

LEXSEE 1997 U.S. APP. LEXIS 23939

MAGGIE WILLIAMS, Plaintiff-Appellee, v. COMMONWEALTH OF KENTUCKY; CABINET FOR HUMAN RESOURCES; DARVIN ALLEN; JOHN HODGKIN; RONALD HOLLAND; LYNNE McWILLIAMS; MARGARET WHITTET; DEE MAYNARD, as Appointing Authority, Cabinet for Human Resources; TREVA B. WRIGHT-DONNELL, as Commissioner, Department for Employment Services; RHONDA V. RICHARDSON, as Director for Field Services, Department for Employment Services, Cabinet for Human Resources, Defendants-Appellants.

NOS. 95-5928; 95-5988

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1997 U.S. App. LEXIS 23939

September 9, 1997, Filed

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SUBSEQUENT HISTORY: Reported in Table Case Format at: *124 F.3d 201, 1997 U.S. App. LEXIS 30630.*

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. 91-00193. Forester. 6-26-95. 7-7-95.

DISPOSITION: AFFIRMED in part, REVERSED in part, and REMANDED.

LexisNexis(R) Headnotes

COUNSEL: For MAGGIE WILLIAMS, Plaintiff - Appellee (95-5928, 95-5988): James M. Mooney, Eugene F. Mooney, Mooney, Mooney & Mooney, Lexington, KY.

For COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES, JOHN HODGKIN, RONALD HOLLAND, LYNNE MCWILLIAMS, MARGARET WHITTET, DARVIN ALLEN, DEE MAYNARD, TREVA B. WRIGHT-DONNELL, RHONDA V. RICHARDSON, Defendants - Appellants (95-5928, 95-5988): Robert Y. Gwin, D. Patton Pelfrey,

Robert W. Dibert, Charles E. Allen, III, Brown, Todd & Heyburn, Louisville, KY.

JUDGES: BEFORE: BROWN, GUY and COLE, Circuit Judges.

OPINIONBY: R. GUY COLE, JR.

OPINION:

R. GUY COLE, JR., Circuit Judge. This action involves plaintiff's claims that her demotion within Kentucky's Cabinet [*2] for Human Resources, Department of Employment Services, was in retaliation for speaking out against political patronage practices within the Department, in violation of her First Amendment rights. Plaintiff further asserts that she was denied procedural due process in her demotion, and in addition, alleges violations of Kentucky law. The district court granted partial summary judgment in plaintiff's favor with respect to her procedural due process claim, and following trial, a jury returned verdicts in plaintiff's favor with respect to her First Amendment and state law claims. Defendants now appeal various orders of the district court, including its rulings on motions for summary judgment; its denial of defendants' motions for judgment as a matter of law and a new trial; its award of monetary damages and injunctive relief; and its award of attorneys' fees to plaintiff. For the reasons that follow, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings consistent with this decision.

I. BACKGROUND

A. Factual history

Plaintiff Maggie Williams is a tenured employee of

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the Commonwealth of Kentucky with more than twenty years of service in the Cabinet [*3] for Human Resources (CHR), Department for Employment Services (DES). From February 1985 until May 1990, Williams was the Field Office Manager of the DES office in Winchester, Kentucky and its satellite office in Richmond, Kentucky, supervising approximately thirty employees.

According to Williams, her discord with her supervisors began in November 1989 at an office managers' meeting. There, Don Dixon, CHR Deputy Secretary, allegedly instructed the office managers to hire and promote the "governor's people" for positions within DES, and that any failure of the office managers to cooperate with this instruction would result in "serious consequences." Williams also alleged that she was later told that she could not demote or terminate political appointees, even if they were performing unsatisfactorily. Williams openly stated to her superiors and the employees that she supervised that she would not abide by these practices because they violated state merit system laws.

In February 1989, Williams alleged that her supervisors, defendants P. Kenneth Cox, Margaret Whittet, and John Hodgkin, hired a political appointee, Franklin L. Gibson, as an employee at the DES office in Richmond. n1 [*4] Williams, as Gibson's supervisor, recommended that Gibson not be retained after his six-month probationary period, citing that he pursued political activities while on the job, used DES telephones for personal business, falsified a travel voucher and failed to report adequately to his supervisors. Williams's supervisors failed to follow her recommendation and urged her to reconsider her negative assessment of Gibson. When Williams refused to do so, she received an adverse job performance rating. Shortly thereafter, an administrative review hearing was held to address allegations that Williams verbally abused employees. At the conclusion of the hearing, Williams was formally reprimanded.

n1 The individually named defendants and their respective positions in the CHR at the time of this action are as follows: P. Kenneth Cox, Director of DES; Margaret Whittet, Commissioner, Acting Commissioner and Deputy Commissioner of DES; Frank J. Willey, Acting Director of Personnel Management and Appointing Authority for the CHR; John Hodgkin, Director and Assistant Director of Division of Field Services for DES; Darvin Allen, Commissioner of DES; Ronald Holland, principal assistant to the Commissioner of DES; and Lynne McWilliams, Acting Director Personnel Management and Appointing Authority for the CHR. Cox and Willey were ultimately dismissed from the lawsuit.

[*5]

In October 1989, defendant Ronald Holland conducted an investigation of Williams's management of the Winchester office. This investigation resulted in defendant Darvin Allen issuing a memorandum informing all employees of the Winchester office that derogatory comments regarding clients or co-workers would not be tolerated. After the issuance of the memorandum, Williams continued to speak out against political patronage practices; in particular, Williams accused employee James Little of "selling jobs" and other improper activities. Williams further alleged that Little committed acts of criminal vandalism against her because of her contentions. Williams informed defendants Hodgkin, Allen, Whittet and Holland of her suspicions about Little, and formally reprimanded him. Thereafter, Little filed a grievance against Williams. In response to the grievance, yet another investigation of Williams's management was carried out, during which time Williams was temporarily assigned to the position of interviewer in the Georgetown DES office. During the time period of the investigation, Williams contacted the police and the FBI, reporting threats, vandalism and the alleged violations of Kentucky's [*6] merit-based hiring laws.

As a result of the second investigation, Holland recommended to Allen that Williams be terminated or demoted. After additional investigation, James Thompson, the DES Regional Supervisor, concluded that Williams should be terminated; instead, Allen requested a demotion for Williams. On May 30, 1991, Thompson and defendant Hodgkin hand-delivered to Williams an eighteen-page letter written by defendant Lynne McWilliams, detailing the reasons for her demotion and apprising her of the right to appeal to the state board of personnel. The letter informed Williams that she was temporarily reassigned to the Lexington DES office at a reduced classification, salary and pay grade.

B. Procedural history

Williams chose not to appeal the demotion; rather, she filed a complaint in federal court against the Commonwealth of Kentucky, the CHR and her immediate supervisors. Williams's complaint set forth five counts: (1) deprivation of employment rights without due process under the Fourteenth Amendment, in violation of 42 U.S.C. § 1983; (2) deprivation of employment rights for exercising free speech under the First Amendment, in violation of 42 U.S.C. § 1983; (3) reprisal [*7] for reporting suspected violations of Kentucky law, in violation of *Ky. Rev. Stat. Ann. § 61.102*; (4) demotion without just cause, in violation of *Ky. Rev. Stat. Ann. § 18A.095*; and (5) wrongful discharge.

Defendants moved for summary judgment, citing the Eleventh Amendment and the individual defendants' entitlement to qualified immunity, and Williams moved for partial summary judgment on her due process claim. On January 23, 1993, the district court dismissed all claims against the Commonwealth of Kentucky and CHR, and all monetary claims against the individual defendants in their official capacities on the basis that those claims were barred by the Eleventh Amendment; held that the individual defendants were not entitled to qualified immunity on the federal claims; and granted partial summary judgment to Williams on her due process claim. n2

n2 On January 15, 1993, defendant Cox was dismissed from the lawsuit.

Thereafter, defendants appealed to this court the district court's determinations regarding qualified [*8] immunity; its failure to dismiss Williams's claims for injunctive relief on the basis of the Eleventh Amendment; and its grant of partial summary judgment in favor of Williams on her due process claim. We held: (1) defendants were not entitled to qualified immunity on Williams's First Amendment claim; (2) defendants were entitled to qualified immunity on Williams's due process claim; (3) Williams's state-law claims for injunctive relief were barred by the Eleventh Amendment; and (4) the district court's grant of partial summary judgment on Williams's due process claim was not a final appealable order. n3

n3 *Williams v. Kentucky*, 24 F.3d 1526 (6th Cir. 1994).

On remand, the district court dismissed the Commonwealth and the CHR as defendants, vacated its order granting partial summary judgment on Williams's due process claim and set the case for trial on the remaining claims. Prior to trial, defendants filed a motion for partial summary judgment on the ground that *Ky. Rev. Stat. Ann. § 18A.095* provides the [*9] exclusive remedy for the demotion of a classified employee; the district court denied that motion as untimely.

On January 30, 1995, a jury trial commenced on Williams's First Amendment and state-law claims. At the close of Williams's case-in-chief, the district court overruled defendants' motion for a directed verdict (or judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(a)*) as to each of the defendants except Willey, who was dismissed from the case. The jury ultimately found in favor of Williams, awarding her \$125,000 in compensatory damages for lost wages and benefits; injury to reputation; and mental distress, embarrassment, and hu-

miliation. The jury further awarded Williams \$100,000 in punitive damages.

Following the trial, the district court overruled defendants' motion for judgment notwithstanding the verdict (judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(b)*), or in the alternative, a new trial. The district court also allowed substitution for defendants McWilliams, Allen and Hodgkin in their official capacities by their successors in office, and granted Williams's motion for reinstatement, ordering a remittitur of \$60,000 of the judgment for compensatory [*10] damages for lost wages and benefits upon reinstatement. In addition, the district court reinstated its earlier grant of partial summary judgment in favor of Williams on her due process claim. Finally, the district court awarded Williams attorneys' fees and costs in excess of \$225,000 against the defendants jointly and severally in their official and individual capacities.

Defendants then filed a timely notice of appeal challenging the following district court actions: (1) its denial of defendants' motions for summary judgment and judgment as a matter of law; (2) its denial of defendants' motion for a new trial; (3) its grant of summary judgment in favor of Williams on her procedural due process claim; (4) its award of monetary and injunctive relief against the defendants in their official capacities; and (5) its award of attorneys' fees and costs.

II. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND JUDGMENT AS A MATTER OF LAW

Defendants appeal the district court's denial of their motions for summary judgment pursuant to *Fed. R. Civ. P. 56* and judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(a)* and (b). The crux of defendants' argument is the same for each of these [*11] motions: Williams failed to establish causation; put differently, Williams did not present any evidence against the individual defendants supporting the inference that she was demoted in retaliation for her protected speech. Defendants' argument encompasses both Williams's First Amendment claim and her state law claims.

We have held in cases in which an appellant made a Rule 56 motion for summary judgment that was denied, made those same arguments in a Rule 50(a) motion at the close of evidence that also was denied, lost in front of a jury, and then renewed its arguments in a rejected Rule 50(b) motion after entry of judgment, that we will review only the denial of the Rule 50(b) motion. *K & T Enter., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174 (6th Cir. 1996). We therefore will address defendants' argument in the context of their motion for judgment as a matter of law pursuant to Rule 50(b).

Our standard of review for a Rule 50(b) motion based on sufficiency of the evidence is identical to that used by the district court. *Id. at 175*. The evidence must be viewed in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences. [*12] *Id. at 176*. We do not weigh the evidence, evaluate the credibility of witnesses or substitute our judgment for that of the jury. *Id. at 175*. The motion should be granted and the district court reversed, only if reasonable minds could not come to a conclusion other than the one favoring the moving party. *Id.* (citations omitted).

A. First Amendment Claim

When assessing a First Amendment claim, we look to the two-stage test set forth in *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), and developed in subsequent decisions. First, the employee must establish that her speech was constitutionally protected, which is a question of law. *Id. at 287*; *Langford v. Lane*, 921 F.2d 677, 680 (6th Cir. 1991); see *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). Speech is protected when it addresses a matter of public concern, and the employee's interest in making such statements outweighs "the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, [*13] 88 S. Ct. 1731 (1968); *Langford*, 921 F.2d at 681-82. We have previously determined that Williams's speech with respect to political patronage and corruption in the DES office were matters of public concern. *Williams*, 24 F.3d at 1535-37.

Once an employee establishes that the speech was protected, the second stage of inquiry involves causation, a factual issue. To satisfy the second stage, the employee must demonstrate that the protected speech was a substantial factor in her dismissal. *Mount Healthy*, 429 U.S. at 287; *Langford*, 921 F.2d at 682-84; *Barnes v. McDowell*, 848 F.2d 725, 733 n. 9 (6th Cir. 1988). It is this stage of the analysis that is the crux of defendants' appeal. Defendants argue that judgment as a matter of law was appropriate in this case because Williams failed to present evidence to the jury indicating that her speech was the motivating factor in her demotion.

Upon reviewing the record, we agree with the district court that Williams presented facts from which the jury could reasonably infer that each of the individual defendants knew about her objections to political patronage activities and corruption, and as a result, were motivated to demote [*14] her. In particular, Williams testified that the CHR Deputy Secretary instructed her, in the presence of defendants Whittet, Hodgkin and Cox, to violate the merit system law. Later, Williams's failed attempts to rid

the Winchester office of political appointee Franklin L. Gibson substantiated Williams's statements that she was informed that she could not fire political appointees, even those who performed poorly. Williams told her supervisors and subordinates that she would not participate in any patronage scheme, and thereafter was subject to administrative review and reprimand by defendants Whittet and Allen. Williams testified further that she notified defendants Holland and Hodgkin about James Little's political activities on the job and the criminal threats against her. Following this notification, defendants Holland and Hodgkin conducted an investigation that Williams characterized as the solicitation of complaint letters against her from employees in the Winchester office. Subsequently, when Williams reprimanded Little, she was again investigated. During the investigation, Williams discussed Little's conduct and relayed her belief that the actions taken against her by her superiors [*15] resulted from her opposition to their patronage scheme.

Corroboration for Williams's testimony included her own contemporaneous notes, Gibson's falsified travel voucher, the testimony of employees William Zorne and Jeanne Kotarski, Williams's removal to the Georgetown office, the investigation of Williams, a death threat letter, Williams's written grievance against Little that was submitted to defendant Hodgkin, and Williams's demotion and pay reduction carried out by defendants Holland, Hodgkin, Whittet and McWilliams. The timing and sequence of events further supported Williams's claim. See *Matulin v. Lodi*, 862 F.2d 609, 613-14 (6th Cir. 1988). Based on this evidence, we conclude that Williams produced sufficient evidence at trial for a reasonable jury to find that her protected speech was a motivating factor in her demotion.

Because Williams produced sufficient evidence, the burden shifted to the defendants to prove by a preponderance of the evidence that the state would have taken the same action absent the protected speech. *Mount Healthy*, 429 U.S. at 287; *Langford*, 921 F.2d at 682-84; *Barnes*, 848 F.2d at 733 n. 9. Towards meeting their burden, the defendants [*16] presented evidence to show that Williams created a "factionalized" and disruptive environment. According to the defendants, Williams had been abusive towards other employees since shortly after assuming her position in 1985. Indisputably, Williams was not popular among a small group of employees in the Winchester office and certain job-seeking individuals.

Considering the foregoing and reviewing the evidence in a light most favorable to Williams, we conclude that the evidence produced at trial was not so one-sided as to warrant judgment as a matter of law. See *Ratliff v. Wellington Exempted Village Sch. Bd. of Educ.*, 820 F.2d 792 (6th

Cir. 1987) (upholding a jury verdict for a substandard employee). Accordingly, we affirm the district court's denial of defendants' motion for judgment as a matter of law with respect to Williams's First Amendment claim.

B. Ky. Rev. Stat. Ann. § 61.102

Defendants also sought judgment as a matter of law on Williams's "whistleblower" claim pursuant to *Ky. Rev. Stat. Ann. § 61.102*, contending that Williams failed to provide "clear and convincing" evidence sufficient to support her claim. In so arguing, defendants set forth an incorrect standard [*17] of review, as evidenced by the following statute:

Employees . . . shall show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action. Once a prima facie case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action.

Ky. Rev. Stat. Ann. § 61.103(3). Thus, Williams had to show, by a preponderance of the evidence, that her disclosure was a contributing factor in her demotion. As discussed in section II.A., we believe that, viewing the evidence in the light most favorable to Williams, there was sufficient evidence for a reasonable jury to conclude that Williams's political patronage statements were a contributing factor in her demotion. Further, in viewing the evidence in the light most favorable to Williams, we believe that a reasonable jury could conclude that defendants failed to establish by clear and convincing evidence that Williams's statements were not a material fact in the decision to demote her. Accordingly, we [*18] affirm the district court's denial of defendants' motion for judgment as a matter of law with respect to Williams's whistleblower claim.

C. Ky. Rev. Stat. Ann. § 18A.095

Kentucky law provides that a classified employee such as Williams cannot be demoted without cause. *Ky. Rev. Stat. Ann. § 18A.095(2)*. Defendants challenge Williams's claim brought under this statute, contending that the statute does not provide a private cause of action. We agree.

Although we are unaware of any Kentucky court deciding whether a private cause of action exists under Chapter 18A, Kentucky law provides that "where the statute both declares the unlawful act and specifies the

civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). Applying the rule in *Grzyb* to the present case, we find that § 18A.095 declares the unlawful act of wrongful demotion and specifies the civil remedy available, stating: "If the board finds that the action complained of was taken without just cause, the board shall order the immediate reinstatement of the employee to his former position or a position of [*19] like status and pay. . . ." *Ky. Rev. Stat. Ann. § 18A.095(23)(b)*. Thus, the statute provides that reinstatement is the remedy for wrongful demotion.

Although Kentucky law also provides a right of recovery for individuals injured due to a violation of any statute, *Ky. Rev. Stat. Ann. § 446.070*, the Kentucky Supreme Court has limited that provision to statutes that are penal in nature, or when the statute does not itself prescribe a civil remedy for its violation. *Grzyb*, 700 S.W.2d at 401; see also *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1989). Consequently, we find the district court erred in exercising jurisdiction over Williams's § 18A.095 claim, and therefore, vacate the judgment entered against defendants as to that claim. n4

n4 Although we vacate the district court's judgment against defendants with respect to Williams's § 18A.095 claim, we do not believe that it is necessary to remand the case for a new trial on damages, nor did the defendants request a new trial on damages. The jury answered three separate interrogatories, determining that defendants' behavior constituted violations of § 1983; *Ky. Rev. Stat. Ann. § 61.102*; and *Ky. Rev. Stat. Ann. § 18A.095*. With respect to damages, the instructions directed the jury to go on to Interrogatory 4 if they answered yes to any of the first three interrogatories. Interrogatory 4 stated: "What sum of money do you believe will fairly and adequately compensate plaintiff for her injury?" Because the same behavior of defendants resulted in the violation of all three statutes and caused the same injury to plaintiff, we see no reason to redetermine damages in this case.

[*20]

III. DEFENDANTS' MOTION FOR A NEW TRIAL

In their motion for judgment as a matter of law, defendants requested alternative relief in the form of a new trial pursuant to *Fed. R. Civ. P. 59*, alleging substantive errors of law in the jury instructions given, the wrongful admission of hearsay testimony and speculative testimony on damages.

A new trial is warranted when a jury reached a "seriously erroneous result" as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, *i.e.*, because of prejudice or bias. *Holmes v. City of Massillon*, 78 F.3d 1041, 1046 (6th Cir.), *cert denied*, 136 L. Ed. 2d 228, 117 S. Ct. 312 (1996).

This Court reviews a district court's ruling on a motion for a new trial under an abuse of discretion standard. *Id. at 1045*. A district court abuses its discretion when, upon review, we are left with a definite and firm conviction that the court made a mistake. *Id.* (citing *Balani v. Immigration and Naturalization Servs.*, 669 F.2d 1157, 1160 (6th Cir. 1982)).

A. Jury Instructions

The defendants raise several objections to the district [*21] court's instructions to the jury, specifically contesting Jury Instruction Nos. 7, 8, 9 and 10. When reviewing such objections, we are mindful that:

When instructions are challenged on appeal, our duty is not to read the instructions word for word in search of an erroneous word or phrase. Rather, our task is to review the instructions as a whole in order to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision.

Wilson v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 83 F.3d 747, 757 (6th Cir.) (quoting *O-So Detroit, Inc. v. Home Ins. Co.*, 973 F.2d 498, 502 (6th Cir. 1992)), *cert. denied*, 117 S. Ct. 610 (1996).

1. Jury Instruction No. 7

Defendants ascribe error to Jury Instruction No. 7, which addressed Williams's free speech claim. According to defendants, that instruction failed to instruct the jury to consider adequately the defendant's affirmative defense that Williams was dismissed for reasons other than her public speech. After reviewing the record, however, we conclude that the jury instruction correctly set [*22] forth the allocation of burdens in this respect. Jury Instruction No. 7 provided:

If you find that the plaintiff has established each element of her claim, you must then decide whether the defendants have shown

by a preponderance of the evidence that they would have penalized and demoted the plaintiff for other reasons even if the plaintiff had not exercised her protected speech activity.

I.J.A. at 462. Thus, defendants' claim that the jury instruction failed to set forth their affirmative defense is without merit.

Defendants further contend that the district court failed to instruct the jury that if it determined that Williams made her reports falsely or with knowledge of their falsehood, the jury must enter a verdict for the defendants. In so arguing, the defendants properly recite the applicable analysis set forth in *Pickering v. Board of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); that is, the First Amendment does not protect false statements that are knowingly or recklessly made. *Id. at 574*; see also *Gossman v. Allen*, 950 F.2d 338, 342 (6th Cir. 1991). To prevail on this affirmative defense, defendants have the burden of showing [*23] that Williams knowingly or recklessly made false statements.

The jury instructions in the present case were silent as to this affirmative defense. Generally, a defendant is entitled to jury instructions on defense theories that are supported by law and raised by the evidence presented. *Ortiz v. Bank of Am. Nat. Trust & Savings Assoc.*, 852 F.2d 383, 386 (9th Cir. 1987); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985). Although defendants' affirmative defense is supported by law, the record fails to demonstrate that the evidence justified such an instruction. There was no evidence suggesting that Williams's statements with respect to the allegedly illegal activities in the Winchester office were false and that Williams knew or was reckless not to know of their falsehood. See, *e.g.*, *Gossman*, 950 F.2d at 343.

In sum, defendants' affirmative defense did not warrant an instruction based on the evidence presented in this case. Consequently, we find that the district court did not err in failing to instruct the jury on the affirmative defense that Williams knew, or was reckless in not knowing, that the protected statements were false.

2. Jury Instruction No. [*24] 8

Defendants also assign error to Jury Instruction No. 8, which addresses Williams's whistleblower claim under Kentucky law. First, defendants contend that the court neglected to include an instruction requiring the jury to find by "clear and convincing evidence" that defendants violated *Ky. Rev. Stat. Ann. § 61.102*. As discussed in section II.B., clear and convincing evidence is not the appropriate standard; therefore, defendants were not entitled to such an instruction.

Defendants next argue that the instruction failed to include the good faith element of the statute. According to *Ky. Rev. Stat. Ann. § 61.102*, a plaintiff must in good faith report suspected violations of the law. After quoting the relevant provision of the statute, including the good faith language, the instruction provided in pertinent part:

To prevail on her "whistleblower" claim, plaintiff must establish a prima facie case by a preponderance of the evidence: First, that she reported or attempted to report to the Kentucky Attorney General, a law enforcement agency, or her superiors an actual or suspected violation of a Kentucky law or regulation . . .; And, second, that she was penalized or demoted [*25] by the defendants directly or indirectly because of such reports.

J.A. at 2075.

Keeping in mind that we review jury instructions as a whole and will not reverse unless those instructions are confusing, misleading or prejudicial, we conclude that Jury Instruction No. 8 adequately informed the jury of the relevant considerations with respect to a violation of the whistleblower statute. *See Wilson, 83 F.3d at 758.*

3. Jury Instruction No. 9

Defendants also challenge the district court's instruction to the jury to consider Williams's Chapter 18A claim. Because we have found that Kentucky does not provide for a private right of action under Chapter 18A, we conclude that the district court erred in including such an instruction. We further conclude, however, that the inclusion of that instruction did not cause the jury to reach a "seriously erroneous result" such that a new trial is warranted.

4. Jury Instruction No. 10

Defendants challenge the inclusion of an instruction to the jury regarding compensatory damages in the form of emotional distress, arguing that Williams did not provide evidence of such damages. We disagree. Williams testified that she suffered [*26] humiliation, embarrassment and distress as a result of her demotion. This testimony was enough to warrant a jury instruction on emotional distress damages.

B. Admission of Hearsay

During the trial, defendants objected to Williams's testimony regarding the content of Don Dixon's political patronage speech, arguing that this testimony constituted inadmissible hearsay. Although a district court's evidentiary rulings are subject to an abuse of discretion review, we review de novo a district court's conclusion of law re-

garding whether proffered evidence constituted hearsay. *Hancock v. Dodson, 958 F.2d 1367, 1371 (6th Cir. 1992)*. Hearsay is defined in *Fed. R. Evid. 801(c)* as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, if a statement is offered into evidence to show knowledge that the statement was made, the statement is not hearsay because it is not offered to prove the truth of the matter asserted. *See United States v. Branham, 97 F.3d 835, 851 (6th Cir. 1996)*.

We find that Dixon's statements were not admitted into evidence to establish the truth of [*27] the matter asserted; rather, the testimony was offered to show knowledge of Dixon's statements by Williams and the defendants who were present. Consequently, we find that the testimony was not hearsay; the district court properly admitted the testimony.

C. Speculative Testimony on Damages

Defendants also object to Williams's testimony with respect to damages that she might suffer in the future. Although Williams testified about the future financial impact of her demotion, the jury was not instructed on future damages, nor was Williams awarded future damages. Accordingly, whether or not this testimony was speculative, we find this argument to be without merit.

IV. PROCEDURAL DUE PROCESS

We turn now to revisit an issue remaining after our previous consideration of this case: whether the district court erred in granting summary judgment to Williams on her due process claim arising from her demotion without a pre-demotion hearing. *See Williams, 24 F.3d at 1543.*

The circumstances surrounding Williams's demotion are not in dispute. On May 30, 1991, at defendant Allen's instruction, Thompson and defendant Hodgkin delivered to Williams an eighteen-page letter signed by [*28] defendant McWilliams, detailing the reasons for the demotion and informing Williams of her right to appeal to the state board of personnel. At that time, the following tape recorded conversation transpired:

Hodgkin: Maggie, the purpose of my and Mr. Thompson's visit is to hand deliver this letter addressed to you from the Appointing Authority. I want to afford you the opportunity to read that and from there you are instructed what to do in that letter. So without any further discussion I want to allow you time to read that letter please.

Williams: Well, I don't know if I want to read it. I will accept it.

Hodgkin: You choose not to read it? It does direct you to report to the Lexington local office.

Williams: Well it looks like it would take about a month to read it, it's numerous pages and I don't think you're going to sit there and wait for me to read all of this and even if I did I wouldn't digest it, so I will accept it, whatever it says.

Thompson: O.K., thank you. Eight o'clock in the morning in the Lexington office report to Mr. Bob Ligon, the office manager. Do you want me to say anything?

Williams: No, not necessarily, I, you called me back [*29] here?

Thompson: No, the letter will be self-explanatory and it will note that you're being demoted and that your assignment, your work assignment will be to the Lexington office. The salary is noted, the grade is noted, the rights that are afforded you by merit law are noted therein. Do you have anything?

Williams: No, my lawyer is not here so I'm not saying anything, you can say anything you want and I'll just record it.

Defendants argue that this exchange satisfied both Kentucky law and due process because Williams was adequately informed of the charges against her and the necessary procedures to obtain a hearing. Defendants therefore assert that the district court erred in its grant of summary judgment to Williams on this issue. We review de novo a district court's grant of summary judgment. *Fed. R. Civ. P. 56(c); Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995).

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving individuals of life, liberty or property without due process of law. To establish a due process violation, an employee must first set forth a deprivation of life, liberty or property and then, [*30] demonstrate that the afforded process was less than that due. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). With respect to the first question, the Due Process Clause applies when an employee has a property interest in her job, that is, a legitimate expectation of continued employment. *Id.* at 538; *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). We have previously determined that Williams enjoyed a property interest in her job and therefore could not be deprived of this interest without due process. *Williams*, 24 F.3d at 1538.

The amount of process due varies with the circumstances of each case. *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). When the disciplinary action is termination, for example, a tenured employee is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546. On the other hand, the Supreme Court has recently held that an employee was not entitled to notice and a hearing prior to his suspension [*31] without pay based on his arrest on drug-related charges. *Gilbert v. Homar*, 138 L. Ed. 2d 120, 117 S. Ct. 1807, 1814 (1997). To determine what procedures must accompany the demotion of an individual in Williams's situation, we must balance three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Gilbert*, 117 S. Ct. at 1812 (quoting *Mathews*); see also *Loudermill*, 470 U.S. at 542; *Williams*, 24 F.3d at 1539.

Thus, we begin by considering the private interest involved. On this point, two factors determine whether the private interest at stake is so great as to require a pre-deprivation hearing. *Chernin v. Welchans*, 844 F.2d 322, 326 (6th Cir. 1988). The first factor addresses the level of suffering that the individual will undergo as a result of the action. *Id.* The second is the length of the possible deprivation. *Id.* at 327 (citing [*32] *Fusari v. Steinberg*, 419 U.S. 379, 389, 42 L. Ed. 2d 521, 95 S. Ct. 533 (1975)).

With respect to the degree of suffering, the district court noted Williams's salary reduction of \$174.06 per month and summarized the adverse impact as follows:

Plaintiff was removed from one of the Cabinet's top merit system positions and transferred to one of its entry-level positions, demoted from her classification of DES Field Office Manager to Senior Unemployment Insurance Claims Examiner. Her pay grade was reduced five levels (from 14 to 9), she lost executive status altogether, and was moved out of her career field of expertise. The overall effect of this demotion was that Plaintiff's career in state government was set back to the beginning.

J.A. at 176. We agree with the district court that demoting Williams constituted a significant deprivation. In addition, the duration factor is significant in this case because by its very terms, a demotion is permanent.

Considering the second factor, the risk of erroneous deprivation in this case was somewhat ameliorated by the six-month investigation of Williams. Nevertheless, the report of the investigation itself neither expressly [*33] found Williams to have acted improperly nor recommended any disciplinary action. Moreover, the accusations against Williams came from a small cadre of "anti-Williams" employees in the Winchester office. In light of the source of the accusations, there existed at least some risk of erroneous deprivation. With respect to additional safeguards, Kentucky law provides for a post-deprivation appeal to the state board of personnel, *Ky. Rev. Stat. Ann. § 18A.095(9)(d)*; n5 however, Kentucky law does not provide for pre-deprivation notice or an opportunity to be heard prior to a demotion.

n5 Williams did not avail herself of this administrative remedy.

In this case, Williams's demotion was a *fait accompli* well before Thompson and Hodgkin delivered the demotion letter to her. We believe that providing some type of minimal pre-deprivation notice and opportunity to be heard would not have been particularly burdensome in this case. At the time of her demotion, Williams had been temporarily transferred from the Winchester [*34] office to the Georgetown office for over a year. As noted by the district court, the "investigation was completed six months before May 30; Thompson's investigation and recommendation were made two months before May 30; and, the Defendants' decision to demote her had been made several weeks before May 30." *J.A.* at 177. On these facts, advance notice and an opportunity to respond would not have burdened the government in a significant manner, especially considering that *Loudermill* does not require a particularly elaborate hearing, but merely "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 supported by [sic] the proposed action." *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 409 (6th Cir. 1992) (citing *Loudermill*, 470 U.S. at 545-46).

With respect to the government's interest, it is well settled that employers have an interest in the quality of their personnel. *See Loudermill*, 407 U.S. at 564. To advance that interest, employers often need to take swift disciplinary action when needed; but in so doing, must not violate due process. [*35] In this case, there was no immediate urgency needed in demoting Williams. As stated, Williams had been temporarily reassigned pending the investigation. Considering the timing of the events, the government's interest would not have been hindered by providing Williams with notice and an opportunity to be

heard.

We therefore conclude that Williams was summarily demoted without an initial safeguard against a mistaken decision. Although we express no opinion as to whether a pre-demotion hearing is always a necessity, we find that notice and an opportunity to respond were required in this case. In finding that Williams was entitled to notice and an opportunity to respond, we reiterate that each demotion case must be assessed on its own facts. In this case, the deprivation was sufficiently severe to require a pre-demotion hearing. Accordingly, we affirm the district court's grant of summary judgment to Williams on her due process claim.

V. DAMAGES AND INJUNCTIVE RELIEF

When the district court entered judgment in this case, many of Williams's original supervisors were no longer in office. As such, pursuant to *Fed. R. Civ. P. 15(b)* and *25(d)(1)*, the district court granted Williams's [*36] motion to substitute the successors in office for defendants McWilliams, Allen, and Hodgkin in their official capacities. Defendants do not challenge this substitution; they contend, however, that because the substituted defendants are named in their official capacities, the Eleventh Amendment precludes the imposition of retroactive injunctive relief or monetary damages, citing *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 152 n. 2 (6th Cir. 1995). Defendants further contend that the substituted defendants are equivalent to the Commonwealth, which was dismissed from this action. We disagree.

The Eleventh Amendment does not bar § 1983 actions seeking prospective injunctive relief against defendants in their official capacities. *Williams*, 24 F.3d at 1544 (citing *Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992) (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985); *Ex Parte Young*, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908)). As clarified by the Supreme Court, the Eleventh Amendment bars suits that "would impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, [*37] 415 U.S. 651, 663, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). Consequently, Williams's claims for equitable relief that do not threaten Kentucky's coffers are proper. We therefore conclude that the district court properly permitted Williams to proceed against the substituted defendants in their official capacities, limiting Williams's recovery from those defendants to prospective injunctive relief. *See Edelman*, 415 U.S. at 669-70; *Thomson v. Harmony*, 65 F.3d 1314, 1320 (6th Cir. 1995), *cert. denied*, 134 L. Ed. 2d 473, 116 S. Ct. 1321 (1996). Prospective injunctive relief includes, for example, reinstatement and an injunction against any further violations of Williams's rights. Williams may not, however, recover

retroactive compensatory relief such as back pay from the official capacity defendants. *Edelman*, 415 U.S. at 677 (denying recovery of past funds improperly withheld).

In this case, the district court entered judgment on March 1, 1995 against the individual capacity defendants for the jury award of monetary compensatory damages. *J.A.* at 155. However, the district court later entered an order of reinstatement against "defendants" that included a lump sum award [*38] of the difference between the salary and benefits Williams would have received and the salary and benefits she actually received from May 30, 1991 to March 1, 1995, and an order of remittitur of \$60,000 of the compensatory damages for lost wages and benefits. Thus, it is not altogether clear from the order whether the official capacity defendants have any liability for the lump sum award of back pay and benefits, which would be impermissible under the Eleventh Amendment. Accordingly, we remand to the district court its order of reinstatement for clarification of the liabilities of the individual capacity defendants and the official capacity defendants.

VI. ATTORNEYS' FEES AND COSTS

Defendants seek reversal or a substantial reduction of the district court's award of attorneys' fees and costs to the plaintiff. Pursuant to 42 U.S.C. § 1988, the district court awarded Williams attorneys' fees and costs totaling \$233,515.39 We review a district court's award of attorneys' fees under the abuse of discretion standard. *Louisville Black Police Officers Organization v. City of Louisville*, 700 F.2d 268, 273-74 (6th Cir. 1983).

Title 42 U.S.C. § 1988 authorizes attorney's fees [*39] to the prevailing party in an action or proceeding to enforce § 1983. *Webb v. Board of Educ.*, 471 U.S. 234, 241, 85 L. Ed. 2d 233, 105 S. Ct. 1923 (1985). There is no precise formula for determining the amount of a fee award, but in exercising its discretion, a district court is to be guided by the degree of success achieved through the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). When considering the degree of success, a district court should not grant attorney's fees based on a simple ratio of successful claims to total claims raised. *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) (citing *Phelan v. Bell*, 8 F.3d 369, 374(6th Cir. 1993)), amended on other grounds, 97 F.3d 833(6th Cir. 1996). Rather than viewing the case on a claim-by-claim basis, a court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. *Id.* In the present case, despite defendants' arguments to the contrary, we believe that Williams achieved a significant degree of success in this litigation.

The starting point for assessing [*40] attorneys' fees requires a determination of the lodestar amount. *Hensley*, 461 U.S. at 434. This figure is calculated by multiplying the number of hours reasonably expended by the market rate per hour. *Id.* There is a strong presumption that the lodestar figure represents a reasonable fee. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986). Defendants argue that the district court abused its discretion in establishing the lodestar rate, erring both with respect to the number of hours expended and the market rate. As to the market rate, the district court determined that rate to be \$150 per hour for Eugene Mooney and \$100 per hour for James and Matthew Mooney. Defendants challenge these rates, arguing that they exceeded the normal billing rates of these attorneys. Acknowledging their regular billing rates, the district court went on to specifically account for the usual hourly rates in the community for the kinds of services rendered by Williams's attorneys, considering the attorneys' skills and experience. Ultimately, the court found the applicable market rate to be slightly higher than counsel's [*41] regular billing rates. Having considered the appropriate factors, we find that the district court did not abuse its discretion in setting the market rate. *See Louisville Black Police Officers Organization*, 700 F.2d at 277-78.

Turning to the number of hours reasonably expended, defendants argue that the fee award should not reflect Williams's failed qualified immunity arguments, unsuccessful suits against the Commonwealth, Cox, and Willey and her separate state action. In considering a similar argument, this court observed that "when claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the costs of litigating the claims should not be reduced." *Yellow Freight Sys., Inc.*, 90 F.3d at 1169. In the present case, Williams's unsuccessful qualified immunity claims and her § 1983 claims against the Commonwealth, Cox and Willey share a common core of facts and related legal theories with her successful claims; however, that is not the case with Williams's separate state law action in state court.

When state court proceedings are part of the enforcement of a [*42] § 1983 action, time devoted to the state court proceedings may properly be chargeable under § 1988. *Barrow v. Falck*, 977 F.2d 1100, 1104 (7th Cir. 1992) (citing *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 L. Ed. 2d 723, 100 S. Ct. 2024 (1980)). To be chargeable, however, the separate state action must be "useful and of a type ordinarily necessary" to secure the final result obtained from the litigation. *Webb*, 471 U.S. at 243. Here, Williams's action against the Commonwealth in state court to secure rights under local civil service laws

cannot be characterized as part of the enforcement of § 1983. *Cf. Brantley v. Surlles*, 804 F.2d 321, 325 (5th Cir. 1986) ("Since [Plaintiffs] state court litigation was based on state law, the district court properly ruled that § 1988 does not allow compensation for her counsel's efforts in state court."). The Commonwealth had, after all, been dismissed during an early state in the case as an improper defendant under the Eleventh Amendment, and there is no indication that the action in state court was useful or necessary in obtaining the relief sought. Accordingly, we do not believe that any hours spent on Williams's separate [*43] state law claims should be included in her award of attorney's fees and reverse the district court's award of attorneys' fees to that extent. We therefore remand this issue to the district court for recalculation of attorneys' fees excluding any amounts attributed to the separate state law proceedings.

Defendants also urge us to reduce the costs awarded to plaintiff in the amount of \$5,568.39. According to defendants, counsel for the plaintiff employed support personnel in dual roles as paralegal and clerical staff. Under *Missouri v. Jenkins*, purely clerical or secretarial tasks should not be billed at a paralegal rate. 491 U.S. 274, 288 n. 10, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989). Because defendants failed to challenge the award of costs below, we review the issue for plain error and conclude that the district court did not commit plain error in awarding costs

to Williams for paralegal services. However, we reverse the award of any costs associated with Williams's separate state law proceedings.

VII. CONCLUSION

For the foregoing reasons, we hereby **AFFIRM** the district court's denial of defendants' motions for summary judgment and its denial of defendants' motions for judgment as a matter of law [*44] with respect to Williams's First Amendment claim and *Ky. Rev. Stat. Ann. § 61.102* claim; however, we **REVERSE** the district court's denial of judgment as a matter of law with respect to Williams's claim under *Ky. Rev. Stat. Ann. § 18A. 095*. In addition, we **AFFIRM** the district court's denial of defendants' motion for a new trial and the district court's grant of summary judgment to Williams on her due process claim. With respect to damages, we **AFFIRM** the district court's order substituting official capacity defendants, but **REMAND** to the district court its order of reinstatement for the purpose of clarifying the various liabilities of the individual capacity defendants and the official capacity defendants. Finally, we **REVERSE** the district court's award of attorneys' fees and costs to Williams to the extent that the amount of the award includes hours or costs devoted to seeking redress for the Commonwealth's alleged violations of state law in state court, and **REMAND** to the district court for recalculation of the award in accordance with this opinion.