address the stigma the university inflicted on him. The exact
nature of that publicity depends on a fact-intensive review of the circumstances attending his case, and we leave to the district court the initial determination regarding the exact parameters of the name-clearing hearing due to Gunasekera.

*Id.* at 471.

5. Cross examination.

On remand in *Gunasekera*, the District Court held that there was no right to cross examination. *Gunasekera v. Irwin*, 678 F. Supp.2d 653, 662-663 (S.D. Ohio 2010), *citing* *Boston v. Webb*, 783 F.2d 1163, 1165-66 (4th Cir. 1986) and *Endicott v. Huddleston*, 644 F.2d 1208, 1216 (7th Cir. 1980).

The District Court in *Gunasekera* on remand ordered the following:

1. a two-hour period in which Dr. Gunasekera may make a statement, allow others to speak and disclose documents under [his attorney's] direction;
2. a room open to the public will be provided at Baker University Center;
3. the university will provide a moderator who will open the meeting and provide a summary of the facts leading up to the hearing, but is not required to state the University's position on the events necessitating the hearing.

*Id.* at 664.

Ultimately, the need for cross examination will depend on the facts of the case. *Id.*

But see *McGhee v. Draper*, 564 F.2d 902, 911 (10th Cir. 1977) ("[W]e agree that in the circumstances of this case due process required that the accusers of plaintiff, who were attacking her morality and fitness as a teacher, be heard only where plaintiff could confront and cross-examine them."); *and Campbell v. Pierce County*, 741 F.2d 1342, 1345 (11th Cir. 1984).
III. VIOLATION OF SUBSTANTIVE CONSTITUTIONAL RIGHTS

In addition, a public employee may enjoy substantive due process protections. Substantive due process principles embodied in the Fourteenth Amendment can provide certain protections for public employees. However, the substantive component of due process only protects "fundamental" constitutional rights, not rights created by state law, regulation or rules.

We have recognized that the Fourteenth Amendment has a substantive due process component that "protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action." Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988).

Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1350 (6th Cir. 1992). Thus, these substantive safeguards may carve an additional exception to the employment-at-will doctrine normally honored by the courts.

The Sixth Circuit has noted that,


Charles v. Baesler, 910 F.2d 1349, 1353-54 (6th Cir. 1990). But the Court is clearly reluctant to extend substantive protections to contractual breaches. "In any event, we are satisfied that in the usual breach of contract case such as this, failure to meet contractual obligations cannot be equated with the sort of injustice inherent in "egregious abuse of government power."" Id. at 1353.

So, a tenured public employment right alone will not equate with a substantive due process right.

[S]ince plaintiffs may have adequate state remedy on remand that will compensate them for any interference with their right to tenured employment, see Baesler, 910 F.2d at 1355, we conclude that plaintiffs do not have a cognizable substantive due process claim. But cf. Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 329 (8th Cir. 1986). (recognizing a substantive due process right to be free from arbitrary and capricious state action resulting in employment termination).

Sutton at 1351.

A. First Amendment Protections for Public Employees

Public employees do not forfeit First Amendment protections when they accept employment with a governmental entity. It provides substantive
protections to public employees who otherwise would be considered employees-at-will.


the government may not take adverse employment action against an individual in retaliation for the latter's exercise of his or her first amendment right of free speech. Rankin v. McPherson, 483 U.S. 378, 383 (1987); Perry v. Sindermann, 408 U.S. 593 (1972). Moreover, such an adverse employment decision is impermissible even if it involves punishment short of dismissal. Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).


B. Elements of First Amendment Claim by Public Employee

1. The speech must be on a matter of public concern;

2. The employee's interest in making the statement must outweigh the government's interest in promoting efficiency in the workplace;

3. The protected speech was a "substantial" or "motivating" factor in the decision to discipline or penalize the employee.


C. Shifting of Burden

If the employee shows the above, the burden shifts to the employer "to show by a preponderance of the evidence that there were other reasons for its adverse action and that it would have taken the same action even if the employee had not spoken." Boger at 322.

"These are issues of fact, however, and may not be decided on a motion for *323 summary judgment unless the evidence 'is so one-sided that one party must prevail as a matter of law.'" Id. at 323, citing Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir.1989); accord, Leary v. Daeschner, 349 F.3d 888, 898 (6th Cir. 2003). (Teacher's comments regarding student discipline and legality of educational programs were protected and foreclosed summary judgment.)

D. Political Association

Thus, an employee’s political associations may provide a source of further protections for otherwise at-will employment.

The *Elrod/Branti* line of opinions circumscribes the conditioning of employment on, or the termination of employment because of, an individual’s political beliefs and political affiliations. The *Elrod* plurality explained:

Patronage . . . to the extent it compels or restrains belief and association is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.

427 U.S. at 357 (internal citation omitted). "In summary," the *Elrod* plurality concluded, "patronage dismissals severely restrict political belief and association." *Id.* at 372.

But challenging your employer in a political race is not protected.

The parties here do not dispute the fact that Carver was discharged solely because she announced her candidacy against Dennis for Dennis’s office. This was not a patronage dismissal. It was not a dismissal because of political beliefs or affiliations. It was not a dismissal based on politics at all, except to the extent that running for public office is a political exercise in its broad sense.

*Carver v. Dennis*, 104 F.3d 847, 850 (6th Cir. 1997). *And see, Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977). (Three Supreme Court decisions "indicate that plaintiff’s interest in seeking office, by itself, is not entitled to constitutional protection. Moreover, since plaintiff has not alleged that by running for Congress he was advancing the political ideas of a particular set of voters, he cannot bring his action under the rubric of freedom of association which the Supreme Court has embraced." (internal citation omitted)).

*See also Wallace v. Benware*, 67 F.3d 655, 661 (7th Cir. 1995). (holding that while the elected county sheriff could, without violating the First Amendment, discharge or demote the deputy who ran against him, the sheriff could not retain the deputy but engage in retaliatory harassment against him because of that candidacy); *Wilbur v. Mahan*, 3 F.3d 214 at 217-19 (7th Cir. 1993) (holding that the sheriff could, without violating the First Amendment, restrict free speech rights of deputy who announced candidacy against sheriff); *Click v. Copeland*, 970 F.2d 106, 111-12 (5th Cir.1992). (holding that deputy sheriffs who ran against the sheriff were
engaged in conduct that addressed matters of public concern and therefore some First Amendment protection attached).

The parties have called our attention to no case, however, and we have found none, in which the employee who announced his candidacy against his employer was the sole employee of that employer, and was discharged solely for the fact of his announced candidacy.

Carver v. Dennis, 104 F. 3d. 847, 852 (6th Cir. 1997).

E. Carver Limited

The Sixth Circuit has cautioned against extending Carver’s holding:

courts within this Circuit have warned against reading Carver too broadly. See Becton v. Thomas, 48 F.Supp.2d 747, 756 (W.D.Tenn. 1999). ("There is no question that the court found no fundamental right to political candidacy. Nevertheless, the Sixth Circuit clearly had no intention of using the Carver case to resolve the broader question of whether the First Amendment ever provides any protection for an individual's right to run for political office.").

Murphy v. Cockrell, 505 F.3d 446, 450 (6th Cir. 2007).

We expressly recognized in Carver that while the mere fact of candidacy was not constitutionally protected, the expression of one's political belief still fell under the ambit of the First Amendment. Accordingly, we now hold that the fact that Cockrell fired Murphy due to Murphy's political speech during the course of her campaign – rather than the mere fact of Murphy's candidacy – is enough to trigger protection under the First Amendment.

Id. at 451.