COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
SEVENTH DIVISION
CIVIL CASE NO. 15-CI-551

PAUL KEARNEY, M.D. — PLAINTIFF

v.

UNIVERSITY OF KENTUCKY — DEFENDANT

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant University of Kentucky's (hereinafter, "UK") Motion for Summary Judgment, wherein UK avers that Plaintiff Dr. Paul Kearney (hereinafter, "Dr. Kearney") fails to qualify for whistleblower protection under KRS 61.102. Having the benefit of memoranda of law, arguments of counsel, and being otherwise sufficiently advised the Court took this matter under advisement.

FACTUAL BACKGROUND

The instant action arises out of a disciplinary process concerning Dr. Kearney's behavior. Dr. Kearney has occasionally been disciplined for berating coworkers, medical students, and patients for over 20 years. In 2012, after verbally abusing a nurse, Dr. Kearney signed a written reprimand containing a warning that if he continued such conduct, he would be subject to corrective action.[1] On January 21, 2014, the University of Kentucky College of Medicine Faculty Council (hereinafter, "Faculty Council"), a group of faculty members in the College of Medicine who make suggestions in matters concerning curriculum and other faculty functions, held a meeting. At this meeting, Dr. Davy Jones and Dr. Kearney discussed the College of Medicine's

[1] Def.'s Mot. for Summ. J. Ex. 2, "Written Reprimand and Action Plan Re Unprofessional Conduct," Dec. 12, 2012.

Practice Plan Committee. The Practice Plan Committee serves as the faculty's oversight committee on sources of income within the College of Medicine. At this meeting, Dr. Jones explained that he had discovered that the Practice Plan Committee had not met from June 2009 to April 2014, seemingly in violation of Administrative Regulation 3:14 (hereinafter, "AR 3:14"), Article X, which requires that the Committee meet periodically to review the operation of the Plan, among other things.[2]

On April 15, 2014, the Faculty Council held a meeting with Dean Frederick de Beer (Dean of the College of Medicine at the time), Executive Vice President of Health Affairs (hereinafter, "EVPHA") Dr. Michael Karpf, General Counsel to the University of Kentucky Bill Thro, and Dr. John Wilson (the faculty-elected trustee to the University of Kentucky Board of Trustees) in attendance. During this meeting, Dr. Kearney stated that he thought an outside attorney was needed to look at how the practice plan contracts were developed. The practice plan contracts detail how the doctors at UK are paid. Additionally, Dr. Kearney stated that he thought an independent audit of the Kentucky Medical Services Foundation (hereinafter, "KMSF") was needed. KMSF is a non-profit, non-member 501(c)(3) organization that collects the bills owed to the UK Clinical physicians and then returns the funds back to the physicians. Dr. Kearney acknowledges that the Faculty Council is limited to academic matters and that he also did not speak with Dr. Karpf, General Counsel Thro, Dean de Beer, or Mr. Wilson after this April 15 meeting regarding the practice plan contracts.

Nearly nine months later, on September 5, 2014, Dr. Kearney was accused of berating a quadriplegic patient. As a result, he was placed on paid administrative leave. Subsequently, he went through a lengthy disciplinary process that eventually concluded with the University of

[2] Pl.'s Resp. to Mot. for Summ. J. Ex. 8, "Practice Plans for Health Science Colleges and University Health Services," p. 7.

Kentucky's Board of Trustees Health Care Committee affirming the revocation of Dr. Kearney's clinical privileges, but it did reinstate his status as a tenured professor. In the midst of the disciplinary process, Dr. Kearney filed this action alleging that the University of Kentucky retaliated against him for disclosing a violation of AR 3:14, itself a violation of the Kentucky whistleblower statute.

In his Complaint, Dr. Kearney alleges that he "blew the whistle" by making four different disclosures. The first disclosure was at the April 15, 2014 meeting stating that AR 3:14 was violated, that an outside attorney was needed to look at the practice plan contracts and how they were developed, and that an independent audit of KMSF was needed. The second was an e-mail from November 3, 2014 to the General Counsel's Office, which claimed the complaints about Dr. Kearney's behavior were only meant to remove Dr. Kearney in retaliation for what he said at the April 15, 2014 meeting. Third, the pleadings allege mismanagement of KMSF funds. The fourth and final disclosure was an affidavit from Daryl Griffith, former CEO of KMSF, which states KMSF is breaching its fiduciary duties to the physicians employed by UK.

CONCLUSIONS OF LAW

I. Overview of purpose and structure of the Kentucky whistleblower statute

KRS 61.102 protects whistleblowers from employer retaliation, as long as the whistleblower can establish four elements: (1) the employer must be an officer or agency of the state or one of its political subdivisions; (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 must have acted or punished the employee for making the report or acted in a way so as to discourage the

making of the report.[3] Furthermore, the whistleblower must also establish by a preponderance of the evidence that the disclosure was a contributing factor in the personnel action taken against him or her.[4]

In this case, the first two elements are plainly met because the University of Kentucky is an agency of the state and Dr. Kearney was employed by the University of Kentucky. The elements to be discussed herein are whether or not Dr. Kearney's statements about the KMSF and Practice Plan Committee at the April 15, 2014 Faculty Council meeting are sufficient to be a report or disclosure and whether or not Dr. Kearney was suspended in retaliation from making such a disclosure. Because this Court finds that Dr. Kearney did not make a valid disclosure under KRS 61.103, for reasons set forth below, we need not address the issue of retaliation.

II. Statutory treatment in Kentucky

KRS 61.103 defines "disclosure" as "a person acting on his own behalf, or on behalf of another, who reported or is about to report, either verbally or in writing, any matter set forth in KRS 61.102."[5] In *Pennyrile Allied Cmty. Servs. v. Rogers*, the Kentucky Supreme Court stated, "[a]s such, the statute's definition of 'disclosure' is not of much help beyond stating that a report need not be in writing and need not be completed, so long as the report was imminent."[6] In that case, the plaintiff, Katricia Rogers, was an employee for a government program focused on rural development. Ms. Rogers's job in the program often required her to be out of the office.[7] Her supervisor, Dennis Gibbs, often traveled to the homes of his employees to ensure that they were working.[8] One day, Mr. Gibbs made an unannounced visit to Ms. Rogers's home, which had a

[3] *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998).
[4] *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 251 (Ky. Ct. App. 2004).
[5] Ky. Rev. Stat. Ann. § 61.103 (LexisNexis 1993).
[6] *Pennyrile Allied Cmty. Servs. v. Rogers*, 459 S.W.3d 339, 344 (Ky. 2015).
[7] *Id.* at 341.
[8] *Id.*

"private property" sign near the driveway, and caused minor damage to the gravel driveway.[9] The same day, Mr. Gibbs informed Ms. Rogers of the damage, and Ms. Rogers made no complaint.[10] Ms. Rogers later visited the sheriff's office to inquire whether Mr. Gibbs's visits constituted trespassing, and a deputy told her that, in his opinion, such visits were, indeed, trespassing.[11] At a staff meeting about two months after Mr. Gibbs's unannounced visit to Ms. Rogers's home, Ms. Rogers challenged Mr. Gibbs on his unannounced visits implying that if he visited her home again, she would seek to prosecute him for trespassing.[12] The next day, she was fired, and she subsequently brought suit under KRS 61.102.[13]

Ms. Rogers asserted that a report or disclosure occurred when: (1) she visited the sheriff's office; (2) she confronted Mr. Gibbs at the staff meeting about his unannounced visit to her home; or (3) she implied that she would take action if Mr. Gibbs made another unannounced visit to her home.[14] At that time, the court had not yet specifically addressed what qualifies as a protected disclosure under KRS 61.102.[15] One aspect of a disclosure under KRS 61.102 is that "[t]he phrases 'in good faith' and 'brings to the attention of' clearly denote an intent on the part of the employee to reveal or impart what is known to the employee to someone else who lacks the knowledge and is in position to do something about it."[16] Additionally, the legislature chose words to include disclosures or reports by a claimant that were intended to expose wrongdoing otherwise concealed.[17]

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 344.
[15] *Id.*
[16] *Id.*
[17] *Id.*

Ultimately, the court concluded that Ms. Rogers's statements were not disclosures under the statute. The visit to the sheriff's office was made with the intent to learn about property and privacy rights, not to report Mr. Gibbs for a suspected violation of law in his capacity as a government official.[18] Similarly, the statements at the staff meeting were insufficient to be disclosures because there was no one at the meeting with supervisory authority over Mr. Gibbs, and, therefore, no one present could initiate corrective action.[19] Thus, the implied threat to Mr. Gibbs of future legal action was merely an expression of a personal grievance with Mr. Gibbs as a private citizen.[20]

Internal reports of wrongdoing are, however, sufficient disclosures under KRS 61.102.[21] In *Workforce Dev. Cabinet v. Gaines*, Ms. Gaines worked as an auditor in the Jefferson County office of the Kentucky Workforce Development Cabinet.[22] In 1998, Ms. Gaines filed a gender discrimination suit against the Cabinet, which was eventually settled.[23] In her subsequent whistleblower suit, Ms. Gaines alleged that after filing her discrimination suit, her workplace environment deteriorated.[24] In February of 2002, the Cabinet informed her that some auditors would be transferred from the downtown Louisville office to the Preston Highway office. The following summer, Ms. Gaines's supervisor informed her that she would be transferred.[25] Ms. Gaines objected and filed a second lawsuit claiming gender discrimination and retaliation in November of 2002.[26]

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789, 794 (Ky. 2008).
[22] *Id.* at 791.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

The disclosure at issue in the *Gaines* case originated on February 6, 2003. On that day, Ms. Gaines witnessed another Cabinet employee throwing documents, relating to her second lawsuit, into a publicly accessible dumpster, which was not standard procedure.[27] Ms. Gaines promptly informed her attorney, who in turn contacted an attorney for the Workforce Development Cabinet.[28] An investigation was done and no wrongdoing was found.[29] On February 10, 2003, Ms. Gaines received notice that she was being transferred to the Preston Highway office, that she was barred from the downtown office, that and had her keys and security card taken away from her.[30] She shortly thereafter amended her complaint to include a whistleblowing claim with the disclosure being the report of the document purge.[31]

The *Gaines* court began its analysis by concluding that the KRS 61.102 must be broadly construed to effectuate its clear purpose of protecting public employees who report wrongdoing.[32] One of the issues in the case was whether Gaines made an appropriate disclosure by making a report to an attorney within the Workforce Development Cabinet. The court read the "any other appropriate body or authority" language in KRS 61.102 "to include any public body or authority with the power to remedy or report the perceived misconduct."[33] Although the Attorney General and Legislative Research Commission are both specifically stated in the statute, the "any other appropriate body or authority" language includes the agency itself because it would be an absurd result to require a direct report to the Attorney General or Legislative Research Commission over minor misconduct.[34] Therefore, the court held that Gaines's disclosure was a sufficient report.[35]

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 792.
[32] *Id.* at 792-93.
[33] *Id.*
[34] *Id.* at 793-94.
[35] *Id.*

In order to be protected under KRS 61.102, a disclosure must also be an initial report.[36] In *Moss v. Kentucky State Univ.*, Ms. Moss was an accountant for Kentucky State University from July 2007 to January 2010.[37] In response to her supervisor asking for a doctor's note verifying an absence in February 2009, Ms. Moss filed a complaint with the Human Resources Director and a Human Resources investigator.[38] Ms. Moss alleged in her complaint to Human Resources that her taxpayer-funded salary was both mismanaged and wasted because she was tasked with completing financial statements, which she did not have the requisite skill to prepare despite her resume stating she had "excellent skills in financial statement preparation".[39] Ms. Moss later filed suit under KRS 61.102 alleging, among other things, that she disclosed the accounts receivable issue, but apparently the University was already taking steps to remedy this.[40] The court held that this report failed to be a disclosure because the University was already attempting to address the accounts receivable problem.[41]

Although a good faith report may be made on hearsay, the employee must still prove that the report was made based on a reasonable belief of accuracy.[42] In *Thornton v. Office of the Fayette Cty. Atty.*, Ms. Thornton was employed with the Fayette County Attorney's Office and supervised by Margaret Kannensohn.[43] Due to her professional duties, Ms. Thornton spent nearly all of her time out of the office.[44] In fall of 2004, Ms. Thornton learned from Ms. Kannensohn's chief administrative assistant that Ms. Kannensohn was engaging in questionable conduct.[45] Ms.

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[36] *Moss v. Kentucky State Univ.*, 465 S.W.3d 457, 460 (Ky. Ct. App. 2014).
[37] *Id.* at 458.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Thornton v. Office of the Fayette Cty. Atty.*, 292 S.W.3d 324, 331 (Ky. Ct. App. 2009).
[43] *Id.* at 327.
[44] *Id.*
[45] *Id.*

Thornton reported this conduct to a number of public officials.[46] On January 31, 2005, Ms. Kannensohn informed Ms. Thornton that she was fired and her position abolished.[47] Ms. Thornton had never been reprimanded because of her job performance.[48]

Ms. Thornton brought suit alleging that she was fired in retaliation for her report Ms. Kannensohn.[49] The majority approach, cited by the court, was that a good faith report may be made on hearsay because the statute's use of the word "'suspected' implies a liberal orientation toward the content of the disclosure."[50] However, the use of hearsay evidence can be a factor in determining if a report was made in good faith.[51] Additionally, the content of the report and the employee's conduct in making the report must still be considered in determining whether the report was a good faith disclosure or not.[52] Ms. Thornton made no effort to learn firsthand the truth of anything she was told about Ms. Kannensohn's conduct, and her source of the information, Ms. Kannensohn's chief administrative assistant, also reported the same alleged misconduct.[53] Therefore, the court held that Ms. Thornton's report was not made in good faith.[54]

Finally, reporting publicly known information is not a protected disclosure, while reports made during litigation, on the other hand, can be protected disclosures.[55] In *Davidson v. Commonwealth, Dept. of Military Affairs*, Mr. Davidson was an employee of Kentucky's Department of Military Affairs ("Department") and an officer of a private corporation, the Wind River Energy Corporation.[56] Starting in 1995, the Kentucky Cabinet for Natural Resources and

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 331.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Davidson*, 152 S.W.3d at 254-55.
[56] *Id.* at 249.

Environmental Protection ("NREPC") repeatedly cited Mr. Davidson as an individual and Wind River for violating mining laws.[57] In 1999, the NREPC filed an action to have its citations against Mr. Davidson and Wind River enforced.[58] In 2001, Mr. Davidson was placed on paid leave by the Department.[59] In both the NREPC's enforcement action and his own action against the Department, Mr. Davidson asserted allegations that the Department violated KRS 61.102 because claiming that it had retaliated against him for disclosing that the NREPC's hearing procedures violated state law.[60] The trial court, however, dismissed this claim.[61]

The *Davidson* court found that Mr. Davidson's disclosures were the allegations that the NREPC's hearing procedures violated state law.[62] The court stated that if the essence of a suit is intended to be a report of any type of activity listed in KRS 61.102, then reports made during litigation can qualify as a disclosure under KRS 61.102 and 61.103.[63] Mr. Davidson's whistleblower claim, therefore, was not categorically foreclosed solely because he made his reports in the course of litigation.[64] However, Mr. Davidson ultimately failed to make a sufficient disclosure because his reports were that the NREPC's hearing procedures were a violation of state law, and he only reported information that could be found in statutes and administrative regulations, which are public information.[65] Thus, although Mr. Davidson could have made a sufficient disclosure in the course of litigation, he failed to do so because he only reported publicly known information.[66]

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 254.
[64] *Id.*
[65] *Id.* at 255.
[66] *Id.*

III. Analysis

In this case, Dr. Kearney asserts that he made four disclosures protected by KRS 61.102. The first alleged disclosure was made at the April 15, 2014 Faculty Council meeting with Dean de Beer, General Counsel Thro, and Dr. Wilson present. Specifically, that Dr. Kearney stated AR 3:14, which governs the Practice Plan Committee, was violated because the Practice Plan Committee had not met in five years. He also stated that an outside attorney was needed to look at the practice plan contracts and how they were developed. Dr. Kearney also alleges that, at this same meeting, he stated that he thought an independent audit of KMSF was needed. The second alleged disclosure was made in an e-mail on November 3, 2014 to the General Counsel's office. In that e-mail, Dr. Kearney claimed the complaints against him were only meant to remove Dr. Kearney from his positions in retaliation for what he reported at the April 15, 2014 meeting. The third alleged disclosure is in the pleadings of this case that assert mismanagement of KMSF funds. The final alleged disclosure is an affidavit from Daryl Griffith, the former CEO of KMSF, which states KMFS is breaching its fiduciary duties to the physicians.

With regard to the statements made at the April 15, 2014 Faculty Council Meeting, if the other requirements for a report of any wrongdoing or suspected wrongdoing are met, then it would constitute a disclosure because Dean de Beer, General Counsel Thro, and Dr. Wilson were at this meeting. As Dean of the College of Medicine, General Counsel to the University, and member of the University's Board of Trustees, respectively, each of these men possessed supervisory authority over the Practice Plan Committee and could remedy the perceived misconduct. Although *Thornton* requires a broad reading of the content of a potential disclosure, *Pennyrile* mandates that the report must bring facts to light not otherwise known to the recipients, who in this case are Dean de Beer, General Counsel Thro, and Dr. Wilson.

In Dr. Kearney's Response to UK's Motion for Summary Judgment, he states that at the January 21, 2014 Faculty Council meeting, Dr. Jones reported that the Practice Plan Committee had not met since its creation in 2009, despite the fact that conditions had occurred requiring the Committee to meet. Dr. Jones's statements concerning the Practice Plan Committee were recorded in the meeting minutes and would, thus, make the information known to Dean de Beer, General Counsel Thro, and Dr. Wilson. It is somewhat unclear in the record if the Faculty Council had authority to compel the Practice Plan Committee to have meetings or otherwise remedy the situation. Assuming that it did in fact possess such authority over the Practice Plan Committee, it was Dr. Jones, and not Dr. Kearney, who made this initial report.

This Court finds that the statements about KMSF from the April 15, 2014 meeting are not a valid report under KRS 61.102 for two reasons. First, based on Dr. Kearney's statements in his own deposition, he vaguely stated that he thought KMSF needed an audit. The statements do not read as if Dr. Kearney intended to expose wrongdoing otherwise concealed, as is required by *Pennyrile*. Second, it does not appear that *Gaines* requirement that the report be made to someone with supervisory authority is met. KMSF is a private corporation, not a public entity. There is no evidence that it is within the purview of Dean de Beer, General Counsel Thro, or Dr. Wilson.

In his Response to UK's Motion for Summary Judgment, Dr. Kearney excerpts the relevant portion of the November 3, 2014 e-mail that he alleges is a disclosure. The excerpt states that the disciplinary process was done in response to "his public disclosure of Dr. Karpf's impropriety i.e. attempting gain control of KMSF practice plan funding contrary to University regulations."[67] The e-mail fails to make the report to an appropriate body because it was sent to the General Counsel's Office, who is alleged to have played a role in the retaliation itself. In other words, the General

[67] Pl.'s Resp. to Def.'s Mot. for Summ. J., p. 8.

Counsel's Office is not an appropriate body to remedy the suspected violation in which the General Counsel himself is alleged to have been involved.

The alleged disclosure found in the pleadings is in relevant part found in paragraph 9 of Dr. Kearney's complaint. Paragraph 9 discusses the April 15, 2014 meeting and specifically states, "plaintiff disclosed to university general counsel Bill Thro that the university's access to the [KMSF]'s funds violated University regulations, constituted an abuse of authority, violation of law and mismanagement."[68] Under *Davidson*, the mere fact that Dr. Kearney made this report in the course of litigation does not bar it from qualifying as a disclosure. However, the alleged disclosure in the complaint is a barebones reiteration of the report from the April 15, 2014 Faculty Council meeting. As a reiteration of an earlier report, this alleged disclosure is not an initial report as required by *Moss* and fails to be a proper disclosure under the whistleblower statute.

The fourth, and final, alleged disclosure is from Daryl Griffith about KMSF breaching its fiduciary duties to the physicians employed at UK. Other than asserting that Mr. Griffith's affidavit constitutes a disclosure under KRS 61.102, Dr. Kearney makes no argument supporting why it is a protected disclosure. Nonetheless, the affidavit states that KMSF was operating as a private, non-stock, nonprofit corporation. It also lists seven different business activities KMSF engaged in while Mr. Griffith was its Executive Director.

Under *Thornton*, the affidavit is not barred from being a disclosure because Mr. Griffith lacks personal knowledge of whether or not the Practice Plan Committee's failure to meet violates AR 3:14. However, KMSF is a *private* corporation and not a *public* entity, as required by the statute in a whistleblower action. Furthermore, Mr. Griffith's affidavit was first entered into the record on February 10, 2016, and the disciplinary proceedings at issue in this case concluded on

[68] Pl.'s Compl., p. 2-3.

August 24, 2015. Chronologically, the affidavit cannot be a report because it came after the alleged retaliation occurred.

CONCLUSION

In summation, none of Dr. Kearney's alleged disclosures qualify for protection under KRS 61.102. The statements at the April 15, 2014, meeting are not disclosures because the statements about the Practice Plan Committee's lack of meetings were not an initial report and the statements about KMSF were not intended to be a report of wrongdoing. Dr. Jones first reported this issue to the Faculty Council in January of 2014, which made the information known to Dean de Beer, General Counsel Thro, and Dr. Wilson. The statements about KMSF were not intended to be a report of wrongdoing because Dr. Kearney merely stated that he thought KMSF needed an audit, and there is no evidence that anyone at the meeting had authority to remedy any potential wrongdoing. KMSF is a private corporation and not a public entity. The November 3, 2014 e-mail is not a disclosure because it is a report to the General Counsel's Office, and the General Counsel himself is alleged to have participated in the retaliation against Dr. Kearney. Any allegations in the pleadings fail to be disclosures because they merely assert legal conclusions. Finally, Mr. Griffith's affidavit is not a disclosure because it was introduced into the record after the disciplinary process at issue in this case concluded.

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Thus, the Court hereby GRANTS the Defendant's Motion for Summary Judgment.

So ORDERED this 7 day of August, 2018.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

CERTIFICATE OF SERVICE AUG - 1 2018

This is to certify that the foregoing was served on this the ____ day of August, 2018, by mailing same first class mail, postage prepaid, to:

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