COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
3rd DIVISION
CIVIL ACTION NO. 15-CI-551
-Filed Electronically-

PAUL KEARNEY, M.D. PLAINTIFF

v. **MOTION FOR SUMMARY JUDGMENT**

UNIVERSITY OF KENTUCKY DEFENDANT

***** ***** *****

Defendant University of Kentucky, by counsel, moves this Court for summary judgment pursuant to CR 56 dismissing Plaintiff, Paul Kearney, M.D.'s Complaint, with prejudice. In support of its Motion, the University relies upon its Memorandum in Support of Summary Judgment, filed contemporaneously herewith.

NOTICE

This motion shall come before the Court for hearing on March 16, 2018 at 2:30 p.m. per this Court's October 16, 2017 Pre-Trial Order.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2018 the foregoing document was electronically filed with the Clerk of this Court using the KY eCourts eFiling system, and also sent via U.S. Mail to the following counsel of record:

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FAYETTE CIRCUIT COURT
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PAUL KEARNEY, M.D. PLAINTIFF

v. **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

UNIVERSITY OF KENTUCKY DEFENDANT

***** ***** *****

This matter involves Dr. Paul Kearney's refusal to accept personal responsibility for his longstanding pattern of unprofessional, profane behavior that ultimately led to the University revoking his clinical privileges to practice medicine on campus. Despite Dr. Kearney's peers independently concluding, and then affirming, his behavior warranted revocation of privileges, Dr. Kearney filed this lawsuit, insisting his discipline was due to a conspiracy to oust him in response two innocuous comments he made at a faculty meeting long before the disciplinary proceedings were initiated. As the Court will see, Dr. Kearney's discipline is attributable only to his egregious conduct; therefore his whistleblower claims fail as a matter of law.

FACTUAL BACKGROUND

Discipline of Dr. Kearney

Dr. Kearney's tenure at the University has been rife with documented behavior problems (noting his verbal abuse of others in 1992, 1995, 2000, 2005, 2009, 2012, 2014). His berating behavior "sucks the smart" right out of nursing staff. Exhibit 1, Testimony of Julie Hudson, R.N., Hearing Transcript, Vol. 2, at p. 187. But even after various University administrators had exhausted numerous other avenues allowing Dr. Kearney multiple opportunities to tame his language and stop the berating and demeaning treatment of staff, Dr. Kearney did it again. After multiple complaints by nurses, in December 2012 Dr. Jay Zwischenberger, Chair of the

University's Surgery Department, issued a written reprimand and action plan prohibiting future unprofessional conduct, specifically including profane comments, and informing Dr. Kearney "If you violate any of the terms of this action plan, you will be subject to corrective action." *See* Exhibit 2, 12/12/12 "Last Chance Agreement."

So, Dr. Kearney was given one last chance knowing that his next infraction could result in significant discipline. But as Dr. Kearney has testified, he cannot change. He claims he has been this way "since first grade, since my first recollection of being alive…Honest to God, that's the way I've been. *That's me*." Exhibit 1, Testimony of Dr. Kearney, Hearing Transcript Vol. 2 at page 80 (emphasis added). And this time, Dr. Kearney verbally berated a quadriplegic patient and hospital staff during a procedure.

In August 2014, the University received a medical student's complaint accusing Dr. Kearney of using profanity and making racist, sexist, and other offensive comments during a lecture.[1] *See* Exhibit 3, Student Complaint Email. Because of his language in the lecture, the Dean of the College of Medicine removed Dr. Kearney from any guest lecture appearances. *See* Exhibit 4, Dean Fred deBeer Dep. at 115-16. Shortly thereafter, on September 4, 2014, the University received notice of a Facebook post authored by a quadriplegic patient's mother complaining Dr. Kearney called her son "a f**king quad", a "f**cking idiot" and told a physician he was supervising "just f**cking cut him." *See* Exhibit 5, MSEC Investigation Report. On September 5, 2014, immediately after the University received the patient complaint, Dr. Kearney was placed on paid administrative leave while the University investigated the incident. Exhibit 6, 9/5/14 Ltr from Boulanger to Kearney.

Pursuant to the University Medical Staff's Bylaws, the Chief Medical Officer ("CMO") summarily suspended Kearney in January 2015, finding violations of both the UK HealthCare

[1] Should the Court desire, the University can provide a recording of Dr. Kearney's offending lecture for review.

Medical Staff Bylaws and the Behavioral Standards in Patient Care Commitments to Performance. Exhibit 7, 1/26/15 Ltr from Boulanger to Kearney; Exhibit 8, UK Health Care Medical Staff Bylaws; Exhibit 9, Behavioral Standards in Patient Care and Dr. Kearney acknowledgement thereof. Following the summary suspension, the matter proceeded to the Medical Staff Executive Committee ("MSEC"). The MSEC is the self-governing body of UK Healthcare's Medical Staff, or those physicians privileged to attend patients at University hospitals. *See* Exhibit 8 at p. 4. The MSEC, rather than the CMO, is tasked with deciding whether reasonable grounds exist to believe the allegations underlying the suspension in order to ensure the suspension is not motivated by a personal or professional vendetta. Exhibit 10, 1/29/15 MSEC Meeting Minutes. On January 29, 2015, the MSEC resolved to conduct an independent investigation into the allegations against Dr. Kearney before recommending sustaining, amending or rescinding the CMO's suspension, and appointed two of its members, Drs. Louis Bezold and Susan McDowell, to conduct the investigation. *Id*. The MSEC agreed to meet again on February 5, 2015 so the investigators could present their findings and the MSEC could conduct a vote on the suspension. *Id*.

On February 5, 2015, the investigators presented their findings to the full MSEC. Exhibit 11, 2/5/15 MSEC Meeting Minutes; Exhibit 5. The MSEC's investigators reviewed complaints from staff, students, and Dr. Kearney's peers concerning Kearney's unprofessional behavior dating back to 1992. *See* Exhibit 5. They also interviewed a number of individuals, including Dr. Kearney, concerning the patient incident. *Id.* Dr. Kearney admitted he said to the patient, "Hey dumb-ass we are trying to help you just relax." *Id*.; Exhibit 12, Kearney Dep. at 113. While Dr. Kearney could not recall exactly what he said to the residents assisting with the procedure, he stated, "I can almost guarantee I used profanity." Exhibit 12 at 113. Following presentation of

the investigation's findings, the MSEC voted to affirm Dr. Kearney's suspension and recommended a revocation of clinical privileges. Exhibit 5.

Dr. Kearney then requested a hearing before three of his medical staff colleagues, a right afforded to him by to the Bylaws. *See* Exhibit 13, Ltr Requesting Hearing; Exhibit 8. The Chief Clinical Officer, Dr. Kevin Nelson, appointed hearing panel consisting of a chair, Dr. Mark Williams, and two members, Drs. Wendy Hansen and Lisa Tannock. *See* Exhibit 14, Hearing Panel Recommendation. Dr. Nelson further appointed Professor of Law Robert G. Lawson to serve as the Presiding Hearing Officer. *See id*. From May 27-28, 2015, Professor Lawson presided over Dr. Kearney's requested hearing. *Id*. The hearing panel received extensive testimony and numerous exhibits. *Id*. Dr. Kearney cross-examined the University's witnesses, called his own witnesses, and testified on his own behalf. *Id*. At the close of the hearing, three of Dr. Kearney's peers unanimously concluded that Dr. Kearney violated both the UK Healthcare Medical Staff Bylaws and the Behavioral Standards in Patient Care Commitments to Performance, and recommended a revocation of privileges. *Id*.

Dr. Kearney appealed this decision to the University's Board of Trustees Health Care Committee, the Chair of which appointed a three-trustee panel to hear the appeal. Exhibit 15, Initial Order on Appeal. Following extensive briefing and oral arguments, the trustee panel unanimously recommended permanent revocation of privileges. Exhibit 16, Appellate Review Panel Decision. On August 24, 2015, the full University Health Care Committee unanimously affirmed the revocation of Dr. Kearney's privileges.[2] Exhibit 17, Final Action of University Health Care Committee. Throughout the entirety of this process, Dr. Kearney had the assistance

[2] Throughout this litigation, Dr. Kearney has insisted the Health Care Committee "restored" his status as a tenured professor. However, since none of the disciplinary proceedings against him concerned his tenure status, Dr. Kearney's tenure has never been revoked or attempted to be revoked. *See* Exhibits 13-17. He remains a tenured professor at the University; he simply lacks clinical or teaching privileges.

of legal counsel and the University strictly followed all procedural steps provided by the medical staff bylaws. *See* Exhibits 13-7.

Following the University Health Care Committee's final decision, the University was in the unique position of having a physician on campus who could neither teach within the College of Medicine nor practice medicine in its hospital or clinics. Yet, Dr. Kearney remained a tenured faculty member. To address Dr. Kearney's new role, the University outlined the limitations on Dr. Kearney's role as a tenured professor without clinical privileges. *See* Exhibit 18, August 28, 2015 Letter to Pafunda. Pursuant to the terms of the Association for Colleges of Graduate Medical Education's Program Requirements for Graduate Education in General Surgery, an individual who lacks clinical privileges cannot teach or interact with students or staff at an accredited program. *See* Exhibit 19, Graduate Education Requirements at II.B.3.; Exhibit 20, McDowell Dep. at 121-23. Due to accreditation concerns, as well as patient safety concerns, Dr. Kearney was prohibited from teaching or interacting with House staff (interns, residents, fellows, or any others governed by the Association for Colleges of Graduate Medical Education), and his access to clinical areas was restricted. *See* Exhibit 18.

The University has continually attempted to work with Dr. Kearney in establishing his role at the University despite his lack of clinical privileges and his inability to teach. *See* Exhibit 21, Correspondence between Thro and Pafunda, November 11, 2015 – April 20, 2016. Despite these efforts, Dr. Kearney has refused to provide a sufficient "Distribution of Effort" proposition, or a plan consisting of research and service contributions to the University, to position him for success in his new role as a researcher. *See id*. As a result, Dr. Kearney continues to collect a salary while contributing very little to the University.

In total, fifteen (15) of Dr. Kearney's peers reviewed his case and found his behavior towards patients, medical students and staff violated University standards for professional conduct and recommended revocation of his privileges to practice medicine on campus. Further, seven members of the University's Board of Trustees unanimously agreed that Dr. Kearney's unprofessional conduct warranted such action. Nevertheless, Dr. Kearney's lawsuit insists his discipline is a result of alleged whistleblowing activity. *See* Compl; Amended Compl.

Alleged Whistleblowing

In January 2014, Dr. Kearney and Dr. Davy Jones presented findings to the College of Medicine Faculty Council concerning the College of Medicine Practice Plan Committee.[3] Exhibit 12 at 7-9; Exhibit 22, 1/21/14 Faculty Council Meeting Minutes. The Faculty Council is a group of faculty at the College of Medicine who make suggestions in matters of curriculum and other faculty functions; they have no authority to make changes within the University. Exhibit 12 at 19-20.At that meeting, Dr. Jones presented a Power Point presentation explaining that through a number of open records requests, he discovered that the College of Medicine's Practice Plan Committee had not met. *Id*. at 15, Exhibit 22, 1/21/14 Faculty Council Meeting Minutes; Exhibit 23, Davy Jones Powerpoint. The Faculty Council resolved to contact the then-Dean of the College of Medicine, Frederick de Beer, about those findings. Exhibit 12 at 8. In response, Dean de Beer sent a memo to the Faculty Council informing them then-Executive Vice President for Health Affairs ("EVPHA") Dr. Michael Karpf would like to meet to discuss their concerns in April 2014. *Id*.

On April 15, 2014, almost five months before Dr. Kearney's inappropriate lecture to medical students and his berating of a quadriplegic patient, the Faculty Council held a special

[3] For additional background on this presentation and the College of Medicine Practice Plan Committee, please see the University's prior briefing in the Motion to Dismiss and Renewed Motion to Dismiss.

meeting. Exhibit 12 at 12; Exhibit 24, 4/15/14 Faculty Council Meeting Minutes. Present were Dean de Beer, EVPHA Dr. Karpf, General Counsel Bill Thro, and the faculty-elected trustee to the University Board of Trustees, Dr. John Wilson. During the meeting, Dr. Kearney made two statements. First, he stated, "I think we need to have an outside attorney, somebody not affiliated with the University, look at the practice plan contracts and how they were developed." Exhibit 12 at 18. Second, Dr. Kearney claims he said, "I think we need an independent audit of KMSF to look at the management of monies there."[4] *Id*.

As for his first statement, Dr. Kearney claims he reported a violation of University Administrative Regulation 3:14 ("AR 3:14"), concerning the College of Medicine's Practice Plan Committee. *Id*. at 15. Specifically, Dr. Kearney claims he informed the Faculty Council and guests that the College of Medicine Practice Plan Committee had not met or been involved in the oversight of the practice plan since its creation in 2010. *Id*. at 26. Dr. Kearney claims any changes in the College of Medicine's Practice Plan, which governs how individual faculty members are paid, has to be approved by a Practice Plan Committee of the College of Medicine. *Id*. at 21; 42. In 2013, Dr. Kearney claims significant changes were made to the physician incentive plan's structure, moving the system from one considering a number of contributions faculty make to the College to a system based almost exclusively on collections, or how much clinical work the physician did for the hospital. *Id*. at 21-22. Dr. Kearney took issue with the fact that the College of Medicine's Practice Plan Committee did not review or approve these changes to the practice plan. *Id*.

[4] Notably, the minutes from the April 15, 2014 Faculty Council meeting do not indicate Dr. Kearney called for an audit or investigation of KMSF. *See* Exhibit 24. Further, other attendees of that meeting do not recall Kearney calling for an audit or investigation of KMSF. *See* Exhibit 25, Dr. Holly Swanson Dep. at 45; Exhibit 26, Dr. Michael Karpf Dep. at 119. Regardless, as discussed below, this does not constitute a report or disclosure protected by the Whistleblower Act.

Dr. Kearney's alleged second statement related to KMSF, the Kentucky Medical Services Foundation. KMSF is an independent nonprofit organization founded in 1978 to bolster the University's efforts to recruit and retain the best clinicians and to support the education, research, service and patient care missions of the University of Kentucky.[5] With that mission in mind, KMSF acts as an independent body providing billing and collection services for providers at UK HealthCare, using that revenue to supplement provider salaries. This arrangement allows UK HealthCare to attract and retain talented physicians in a financially competitive medical market. Dr. Kearney claims he was "concerned about mismanagement of KMSF funds," and heard rumors of KMSF entering into contracts with outside practitioners and private practices, and questioned KMSF's involvement with the Child Development Center as well as Dr. Karpf's use of KMSF funds to lease an aircraft. *See* Exhibit 12 at 16, 27. However, Dr. Kearney did not voice any of these rumors or concerns at the April 15, 2014 Faculty Council meeting. *See id*. at 18. Instead, he merely claims he made a vague call for a KMSF audit.

In response to his complaints, Dr. Kearney claims EVPHA Dr. Karpf stated, "Dr. Kearney, if you don't like it here, you can leave," to which another attendee, Dr. Hollie Swanson allegedly asked "Dr. Karpf, did you just threaten Dr. Kearney?" *Id*. Dr. Karpf replied no. Exhibit 26 at 149-51. On the contrary, Dr. Karpf's comments were congenial, meant only to convey to Dr. Kearney that if he was unhappy at the University, he could find a job elsewhere. *Id*. at 149-51. Dr. Kearney further claims General Counsel Thro informed the Faculty Council that AR 3:14 was "none of their business." Exhibit 12 at 18. General Counsel Thro denies using that language, but testified that he simply explained to the Faculty Council that they as an organization are tasked with academic matters, not administrative matters, and therefore are not the appropriate

[5] *See* KMSF website, available at: https://kmsf.com/ (Last visited 1/25/2018); KMSF Bylaws, available at: http://www.uky.edu/Trustees/agenda/full/2007/jan/uhcr1.pdf (Last visited 1/29/2018).

organization to address the Practice Plan. *See* Exhibit 27, Thro Dep. at 14. Dr. Kearney acknowledges the Faculty Council's purview is limited to academic matters. *See* Kearney Dep. at 19-20. Dr. Kearney did not speak with Dr. Karpf, Mr. Thro, Dean de Beer, or John Wilson about his concerns after the April 15, 2014 Faculty Council meeting. Exhibit 12 at 30-33.

Dr. Kearney filed his Complaint in February 2015, alleging whistleblower retaliation in the form of his January 26, 2015 suspension. *See* Compl. On September 14, 2016, Dr. Kearney filed an Amended Complaint, amending his original Complaint to include allegations that the University denied him "procedural remedies." *See* Amended Compl. ¶ 16.

At the outset, the University moved this Court to dismiss Dr. Kearney's lawsuit since his alleged "whistleblowing" was merely a complaint about publicly known or available information, not a complaint of a violation of a law, rule or regulation or any other alleged wrongdoing, and because Dr. Kearney failed to make his complaints to any appropriate authority. *See* 3/4/15 Motion to Dismiss. This Court granted Dr. Kearney time to conduct limited discovery on limited topics, and thereafter, the University renewed its motion to dismiss. *See* 2/2/16 Renewed Motion to Dismiss. Although this Court denied the University's renewed motion allowing discovery to proceed, discovery has only confirmed the fact that Dr. Kearney did not bring to light any publicly unknown or unavailable information, or any violation of a law, rule, or regulation. Dr. Kearney also failed to address his complaints to the appropriate authorities as required by the Kentucky Whistleblower Act. Regardless of Dr. Kearney's failure to engage in an activity protected under the Whistleblower Act, he cannot establish a causal connection between his actions and the disciplinary action taken against him. For a number of reasons, Dr. Kearney's claims under the Whistleblower Act fail as a matter of law. Accordingly, they must be dismissed, with prejudice.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476 (Ky. 1991); CR 56.03. An opponent cannot defeat a motion for summary judgment "without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482; *see also Hubble v. Johnson*, Ky., 841 S.W.2d 169, 171 (Ky. 1992); *Haney v. Monsky*, 311 S.W. 3d 235 (Ky. 2010). A party opposing summary judgment "cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment." *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). In other words, the Court must dismiss an action when it is impossible for the Plaintiff to produce evidence at trial to warrant a judgment in his or her favor. *Id.*

ARGUMENT

I. Dr. Kearney cannot establish a prima facie case of whistleblower retaliation.

The Kentucky Whistleblower Act, KRS 61.101 *et seq*., protects government employees who disclose wrongdoing in government. *See Thornton v. Office of Fayette County Attorney*, 292 S.W.3d 324, 328 (Ky. App. 2009). KRS 61.102 states, in relevant part:

> (1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who **in good faith reports, discloses, divulges, or otherwise brings to the attention** of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the Executive Branch Ethics Commission, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, **or any other appropriate body or authority**, **any facts or information relative to an actual or suspected violation of any law, statute,**

> **executive order, administrative regulation, mandate, rule, or ordinance** of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, **or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.** No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

KRS 61.102(1) (emphasis added).

In order to prevail on a claim brought under KRS 61.102, the burden is on Dr. Kearney to prove: (1) the employer is an officer or agency of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of federal, state or county law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee for making such a disclosure. *See Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 251 (Ky.App. 2004). (citing *Woodward v. Com*., 984 S.W.2d 477, 480-81 (Ky. 1998)). In addition, Dr. Kearney must prove by a preponderance of the evidence that his disclosure was a contributing factor in the personnel action taken against him. *Davidson*, 152 S.W.3d at 251 (citing KRS 61.103(1)(b)). If Dr. Kearney can meet his burden, the burden then shifts to the University to prove by clear and convincing evidence that Dr. Kearney's disclosure was not a material fact in the personnel action. *Davidson*, 152 S.W.3d at 251 (citing KRS 61.103(3)). KRS 61.103(1)(b) defines "contributing factor" as,

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

The Kentucky Whistleblower Act, KRS 61.101 et seq., is "similar in almost every respect" to the federal whistleblower statute. *Commonwealth, Dep't of Agriculture v. Vinson*, 30 S.W.3d 162,

169 (Ky. 2000); *compare* KRS 61.102 and 5 U.S.C. §2302. Thus, federal precedent may provide guidance in evaluating whistleblower claims. *Davidson,* 152 S.W.3d at 255.

The University is a public employer and Dr. Kearney its employee. Furthermore, revocation of his practice privileges is a "personnel action" taken following the decisions made by independent actors pursuant to the UK HealthCare Medical Staff Bylaws' procedures. Consequently, in order to survive sustain his whistleblower claims, Dr. Kearney must still prove three things: 1) he made a good faith report or disclosure of a suspected violation of law; 2) he made that report or disclosure to an appropriate body or authority; and 3) his report was a contributing factor to personnel action taken against him. Dr. Kearney cannot prove he made an appropriate report under the Act, nor can he prove he made such a report to an appropriate authority. Further, the evidence of record firmly establishes that Dr. Kearney's alleged "whistleblowing" was not a factor in the personnel actions taken against him.

a. Dr. Kearney's comments at the April 15, 2014 Faculty Council meeting do not constitute a "disclosure" or a "report" as required to sustain a whistleblower claim.

Foremost, Dr. Kearney cannot establish his comments at the April 15, 2014 Faculty Council meeting were a proper "report" or "disclosure" under the Whistleblower Act. For purposes of this case, a proper report or disclosure must concern (1) violations of law, mismanagement, waste, fraud or abuse of authority; (2) that were *concealed*, that is, about information that was not publicly known or available. Dr. Kearney claims he addressed two issues at the April 15 meeting: the Practice Plan Committee issue and an audit of KMSF. First, Dr. Kearney's simple statement that he believed KMSF should be audited does not constitute a report or disclosure of a violation of law, mismanagement, waste, fraud or abuse of authority. Second, all information contained in Dr. Kearney's complaints concerning AR 3:14 and the

Practice Plan Committee at the April 15th meeting was either publicly known or publicly available information. Neither stating an opinion that alleges no wrongdoing nor calling attention to publicly available information is protected by the Whistleblower Act.

i. Dr. Kearney's vague comment about KMSF does not allege a violation of law or any other wrongdoing contemplated by the Act.

First, Dr. Kearney claims he raised concerns about KMSF at the April 15, 2014 Faculty Council meeting. While the minutes do not reflect Dr. Kearney raising this issue, and others present at the meeting do not recall Dr. Kearney making any statement of that nature, taking the facts in a light most favorable to Dr. Kearney, we will assume he made the statement, "I think we need an independent audit of KMSF to look at the management of monies there," at that meeting. The simple declaration, "I think we need an independent audit of KMSF to look at the management of monies there," does not allege any violation of law, rules or regulations. *See* KRS 61.102(1). It also does not disclose any mismanagement, fraud, waste, abuse of authority, or danger to the public. *See id*. Such a statement does not disclose, allege, or even suggest any wrongdoing. It contains so little detail and support, it is at best a vague statement of opinion.

Dr. Kearney's testimony concerning rumors he heard about KMSF and what he intended in calling for an audit are irrelevant because he never "blew the whistle" or reported those concerns. *See* Exhibit 12 at 18. The Court must look to what Dr. Kearney *actually* disclosed or reported, not what he intended to report or what he felt or believed at the time of his comments. Since he failed to report or disclose any alleged wrongdoing, Dr. Kearney's alleged comments concerning KMSF do not support a whistleblower claim.

ii. Dr. Kearney's complaints about the Practice Plan Committee do not constitute a disclosure protected by the Act.

Next, Dr. Kearney's comments about AR 3:14 and the Practice Plan Committee also cannot support a whistleblower claim. Dr. Kearney's comments neither revealed publicly unavailable or unknown information, nor revealed any violation of law or rule. Without revealing some sort of concealed or publicly unknown wrongdoing, Dr. Kearney cannot avail himself of the protections of the Act, and his claim thereunder fails.

1. Complaining about publicly known or available information is not a "disclosure" for purposes of whistleblowing.

The purpose of the Whistleblower Act "is to protect employees who possess knowledge of wrongdoing that is *concealed or not publicly known*, and who step forward to help *uncover* and disclose that information." *Davidson*, 152 S.W.3d at 255 (emphasis added). "The Act has a remedial purpose in protecting public employees who *disclose* wrongdoing. It serves to discourage wrongdoing in government, and to protect those *who make it public*." *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792-93 (Ky. 2008) (emphasis added). When Dr. Kearney reports no hidden or publicly unavailable information, he does *not* "blow the whistle."

In *Davidson*, the Court affirmed summary judgment dismissing the employee's Whistleblower Act claim. 152 S.W.3d 247. The *Davidson* plaintiff was an employee in the Kentucky Department of Military Affairs whose duties included serving as a liaison with the Governor's Office. *Id.* at 250. He also moonlighted with a private company whose conduct had fallen into dispute, and ultimately litigation, with another part of the Executive Branch - the Cabinet for Natural Resources and Environmental Protection. He sought a meeting with the

Governor's Chief of Staff in order to get the Cabinet "off [his] back." He was later asked to resign and an investigation was launched into his conduct. *Id.*

The *Davidson* plaintiff's claimed "disclosures" involved allegations that the Cabinet's hearing procedures were an abuse of discretion and violated Kentucky law. *Id.* at 252. But, complaining about a State agency's procedure set out in publicly available regulations is not the type of disclosure protected by the Act. This type of complaint does not bring to light information that is not already publicly available. As the Court held, "he did not report anything about these procedures which was not already known, *such as secretive agency procedures*. These hearing procedures are set forth in statutes and administrative regulations." *Id.* at 255 (emphasis added).

In *Helbig v. City of Bowling Green*, 371 S.W.3d 740 (Ky.App. 2011), the Court of Appeals reiterated this principle. In *Helbig,* the City of Bowling Green changed its personnel policy so that employees taking paid leave would not be able to count those unworked hours in calculating the number of hours worked in a week for overtime purposes. *Id.* at 741. The net result was that some employees did not receive overtime pay for certain hours on which they had previously received overtime. A city police officer filed an internal grievance claiming the new City policy violated KRS 95.495. His grievance was denied and he was reassigned from Captain to Sergeant. The Court of Appeals affirmed the dismissal of his whistleblower suit. *Id.*

The Court of Appeals rejected the plaintiff's whistleblower claim based on the fact that the City's overtime policy was "publicly disclosed and approved and had been widely known prior to the date of his grievance." *Id.*, at 742. Even though the officer's basis for objecting to the city policy (the allegation the policy conflicted with statute) was not publicly known, the Court affirmed dismissal as "it does not logically follow that [Helbig] is protected under [KRS

61.102] for reporting that a publicly known policy violates a publicly known law." *Id.* at 743. The Court reasoned that "KRS 61.102, is not needed to encourage employees to disclose the illegality of a city commission's publicly enacted policy. That policy is already public; the public is presumed to know the law; and, any alleged illegality with regard to that policy is readily redressable by means of a declaratory action." *Id.*

Here, at the April 15, 2014 Faculty Council meeting, Dr. Kearney and other faculty members complained about University Administrative Regulation 3:14, which authorizes and dictates the composition of the Practice Plan Committee for the College of Medicine.[6] Like *Davidson* and *Helbig*, Dr. Kearney's allegations concern a "publicly known policy" redressable by other appropriate legal means. His Complaint does not allege he raised any information that was not publicly known nor has he brought to light any "secretive agency procedures."

The Practice Plan mandated by the University was established by University Regulation AR 3:14, which is available online. https://www.uky.edu/regs/ar3-14 (Last visited 1/28/2018); Exhibit **, AR 3:14. The College of Medicine's Addendum and each Department's Practice Plan were both provided to Dr. Kearney and his colleagues and otherwise publicly available via a simple Open Records request to the University. *See, e.g.,* Exhibit 28, January 6, 2014 response to open records request of Dr. Davy Jones.

One of Dr. Kearney's colleagues, Dr. Davy Jones, testified at length about his research into the Practice Plan. As Dr. Jones explained, his research came from open records requests to the University. Exhibit 29, Dr. Davy Jones Dep., Vol. I at p. 43-48. Through responses by the University, Dr. Davy Jones learned that: the College's Practice Plan Committee was comprised of the faculty elected representatives to the KMSF Board, the Practice Plan Committee had not

[6] Allegations of a violation of a University regulation are not encompassed in KRS 61.102 because University regulations are not a regulation of "the United States, the Commonwealth of Kentucky, or any of its political subdivisions" (i.e., counties). KRS 61.102(1).

met between 2009 and 2013, and no agendas or minutes existed of any Practice Plan Committee in that time frame. Exhibit 29 at p. 43-48; Exhibit 25 at p. 26. As explained above, the Committee meets only to review potential changes to the College's Practice Plan. In the absence of any changes, the Committee would not meet. Nevertheless, the Committee's existence and the fact it had not met or kept minutes was indeed information publicly available under the Open Records Act and Plaintiff did not "blow the whistle" on the absence of Practice Plan Committee meetings.

As the Practice Plan Committee did not meet during that time period, a response of no documents is precisely what should have been expected. Thus, Dr. Kearney's alleged whistleblowing, complaints that the Practice Plan Committee never met to review changes to the Plan, only involves information available online and/or through a simple open records request. One cannot "disclose" publicly available information. Therefore, Dr. Kearney cannot identify any disclosure protected under the Whistleblower Act.

2. Complaining about the Practice Plan Committee's communication is not a report about the violation of any law or rule.

Next, Dr. Kearney's complaints about the Practice Plan Committee did not report a violation of any law or rule. Dr. Kearney's comments at the April 15, 2014 Faculty Council meeting complain of allegedly deficient communication among University employees, that is between Practice Plan Committee Board members and the Faculty Council and/or other physicians who are plan members. Nothing in this report alleges any violation of law, rule or regulation nor does it raise an issue about mismanagement, waste, fraud or abuse of authority. In fact, AR 3:14 provides that any communication about changes to the College's Practice Plan are to be brought before the faculty members by the Chair of the Practice Plan Committee. Exhibit

30, AR 3:14 at p. 7. Dr. Kearney has not made any allegation nor "blew the whistle" that such changes were not communicated. The Department of Surgery's Plan provides that changes to Schedules A and B of the Plan concerning cost allocation and calculation will be subject to faculty vote. Exhibit 31, Dep't of Surgery's Plan at p. 1-2. Again, Dr. Kearney can make no allegation complaining of this lack of input since such presentation was made. Exhibit 32, Powerpoint presentation concerning changes to 2014 Practice Plan. Accordingly, he also made no report of a proper subject matter that could violate KRS 61.102. Since Dr. Kearney's complaints neither revealed publicly unavailable or unknown information nor reported a violation contemplated by KRS 61.102, his whistleblower claims fail as a matter of law, and must be dismissed.

b. Dr. Kearney did not complain to an appropriate official.

The contents of Dr. Kearney's complaints aside, Dr. Kearney also did not report to his complaints to an "appropriate body or official." Dr. Kearney testified that he "blew the whistle" to then-dean of the College of Medicine, Dr. Fred de Beer, then-Executive Vice President for Health Affairs, Dr. Michael Karpf, General Counsel for the University of Kentucky Bill Thro, and Board of Trustees member Dr. John Wilson in April 2014.[7] Exhibit 12 at 5-6. The Whistleblower Act covers only those disclosures made to a limited enumerated list of persons or entities; Dr. Kearney does not allege that he reported to any person or entity on this specifically included exhaustive list. *See* KRS 61.102(1).

Instead, Dr. Kearney alleges University General Counsel William Thro was present at the April 15, 2014 Faculty Council meeting where he made his complaints and that Thro's attendance at the meeting, for the purpose of making a brief presentation and answering

[7] Dr. Kearney explicitly acknowledges that he engaged in no whistleblower activity prior to the April 15, 2014 faculty council meeting. Exhibit 12 at 11.

questions, rendered his complaints a report to an "other appropriate body or authority" under KRS 61.102. The Supreme Court has held in some circumstances a direct report from an employee's attorney to the general counsel's office may constitute an internal disclosure to an "other appropriate body or authority." *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008). In *Gaines*, the plaintiff witnessed two other employees of the Workforce Development Cabinet throwing confidential materials into a publicly accessible dumpster and, believing the materials might be related to an ongoing discrimination lawsuit, asked her attorney to report what she witnessed to the Cabinet's attorney. *Id*. at 791. The Court found this report was a report to an "other appropriate body or authority," since the Cabinet's general counsel's office had the investigative power to remedy or report the perceived misconduct. *Id.* at 793.

First, since KMSF is an organization independent from the University, Thro is not an appropriate body or authority for reporting complaints concerning KMSF. As for Dr. Kearney's complaints concerning the Practice Plan, the Supreme Court recently imposed a significant limitation on the application of *Gaines'* rationale germane to this case. In *Pennyrile Allied Community Services, Inc. v. Rogers,* 459 S.W.3d 339 (Ky. 2015), the Supreme Court upheld summary judgment on the whistleblower claim of a state employee who complained in a staff meeting about her boss' policies and practices. As the Court explained, the purported retaliatory boss "was the highest-ranking person at the meeting" and the employee "made no effort to bring her claim to the attention of anyone with the power to remedy or report" the alleged wrong behavior. *Id.* at 346. The Court recognized the plaintiff "was merely expressing to her boss her displeasure about a practice. She did not intend to report, divulge, or disclose anything by discussing this practice with the offending boss in front of her co-workers." *Id.* "An []

employee cannot gain whistleblower status, and the protections that come with that status, by simply complaining to her boss about what she perceives as his misconduct." *Id.*

Similarly, Dr. Kearney does not become a whistleblower because the University's general counsel was present in a faculty council meeting when he complained about the Practice Plan or the fact the Committee had not met. Under *Pennyrile*, Dr. Kearney's complaint in a faculty meeting about his dissatisfaction with the Practice Plan Committee is not a disclosure to an appropriate authority; it is merely complaining to your superiors about policies and practices.

c. Dr. Kearney cannot prove his alleged whistleblowing was a contributing factor to the disciplinary action taken against him.

Regardless of Dr. Kearney's inability to prove his comments at the April 14, 2015 Faculty Council meeting constituted a "disclosure" to an "other appropriate body or authority" under the Whistleblower Act, Dr. Kearney cannot prove by a preponderance of the evidence that his alleged whistleblowing was a contributing factor to the actions taken against him. Given the extreme nature of the allegations made against Dr. Kearney by his patient, and Dr. Kearney's own admission that he ridiculed and used profanity with the patient, no reasonable person could conclude Dr. Kearney's prior vague complaints were contributing factors to the disciplinary actions taken against him. Dr. Kearney's only evidence that his so-called whistleblowing contributed to the revocation of his privileges is his own speculation and subjective interpretation of events, insufficient to prove causation.

The actions taken against Dr. Kearney were initiated directly following the student and patient complaints received in August and September 2015. None of the officials Dr. Kearney accuses of orchestrating the alleged retaliation against him, Dr. Karpf, Mr. Thro, Dr. Wilson and Dr. de Beer, were involved in the investigation and decision-making; rather, all disciplinary actions were investigated and recommended by independent investigators and adjudicatory

panels, in accordance with the UK Health Care Medical Staff Bylaws. *See* Exhibits 13-17. The MSEC members tasked with investigating the allegations against Dr. Kearney, and the MSEC members appointed to the fair hearing panel that presided over Dr. Kearney's hearing along with Professor Lawson were not present at either the January 21, 2014 or April 15, 2014 Faculty Council meetings where Dr. Kearney supposedly discussed his concerns with the Practice Plan Committee and KMSF. *See* Exhibits 22 and 24. Dr. Boulanger, responsible for Dr. Kearney's initial suspension following his paid administrative leave, also was not present at either of the Faculty Council meetings. *Id*. Finally, no member of the Healthcare Committee of the Board of Trustees, either on the Appellate Review Panel or in the final vote, was present at either Faculty Council meeting at which Dr. Kearney complained. *Compare id*. to Exhibits 16, 17.

Further, no evidence of record indicates anyone present at the April 15, 2014 Faculty Council meeting communicated with the independent decision-makers concerning Dr. Kearney's comments. On the contrary, Dr. Frederick Zachman, who presided over the January 29 and February 5 meetings of the MSEC, explained Dr. Kearney's discipline was due solely to the information contained in the MSEC's report and the general consensus among the MSEC was that Kearney posed a potential risk of harm to faculty. *See* Exhibit 33, Dr. Frederick Zachman Dep. at 106-07; 113. Finally, Dr. Zachman, testified Dr. Boulanger's directives prohibiting Dr. Kearney from being present on campus and restricting his contact with patients, faculty, residents, students, and staff were due to Dr. Kearney's unprofessional behavior and safety concerns. *Id*. at 116, 118, 120-21; 123. Dr. Kearney simply cannot establish a causal connection between his alleged whistleblowing and the disciplinary actions taken against him.

Without doubt, Dr. Kearney cannot take advantage of KRS 61.103(1)(b)'s presumption that a disclosure is a contributing factor "if the official taking action knew or had constructive

knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action." First, Dr. Kearney offers no evidence that anyone present at the April 15, 2014 Faculty Council meeting was a decision-maker in the disciplinary proceedings against him. Second, even if one assumes Dr. Kearney's September 5, 2014 placement on paid administrative leave constitutes a "personnel action" under the Whistleblower Act, that action did not take place until *almost five months* after Dr. Kearney's comments at the April 15 Faculty Council meeting. When a plaintiff relies on temporal proximity alone to prove causation, the protected activity and the personnel action "must be very close" in time to support a causal connection. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)(interpreting a Title VII retaliation claim).[8] Thus, Dr. Kearney cannot establish an "official taking action" did so "within a limited period of time" for purposes of KRS 61.103(1)(b)'s contributing factor presumption.

Since Dr. Kearney cannot avail himself of the generous presumption provided by KRS 61.103(1)(b), he must prove, by a preponderance of the evidence, his comments were a contributing factor to his discipline. The only evidence Dr. Kearney cites in support of his belief that his termination was due to his April 15, 2014 comments at the Faculty Council meeting is his interpretation of Dr. Karpf's comments at that meeting. Dr. Kearney's subjective interpretation of this comment as a threat is insufficient to prove Kearney's comments in any way contributed to the disciplinary action. There is no evidence Dr. Karpf was involved with either the MSEC hearing panel or the Board of Trustees appeals. Since no other evidence of record supports Kearney's contention that his discipline was due to his comments at the April 15,

[8] The Sixth Circuit has held a period of *five months* is too long to infer causation from temporal proximity alone. *See Kubik v. Central Michigan University Bd. of Trustees*, 2017 WL 5900644 at *3 (6th Cir. 2017). The Kentucky Supreme Court has found an alleged act of retaliation after only *four months'* time too attenuated from the claimant's report to create an inference of causation. *See Brooks v. Lexington Fayette Urban County Gov't*, 132 S.W.3d 790, 804 (Ky. 2004).

2014 Faculty Council meeting, he cannot make *a prima facie* case of whistleblower retaliation, and his claims must be dismissed.

II. The University has proven by clear and convincing evidence that Dr. Kearney's alleged disclosure was not a material fact in the disciplinary action taken against him.

Despite Dr. Kearney's failure to prove his own *prima facie* case, the University has proven by clear and convincing evidence that the disciplinary actions taken against Dr. Kearney were due solely to the complaints brought against him. The actions taken against Dr. Kearney were initiated directly following the student and patient complaints received in August and September 2014. None of the officials Dr. Kearney accuses of orchestrating the alleged retaliation against him, Dr. Karpf, Mr. Thro, Dr. Wilson and Dr. de Beer, were involved in the investigation and decision-making; rather, all disciplinary actions were investigated and recommended by independent investigators and adjudicatory panels, and the University strictly complied with the UK Health Care Medical Staff Bylaws. *See* Exhibits 14, 16, 17.

The *McDonnell-Douglas* burden shifting scheme, applicable to similar retaliation claims brought under KRS Chapter 344, is useful in whistleblower retaliation cases as it assists understanding the plaintiff's burden once his employer has proven the personnel action taken against plaintiff was unrelated to plaintiff's protected disclosure. *See McDonnell-Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), adopted by *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 700-01 (Ky. App. 1991). Under the *McDonnell-Douglas* burden shifting scheme, once an employer has refuted an employee's *prima facie* case of retaliation by providing a legitimate, nondiscriminatory reason for the action taken against the plaintiff, the burden shifts back to the plaintiff. In that event, the plaintiff must present "cold hard facts" from which a reasonable juror can draw the inference that the employer's proffered reason

for the disciplinary action was pretext for unlawful retaliation in order to sustain his claim. *Handley*, 827 S.W.2d at 700-01 (Ky. App. 1991). In other words, to demonstrate pretext, a plaintiff must show *both* that the employer's proffered reason was not the real reason for its action, *and* that the employer's real reason was unlawful." *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 767 (6th Cir. 2015) (*citing Hicks*, 509 U.S. at 515; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000)).

Under the Kentucky Whistleblower Act's burden-shifting scheme, an employer must prove by clear and convincing evidence that the employee's disclosure was not a material fact in the decision to take disciplinary action. *See Davidson*, 152 S.W.3d at 251. Here, the University has proven Dr. Kearney's complaints at the April 15, 2014 meeting were not the impetus, or even a consideration in the disciplinary actions taken against him. Moreover, Dr. Kearney has presented no evidence contradicting this fact. Dr. Kearney cannot identify any "cold hard facts" to support his belief that the revocation of his practice privileges was not motivated by the patient's complaints. *See* Kearney Dep. at 82-85. Indeed, Dr. Kearney could only cite his own belief that if the prior complaints against him were insufficient to warrant discipline, this disciplinary action must be unrelated to the serious complaint lodged by a patient. *See id*. A plaintiff's subjective beliefs or impressions do not allow a reasonable juror to infer pretext. *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir 1993); *Ford Motor Co.*, 782 F.3d at 768 (Finding an employee's "subjective skepticism" regarding the truth of a supervisor's motivation in taking an employment action does not create "a triable issue as to pretext."). Dr. Kearney admits he has no knowledge of any of the information collected by the MSEC investigators was inaccurate. Exhibit 12 at 109.

Dr. Kearney cannot rely on his prior success at the University to sweep his behavior under the rug or his own beliefs as to what caused his discipline to evade the simple fact that the University's revocation of his privileges was in direct response to his inappropriate and unprofessional conduct in front of a patient in September 2014. Absent any evidence to contradict the University's obvious and just cause for the actions taken against him, supported by the clear and convincing evidence of record, Dr. Kearney cannot succeed on his whistleblower claims. Those claims therefore must be dismissed, with prejudice.

CONCLUSION

For the foregoing reasons, the University is entitled to summary judgment on all claims and respectfully requests this Court dismiss Dr. Kearney's Complaint, with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February 2018 the foregoing document was electronically filed with the Clerk of this Court using the KY eCourts eFiling system, and also sent via U.S. Mail to the following counsel of record:

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