UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:17-CV-00041
ELECTRONICALLY FILED

JOHN COTTRELL PLAINTIFF

vs.

BULLITT COUNTY, KENTUCKY AND
DAVE GREENWELL, Bullitt County Sheriff in his
Individual and Official Capacities DEFENDANTS

PLAINTIFF'S JOINT MEMORANDUM RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes Plaintiff, John Cottrell, by counsel, and for his Response to Defendant's Motions to Dismiss and for Summary Judgment states as follows:

INTRODUCTION

Mr. Cottrell was terminated after he hurt his knee in the course of police duty and was heavily involved in the investigation of drug trafficking within the police department. Defendants want this Court to believe that even with the loaded facts of this case, Mr. Cottrell was merely terminated for not showing up for work while he was recovering from his knee injury. Discovery has not yet taken place. Mr. Cottrell offers his First Amended Complaint to help provide more foundational facts. Mr. Cottrell respectfully requests that this Court deny both of Defendants' absurdly premature motions: the Motion to Dismiss, and the Motion for Summary Judgment.

COUNTER-STATEMENT OF FACTS

Mr. John Cottrell was the dedicated Chief Deputy Sheriff of Bullitt County, Kentucky for almost six years. (Affidavit of John Cottrell, January 11, 2018, par. 1, p. 1, attached hereto as **Exhibit A**.) During his time serving and protecting his community, Mr. Cottrell ran the day-to-day operations of the Bullitt County Sheriff's Office (BCSO). (Cottrell Affidavit at par. 2, p. 1; Myrtle French Unemployment Hearing Testimony, p. 22, March 7, 2017, attached hereto as **Exhibit B**.) This is because Dave Greenwell, disgraced former sheriff of Bullitt County, was not upholding his duties as sheriff. When Greenwell found out that Mr. Cottrell was investigating him for involvement in drug trafficking, Greenwell terminated Mr. Cottrell for "abandoning" his job while on approved sick leave for an injury sustained in the line of duty. (Cottrell Affidavit at pars. 3, 48, and 63-64, pp. 1, 7, and 9-10.) In response, Mr. Cottrell filed this action. (DN #1-1, Verified Complaint, January 23, 2017.)

At the time that Mr. Cottrell filed his Verified Complaint, he could not include specific facts regarding the criminal investigation of former Sheriff Greenwell as Greenwell had not yet been indicted. As stated in Mr. Cottrell's Motion to Hold Case in Abeyance, if Mr. Cottrell had included specific facts of the allegations against Greenwell before his indictment, Mr. Cottrell would have been violating the secrecy clause of Federal Rule of Criminal Procedure 6 regarding information that may be disclosed to a grand jury. (DN #13, Motion to Hold Case in Abeyance, April 24, 2017, PageID #s: 208-210.) However, Mr. Cottrell only had 90 days before the statute of limitations would run out on his Whistleblower claims, and Greenwell was not indicted until April 28, 2017. (Greenwell Indictment, April 28, 2017, attached hereto as **Exhibit C**.) Therefore, Mr. Cottrell had no choice but to submit his Verified Complaint with its limited facts if he wanted to pursue his case. (*See generally* DN #1-1.)

Now that Greenwell has been indicted on the charges of aiding and abetting a conspiracy to distribute more than 1,000 kilograms of marijuana along with four counts of attempting to obstruct justice, Mr. Cottrell can finally tell the full story of how he helped take down a sheriff with connections to the Mexican cartel and the retaliatory consequences he faced for doing his job of protecting and serving the community. Therefore, Mr. Cottrell has submitted his First Amended Complaint in addition to this Response to more fully support his timely-filed claims. (*See generally* First Amended Complaint, January 12, 2018, attached hereto as **Exhibit D** and fully incorporated by reference.) Good police officers should not be punished for fighting corruption.

I. The Criminal Investigation of Ex-Sheriff Dave Greenwell

The investigation that would eventually lead to Greenwell started as an investigation into Chris and Leonard Mattingly's used car dealership. (Cottrell Affidavit at par. 4, p. 1.) In May of 2014, a car was stopped in Riverside, California with $420,000.00 cash hidden in compartments and panels of the vehicle. (*Id.*) The Drug Enforcement Administration (DEA) connected the money to the Mexican cartel. (*Id.* at par. 5, p. 2.) The vehicle was registered to the Mattinglys' used car dealership in Bullitt County, Kentucky. (*Id.* at pars. 4 and 6, pp. 1 and 2.) The DEA contacted Mike Halbleib, Captain of the drug task force who worked under Mr. Cottrell, to investigate the Mattinglys. (*Id.* at par. 6, p. 2.)

This put Mr. Halbleib in an uncomfortable position. Halbleib knew that the Mattinglys were close personal friends with Greenwell. (*Id.*) In addition, the Mattinglys' business was next door to Greenwell's personal residence. (*Id.* at par. 9, p. 2.) Halbleib sought out Mr. Cottrell's advice as to how he should proceed with the investigation. (*Id.* at par. 7, p. 2.) Mr. Cottrell

advised Halbleib to move forward with the investigation, and that if Greenwell ended up being involved, they would deal with it when the time came. (*Id.* at par. 8, p. 2.)

Mr. Cottrell and Halbleib decided to put a pole camera in the vicinity of the Mattingly's business. (*Id.* at par. 9, p. 2.) It had only been up for one day when Chris Mattingly brought a confidential informant (CI) outside, pointed up at the pole camera, and said it was a pole camera. (*Id.* at par. 10, p. 2.) When the CI asked Mattingly how he knew what it was, Mattingly said that Greenwell had told him. (*Id.*) When Mr. Cottrell and Halbleib confronted Greenwell about telling Mattingly about the pole camera, Greenwell told them many inconsistent stories in an attempt to explain it away. (*Id.* at par. 12, p. 3.) His stories only made him appear more suspicious.

Greenwell was now suspected of involvement with drug trafficking. (*Id.*) Mr. Cottrell assigned Halbleib to investigate Greenwell's involvement with the Mattinglys, and to lie to Greenwell if Greenwell asked if he was being investigated. (*Id.* at par. 13, p. 3.) This ended up being necessary as Greenwell confronted both Mr. Cottrell and Halbleib as to what was happening with the Mattingly investigation. (*Id.* at par. 15, p. 3.) Mr. Cottrell, Halbleib, and Tim Murphy (another officer on the case) would meet frequently to discuss the investigation. (*Id.* at par. 14, p. 3.) At Mr. Cottrell's direction, Halbleib and Murphy kept US Attorney Larry Fentress updated on the investigation into Greenwell. (*Id.* at pars. 16-17, p. 3.)

Greenwell began to try to get rid of the detectives he rightly feared were investigating him. Greenwell started a rumor that Halbleib was fired from the Louisville Metro Police Department for sexual harassment, and Greenwell tried to convince Mr. Cottrell to fire Halbleib and Murphy for "harassing" (i.e., investigating) Mattingly. (*Id.* at pars. 20-21, p. 4.) Greenwell also tried to convince Mr. Cottrell to reassign Murphy from narcotics. (*Id.* at par. 24, p. 4.) In a

particularly strange interaction, Greenwell confronted Mr. Cottrell in a truck, asking for his phone and telling him in a paranoid manner that he thought Halbleib and Murphy were investigating him. (*Id.* at pars. 27-29, pp. 4-5.) When it became apparent that Mr. Cottrell was not going to fire Halbleib and Murphy, Greenwell stated that he would do it himself. (*Id.* at par. 30, p. 5.) Mr. Cottrell managed to convince Greenwell not to fire Halbleib and Murphy. (*Id.* at par. 31, p. 5.) Mr. Cottrell kept Halbleib updated on all of these incidents, telling him to report them to Fentress. (*Id.* at pars. 23 and 24, p. 4.)

Finally, Mattingly was arrested. (*Id.* at par. 35, p. 5.) The Mattinglys discussed the possibility of bribing or "getting rid of" Mr. Cottrell, Halbleib, and Murphy while Chris Mattingly was in jail. (*Id.*) Right after Mr. Cottrell learned of this conversation, Greenwell made multiple attempts to reassign Murphy from narcotics to road duty. (*Id.* at pars. 36, 38-40, pp. 5-6.) Murphy was terrified that he would be killed by the Mattinglys while on road duty. (*Id.* at par. 37, p. 6.) Mr. Cottrell did not allow Murphy's reassignment to go through, angering Greenwell. (*Id.* at pars. 38 and 40, p. 6.)

Greenwell quickly lost any control he had over the situation. The Mattinglys made a threat on Greenwell's life, and Greenwell feared being arrested himself. (*Id.* at pars. 42-43, p. 6.) Mr. Cottrell and Murphy went to California to interview a CI. (*Id.* at par. 44, p. 6.) The CI reported a delivery of thousands of pounds of marijuana to the Mattingly's Breckinridge County farm. (*Id.*) DEA agents in California told Mr. Cottrell and Murphy that Greenwell was involved and a "serious problem." (*Id.*) All of this information was reported to Fentress, along with the report that Mr. Cottrell would continue to support the investigation. (*Id.* at par. 44, pp. 6-7.) Mr. Cottrell himself was interviewed by Fentress about Greenwell's criminal activities. (*Id.* at par. 52, p. 8.)

When Mr. Cottrell returned from California, he learned that Greenwell was also in trouble with the Fiscal Court over spending and waste at the BCSO. (*Id.* at par. 45, p. 7.) Greenwell ordered Mr. Cottrell not to speak with anyone from the Fiscal Court, and said he would fire Mr. Cottrell if he did talk. (*Id.*) Greenwell contemplated disbanding the drug task force and shutting down the department, which would have resulted in a loss of 30 to 40 jobs, then blaming it all on the Fiscal Court. (*Id.* at par. 46, p. 7.) Eventually in February or March of 2016, Greenwell simply stopped coming into work. (*Id.* at par. 47, p. 7.)

In May of 2016, Greenwell's suspicions were finally confirmed. Deputy John Miller told Greenwell that he was under investigation. (*Id.* at par. 48, p. 7.) Greenwell became even more eager to shut down the drug task force, the entire Sheriff's office, and fire Halbleib and Murphy. (*Id.* at par. 49, p. 7.) Greenwell came into work after several weeks of absence to accuse Mr. Cottrell of insubordination for refusing to deal with Halbleib and Murphy. (*Id.* at pars. 49-50, p. 7.) As a punishment for continuing to refuse to fire Halbleib and Murphy, Greenwell put Mr. Cottrell on the night shift. (*Id.*) After that, Mr. Cottrell only saw Greenwell at Command Staff Meetings, and would otherwise communicate with him over the phone. (*Id.* at par. 51, p. 8.) Greenwell was finally indicted on April 28, 2017. (Greenwell Indictment.)

II. Mr. Cottrell's Injury and Termination

In August of 2016, Mr. Cottrell was injured on duty when he went down on his knee hard while arresting a suspect, causing two bones in his knee to collide and resulting in painful inflammation to his knee. (Cottrell Affidavit at pars. 3 and 60, pp. 1 and 9.) The pain grew worse as time passed. On September 18, 2016, Mr. Cottrell had to call Deputy Jeff Bell to cover his shift as the pain had made it impossible for Mr. Cottrell to work. (*Id.* at par. 54, p. 8.)

The last shift Mr. Cottrell was paid for was his shift of September 17, 2016 from 6:00 PM to 6:00 AM. (*Id.* at par. 53, p. 8.) Mr. Cottrell was not paid from September 18 to October 5. (*Id.*) The same day Mr. Cottrell asked Bell to cover his shift, Mr. Cottrell texted Greenwell to inform him that Bell was covering Mr. Cottrell's shift as he could not walk due to the progression of his knee injury he had sustained the previous month. (*Id.* at pars. 3, 55, and 60, pp. 1, 8, and 9.) Greenwell did not respond. (*Id.* at par. 55, p. 8.)

At the next Command Staff Meeting, Mr. Cottrell showed up in a knee brace. (*Id.* at pars. 56 and 58, p. 8.) Both Greenwell and his Office Manager, Myrtle French, were at the meeting. (*Id.* at pars. 56-57, p. 8.) Greenwell asked Mr. Cottrell why he was wearing a knee brace, and Mr. Cottrell reminded Greenwell about the injury he had sustained while making an arrest. Mr. Cottrell told Greenwell that he was going to try to see the doctor soon. Mr. Cottrell went to see his primary care physician, Paul McKee, on September 20, 2016, the day after the Command Staff Meeting. (*Id.* at par. 58, p. 8; John Cottrell Medical Records, p. 22 (referencing 9/20/16 appointment), September 23, 2016-June 27, 2017, attached hereto as **Exhibit E**.)

After Mr. Cottrell's doctor appointment on September 20, 2016, Mr. Cottrell told Office Manager French that his doctor had told him he could not perform physically-demanding police work for the time being due to his knee injury. (Cottrell Affidavit at par. 59, p. 9; French Testimony at p. 9.) He told French that he had a MRI scheduled for September 23, 2016, and that he would keep her updated about when he could come back to work. (Cottrell Affidavit at par. 59, p. 9; Cottrell Medical Records at pp. 25-28.) Mr. Cottrell also informed French that he needed to make a workers' compensation claim as he hurt his knee on the job.[1] (French

[1] At different times, French has claimed that Mr. Cottrell texted her with this information and called her with this information. (*See* French Testimony at pp. 11 and 17.)

Testimony at pp. 11 and 17.) However, even though she talked to the workers' compensation carrier about Mr. Cottrell's injury, she did not file a claim.[2] (*Id.* at p. 18.)

Mr. Cottrell's follow-up appointment to discuss the results of his MRI took place a few days later on September 27, 2016. (Cottrell Affidavit at par. 60, p. 9; Cottrell Medical Records at p. 22-24.) He found out the extent of damage to his knee, and was restricted to desk duty. (Cottrell Affidavit at par. 60, p. 9.) Mr. Cottrell told Greenwell of these new restrictions, and updated French as he had said he would. (*Id.* at pars. 60-61, p. 9.) French asked Mr. Cottrell to bring in documentation of his injury. (*Id.* at par. 61, p. 9.) This surprised Mr. Cottrell as in his almost six years as Chief Deputy, he had never been asked to provide documentation when he was out sick. (*Id.* at par. 62, p. 9.) None-the-less, he told French that he had his next doctor's appointment on October 6, 2016, and asked if it would be acceptable to wait until then to acquire documentation. (*Id.* at par. 61, p. 9.) French told him that was fine.[3] (*Id.*; French Testimony at p. 12.)

Now that Mr. Cottrell knew that he could work desk duty, he asked Greenwell if Greenwell would prefer for him to work desk duty, or to just take off some sick time since he had so much sick time accrued. (Cottrell Affidavit at par. 63, p. 9.) This was in line with the BCSO written policy that employees should notify their supervisors when they are not going to be at work.[4] (French Testimony at p. 15.) Greenwell told him to just take his sick time for now.

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[2] While French admits this exchange happened in her unemployment hearing testimony, she claims that Mr. Cottrell did not contact her regarding workers' compensation until October 6, 2016 in her affidavit. (*See* French Testimony at pp. 11, 17-18; *see* DN #10-5, Affidavit of Myrtle French, at par. 9, PageID #: 102, April 4, 2017.)

[3] While French admitted that this exchange happened in her unemployment hearing testimony, she denied that she and Mr. Cottrell ever discussed when he would bring in his medical documentation in her affidavit. (*See* French Testimony at 24; *see* DN #10-5 at pars. 3-7, PageID #: 101.)

[4] However, since Mr. Cottrell ran the day-to-day operations of the BCSO, requests for approval for time off went to Mr. Cottrell after they went through an employee's supervisor. (French Testimony at p. 17.) Mr. Cottrell was the person who approved leave. (*Id.*)

(Cottrell Affidavit at par. 63, p. 9.) French denies these phone contacts between Mr. Cottrell and Greenwell ever happened. (DN #10-10, KUIC Rebuttal Detail, PageID #: 110, April 4, 2017.) This conversation took place over the phone on speaker phone, and Mr. Cottrell's wife Natasha witnessed the conversation. (Cottrell Affidavit at par. 63, pp. 9-10.) In addition, French admits that Mr. Cottrell sent her a note informing her that he would be taking some time off. (French Testimony at p. 9.) Complying with Greenwell's orders, Mr. Cottrell did not work at the BCSO while he waited for his next doctor's appointment on October 6, 2016.

During this period, Mr. Cottrell continued to work some of his outside jobs that did not require strenuous physical activity. (DN #10-10 at PageID #: 110.) For many of these outside jobs, Mr. Cottrell's role was to provide a police escort for various companies during important transportations. In these outside jobs, Mr. Cottrell was performing the equivalent of desk duty by sitting in a car and keeping his weight off his left knee in the process. (*Id.*) These jobs were not done on the sly. Outside jobs are very common for police officers. Mr. Cottrell was not hiding that he was engaging in other desk duty-type work after Greenwell declined Mr. Cottrell's offer to perform desk duty work for BCSO. (Cottrell Affidavit at par. 63, p. 9.)

On October 5, 2016, three deputies showed up to Mr. Cottrell's home. (Cottrell Affidavit at par. 64, p. 10.) They gave him a letter informing him that he had been terminated for "abandoning" his job[5] even though he was on sick leave,[6] had kept Greenwell and French updated at every point that he received new information about his knee (along with the entire BCSO), and was not on the schedule to have any shifts that he could have missed. (*Id.* at pars. 64

[5] French claims that Mr. Cottrell was also under investigation for using a taser on a girlfriend to prevent her from jumping out of a moving car. (DN #10-10 at PageID #: 110.) In addition to his involvement with the investigation against Greenwell and the Mattinglys, this is another potential reason for Mr. Cottrell's termination.

[6] Interestingly, Greenwell was also off on sick leave during the entire period for which Greenwell claims Mr. Cottrell abandoned his job. (French Testimony at p. 26.)

and 68, p. 10; *id.* at *supra*; French Testimony at p. 22.) Mr. Cottrell texted Greenwell and called the office to ask why he had received such a baseless letter, but neither Greenwell nor anyone from the office replied. (Cottrell Affidavit at par. 65, p. 10.)

Mr. Cottrell went to his October 6, 2016 doctor's appointment the next day as planned. (*Id.* at par. 66, p. 10; Cottrell Medical Records at pp. 19-21.) He received treatment including having his knee drained and receiving a Cortisone shot. (Cottrell Affidavit at par. 66, p. 10; Cottrell Medical Records at p. 20.) The medical staff told him that those treatments should take care of his knee, but did not yet lift his desk duty restrictions. (Cottrell Affidavit at par. 66, p. 10; Cottrell Medical Records at p. 20.) Mr. Cottrell got documentation from the doctor as French had requested. (Cottrell Affidavit at par. 67, p. 10; *see* Cottrell Medical Records at p. 1.) After the appointment, Mr. Cottrell took the documentation to French as they had arranged nine days before-hand. (Cottrell Affidavit at par. 67, p. 10; *id.* at *supra*.) French attempted to refuse to accept Mr. Cottrell's medical documentation.[7] (*Id.* at par. 67, p. 10.) She began to cry and begged him, a man she had just helped wrongly fire, to have pity on her and not put her in a tough spot. (*Id.*) Mr. Cottrell did not honor this bizarre and unreasonable request, and left the medical documentation with French, anyway. (*Id.*)

Upon his wrongful termination, Mr. Cottrell was paid approximately $9,300.00 for all of the vacation, holiday, and comp time he had accrued over the years. (*Id.* at par. 69, p. 10.) Mr. Cottrell was never paid for the sick time he took from September 18 to October 5, or for coming into work for Command Staff Meetings. (*Id.* at par. 69, pp. 10-11.) He also never received

[7] While French admits this exchange happened (and that it happened on October 6, 2016) in her unemployment hearing testimony and her KUIC statement, she claims Mr. Cottrell merely emailed her his doctor's note on October 7, 2016 in her affidavit. (*See* French Testimony at p. 24; *see* DN #10-10 at PageID #: 110; *see* DN #10-5 at pars. 10-11, PageID #: 102.) Instead of attaching the alleged email as an exhibit, Defendants merely attached the doctor's note with "Email 10/7/16 9:39 AM" scrawled on it in pen. (*See* DN #10-7, KentuckyOne Health Doctor's Note, PageID #: 107, April 4, 2017.)

payment for his 30 days of accrued sick time. (*Id.*) Mr. Cottrell requested a hearing twice to challenge his wrongful termination, and was denied that hearing twice. (DN #1-1 at pars. 60-62, PageID #: 11.) Mr. Cottrell was terminated for an easily refutable reason and was denied money due to him upon his termination. The idea that Defendants believe there is no dispute of material fact as to why Mr. Cottrell was fired and that all of his claims should be terminated on dismissal or summary judgment is frankly shocking. This exchange of Motions and Response is a waste of time for everyone involved.

III. Initiating the Current Case and Resulting Additional Forms of Retaliation Against Mr. Cottrell

Mr. Cottrell filed his Verified Complaint initiating the current case on January 23, 2017. (DN #1-1 at PageID #s: 4-17.) On March 22, 2017, Mr. Cottrell was indicted for two counts of criminal possession of a forged instrument in the second degree. (John Cottrell Indictment 1, March 22, 2017, attached hereto as **Exhibit F**.) On September 29, 2017, Mr. Cottrell was indicted for theft of a legend drug, first offense; abuse of public trust less than $10,000; tampering with physical evidence; misapplication of entrusted property; and official misconduct in the second degree. (John Cottrell Indictment 2, September 20, 2017, attached hereto as **Exhibit G**.) Both of these indictments are based on a mix of faulty and incomplete information, and are direct retaliations to Mr. Cottrell's initiation of the current case. In addition, both allege criminal conduct during the time in which Mr. Cottrell was still working for the BCSO, presenting additional possible reasons for his termination.

While Mr. Cottrell did his best to deal with his frivolous criminal charges, the current case moved forward. On April 4, 2017, Defendants filed a Motion to Dismiss and a Motion for Summary Judgment. (DN #10, Defendants' Motion to Dismiss, April 4, 2017; DN #11, Defendants' Motion for Summary Judgment, April 4, 2017.) On April 24, 2017, Defendants filed

their Joint Motion to replace the April 4, 2017 motions. (DN #12, Notice of Docket Correction, April 24, 2017.) Also on April 24, 2017, Mr. Cottrell filed a motion to hold his case in abeyance because Fed. R. Crim. P. 6 prevented him from providing a detailed facts section in his Verified Complaint. (DN #13 at PageID #s: 208-210.) Interestingly, Defendants have reached out to begin the discovery process since filing their Joint Motion. Now that Greenwell has been indicted, Mr. Cottrell moves to file his First Amended Complaint and responds to Defendants' joint motions.

ARGUMENT

I. Defendants' Motion to Dismiss Mr. Cottrell's Claims Arising Under KRS §§ 15.520 and 70 *et seq.*, KRS § 61.101 *et seq.*, and 42 USC § 1983 Should Be Denied, and this Court Should Accept Mr. Cottrell's Amended Complaint.

A. Standard of Review for Motion to Dismiss

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court "must accept all of the allegations in the complaint as true, and construe the complaint liberally in favor of the plaintiff." *Lawrence v. Chancery Court of Tennessee*, 188 F.3d 687, 691 (6th Cir. 1999). Detailed factual allegations are not necessary at this stage. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint only needs to allege sufficient facts to "state a claim to relief that is plausible on its face." *Id.* at 570. Therefore, 12(b)(6) motions to dismiss should be denied unless the moving party can establish "beyond a doubt" that there is no set of facts that would support the plaintiff's claim and entitle the plaintiff to relief. *Achterhof v. Selvaggio*, 886 F.2d 826, 831 (6th Cir. 1989). Under Federal Rule of Civil Procedure 15(a)(2), the Court should allow plaintiffs to amend their complaints when "justice so requires," or if the amended complaint would survive its own 12(b)(6) motion to dismiss. *Moher v. United States*, 875 F. Supp. 2d 739, 747 (W.D. Mich. 2012). Here, Defendants will not be able to establish that Mr. Cottrell is not entitled to relief under the facts presented in his original Complaint or his

Amended Complaint. Therefore, Defendants' Motion to Dismiss should be denied, and this Court should accept Mr. Cottrell's Amended Complaint.

B. Mr. Cottrell Sufficiently Pleads a Claim Under Kentucky's Whistleblower Act, KRS § 61.101 et seq.

Mr. Cottrell has stated a claim upon which relief may be granted under FRCP 8(a)(2) to support his claim under Kentucky's Whistleblower Act, KRS § 61.101 *et seq.* Alternatively, even if Mr. Cottrell's original Verified Complaint was insufficient, the jointly filed First Amended Complaint is sufficient, and settles any *Twombly* problems with Mr. Cottrell's pleadings. The Whistleblower Act does apply to Mr. Cottrell, Greenwell, and Bullitt County, and Mr. Cottrell was fired in retaliation of his reports of unlawful activity.

The Kentucky Whistleblower Act protects employees from retaliation by their employers when they report various types of violations and wrongdoings to appropriate authorities. *Thorton v. Office of Fayette County Attorney*, 292 S.W.3d 324, 328 (Ky. App. 2009). The Whistleblower Act applies to employees and employers that fall under the definitions stated in the Act:

> (1) "Employee" means a person in the service of the Commonwealth of Kentucky, or any of its political subdivisions, who is under contract of hire, express or implied, oral or written, where the Commonwealth, or any of its political subdivisions, has the power or right to control and direct the material details of work performance;
> (2) "Employer" means the Commonwealth of Kentucky or any of its political subdivisions. Employer also includes any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions, with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees[.]

KRS § 61.101(1-2) (emphasis added). The BCSO is a political subdivision of the Commonwealth of Kentucky because it is an arm of the county. Under *Wilson v City of Central City*, 372 S.W.3d 863 (Ky. 2012), counties are political subdivisions under the Whistleblower Act. *Id.* at 868. BCSO and Greenwell are employers under the Whistleblower Act, and Mr. Cottrell was an employee protected by the Whistleblower Act.

Beyond showing that he was an employee working for an employer under the Whistleblower Act, Mr. Cottrell has established that his actions were exactly the kind of actions that the Whistleblower Act was meant to protect. Under the Whistleblower Act:

> (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…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.
> (2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section.

KRS § 61.102(1), (2). In other words, employers cannot fire employees for reporting suspected unlawful behavior to the Federal Bureau of Investigation (FBI) or the DEA, or for helping another employee report suspected unlawful behavior to the FBI or the DEA. Mr. Cottrell, an employee, reported unlawful behavior of Greenwell, his employer, to the FBI, DEA, and Halbleib, a fellow employee who was also making reports to the FBI and DEA. (*See, i.e.*, Cottrell Affidavit at pars. 16-17, 23-24, 44, and 52, pp. 3, 4, 6, and 8.) Mr. Cottrell made these reports in good faith because he did not know he would be fired when he made his reports. *Thorton*, 292 S.W.3d at 331. After making these good faith reports, Mr. Cottrell was fired.

In addition, the Kentucky Whistleblower Act applies to both external and internal reports. *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008) held that the Kentucky Whistleblower Act forbids retaliation by employers for internal reports of wrongdoing under the "or any other appropriate body or authority" language in KRS § 61.102(1). *Id.* at 792. When Mr.

Cottrell reported Greenwell's unlawful conduct to Halbleib who was then reporting those wrongdoings to Fentress, Mr. Cottrell's reports were protected by the Whistleblower Act. Even if this Court finds that Mr. Cottrell never reported unlawful behavior by Greenwell to external sources, Mr. Cottrell is still protected by the Kentucky Whistleblower Act. Defendants' Motion to Dismiss Mr. Cottrell's Whistleblower claim should be denied.

C. Mr. Cottrell's Claims Under the Police Officer's Bill of Rights, KRS § 15.520 and KRS § 70 et seq. Do Not Fail as a Matter of Law.

Mr. Cottrell has established a *prima facie* case to support his claim under the Police Officer's Bill of Rights, KRS § 15.520 and KRS § 70 *et seq.* Alternatively, even if Mr. Cottrell's original Verified Complaint is insufficient, the jointly filed Amended Complaint sufficiently establishes a *prima facie* case. Defendants emphasize that Mr. Cottrell was officially fired for job abandonment. Defendants claim that since this is not unique to police officers, Mr. Cottrell is not entitled to a § 15.520 hearing. However, there are several other possible reasons as to why Mr. Cottrell was actually fired. He was under investigation for tasing his girlfriend to prevent her from jumping out of a moving car, he was under investigation for forging an identification card, and he was under investigation for stealing marijuana (not to mention the illegal alternative motivations that Mr. Cottrell has presented throughout his complaints and this Response). Once discovery takes place, the evidence will show that Mr. Cottrell was not terminated for job abandonment, but for one of the remaining reasons all connected in someone way to being a police officer. Pending additional evidence in discovery as to what Defendants' actual reasons were for terminating Mr. Cottrell, this Court should deny Defendants' Motion to Dismiss as to Mr. Cottrell's Police Officer's Bill of Rights claim.

D. Mr. Cottrell's Claim of Violation of Procedural Due Process Under 42 USC § 1983 Does Not Fail as a Matter of Law.

Mr. Cottrell has stated a claim upon which relief may be granted to support his claim of a violation of procedural due process under 42 USC § 1983. Mr. Cottrell did not receive all the process he was due. In order to establish that a police officer was denied due process under the Fourteenth Amendment, the officer must show two things:

(1) The existence of a protectable property interest in the officer's position as a law enforcement officer; and
(2) Whether the officer was "afforded the procedures to which government employees with a property interest in their jobs are ordinarily entitled."

Kuhn v. Washtenaw County, 709 F.3d 612, 620 (6th Cir. 2013) citing *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 895 (6th Cir. 2006). In order to establish a property right, one must establish a "legitimate claim to continued employment." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 141 (6th Cir. 1997). Under KRS § 70.270, "any deputy sheriff may be removed, suspended, or laid-off by the sheriff for any cause which *will promote the efficiency of the department*." KRS § 70.270(1). Mr. Cottrell was the only thing keeping BCSO remotely efficient. He made the schedules and ran the day-to-day activities—Greenwell, when he bothered to show up at all—was focused on not being arrested for his involvement in drug trafficking and figuring out who was investigating him, not on making the department efficient. Terminating Mr. Cottrell was detrimental to the department, not more helpful. Therefore, in the specific context of this case, Mr. Cottrell had a property right in his job under KRS § 70.270. Mr. Cottrell was denied a hearing, a procedure "to which government employees with a property interest in their jobs are ordinarily entitled." *Kuhn*, 709 F.3d at 620. Mr. Cottrell was denied the process due to him, and Defendants' Motion to Dismiss as it applies to Mr. Cottrell's 1983 claim should be denied.

II. Defendants' Motion for Summary Judgment for Mr. Cottrell's Claims Arising Under KRS § 344.010 *et seq.*, KRS § 342.197, and 29 USC § 2601 *et seq.* Should Be Denied, and this Court Should Allow this Case to Move Forward with Discovery.

A. Standard of Review for Motion for Summary Judgment

When considering a motion for summary judgment under Federal Rule of Civil Procedure 56(c), the Court "must view the factual evidence and draw all reasonable inferences in favor of the non-moving party." *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 444 (6th Cir. 2009). Through this lens of favor to the non-moving party, summary judgment is appropriate only "if the pleadings, *the discovery* and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Patterson*, 551 F.3d at 444 citing Fed. R. Civ. P. 56(c) (emphasis added). "When moving for summary judgment the movant has the initial burden of showing the absence of a genuine dispute to a material fact." *Automated Sols. Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 520 (6th Cir. 2014).

Defendants presented an incomplete summary judgment standard in their Motion for Summary Judgment. (*See* DN #12 at PageID #: 194.) In their Motion for Summary Judgment, Defendants presented the following conveniently-edited quote from *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986):

> "Rule 56(c) mandates the entry of summary judgment, […] against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

DN #12 at PageID #: 194, citing *Celotex Corp.*, 477 U.S. at 322 (excerpt removed using brackets appearing first in Defendant's Motion). The full quote from *Celotex* reads as follows:

> Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp., 477 U.S. at 322. Here, Defendants cannot show an absence of a genuine dispute of material fact because discovery has not yet taken place. The opposing party must have a "full opportunity to conduct discovery" when working to defeat a moving party's motion for summary judgment. *Aslani v. Sparrow Health Sys.*, 2009 U.S. Dist. LEXIS 19867, *55-56 (W.D. Mich. 2009) citing *Farah v. Wellington*, 295 F. App'x 743, 747 (6th Cir. 2008). Here, the witnesses who saw Mr. Cottrell in his knee brace talking about his knee injury to Greenwell at the Command Staff Meeting could be obtained to support the statements in Mr. Cottrell's affidavit if this Court allows discovery to take place. Additionally, the texts mentioned throughout the Counter-Statement of Facts could be obtained to support the statements in Mr. Cottrell's affidavit. However, discovery has not yet taken place. Defendants' Joint Memorandum is merely a half-hearted hope that this Court will end this case before the inevitable mountain of evidence supporting Mr. Cottrell's tale of retaliation surfaces in discovery. Therefore, Defendants' Motion for Summary Judgment should be dismissed, and the parties should be allowed to proceed with discovery.

B. Mr. Cottrell's Claims Under the Kentucky Civil Rights Act, KRS § 344.010 et seq. Do Not Fail as a Matter of Law.

The developing record taken as a whole could lead a rational trier of fact to find for Mr. Cottrell as there is a genuine issue of material fact to be determined regarding his claim under the Kentucky Civil Rights Act (KCRA), KRS § 344.010 *et seq.* The test for disability discrimination is laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the plaintiff has the burden of establishing a *prima facie* case. *Id.* at 802. If the plaintiff meets that burden, the defendant must provide a legitimate, nondiscriminatory reason for terminating the plaintiff. *Id.* Once the defendant offers its reason, the plaintiff has a burden of

proving that the reason provided by the defendant is merely pretext for discrimination. *Id.* at 804. Each element is explored separately below.

1. Mr. Cottrell Can Present a Prima Facie Case of Discrimination.

Mr. Cottrell has presented a *prima facie* case of discrimination, and it will grow stronger as the record develops. In order to establish a *prima facie* case as applied to KCRA disability discrimination, the plaintiff must meet four prongs. The plaintiff must show that he: (1) is disabled within the meaning of the KCRA; (2) was unquestionably otherwise qualified to perform the duties of his position; (3) was unquestionably subjected to an adverse employment action; and (4) was unquestionably treated differently than similarly situated employees for the same or similar conduct. *Wheatley v. J.J.B. Hilliard, W.L. Lyons, Inc.*, 2006 U.S. Dist. LEXIS 34181, *17 (W.D. Ky. 2006).

First, Mr. Cottrell was unquestionably disabled under the meaning of the KCRA. Under the KCRA, "disability" is defined as follows:

> "Disability" means, with respect to an individual:
> (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
> (b) A record of such an impairment; *or*
> (c) Being regarded as having such an impairment.

1966 Ky. Rev. Stat. § 344.010(4) (emphasis added). Under section (a), "[a] physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual" includes "working" as a "major life activity." *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003). Mr. Cottrell could not perform the strenuous physical activities required of his job at BCSO because of his knee, so Mr. Cottrell has a physical impairment. Mr. Cottrell provided records of his impairment when he submitted medical documentation to French. (Cottrell Affidavit at par. 67, p. 10; *see* Cottrell Medical Records at p. 1.) Under section (c), "[b]eing

regarded as having such an impairment," the regard of whether the plaintiff is disabled is from the perspective of the defendant. *Keys v. Dart Container Corp.*, 2012 U.S. Dist. LEXIS 93755, 26 (W.D. Ky. 2012). Mr. Cottrell offered to come into work, but Greenwell told him to take sick leave. (Cottrell Affidavit at par. 63, p. 9.) Greenwell regarded Mr. Cottrell as having a physical disability.

Second and third, Mr. Cottrell was unquestionably otherwise qualified to perform the duties of his position, and was unquestionably subjected to an adverse employment action. Mr. Cottrell had been going above and beyond in his possession of Deputy Sherriff given that he also had to perform many of Greenwell's duties. (Cottrell Affidavit at par. 2, p. 1; French Testimony at p. 22.) Mr. Cottrell could have performed the "desk duty" and police escort portions of being a Deputy Sherriff without issue. He only continued to take the sick leave to which he was entitled because Greenwell told him not to go on desk duty. (Cottrell Affidavit at par. 63, p. 9.) Mr. Cottrell was terminated, an undeniably adverse employment action.

Fourth, Mr. Cottrell was unquestionably treated differently than similarly situated employees for the same or similar conduct. Like Mr. Cottrell, Greenwell was out on sick leave during the time at which he claims Mr. Cottrell "abandoned" his job. Like Mr. Cottrell, Murphy and Halbleib participated in the investigation to bring Greenwell to justice. However, none of these employees were terminated when Mr. Cottrell was terminated. Mr. Cottrell has successfully presented a *prima facie* case of disability discrimination under the KCRA and passed the first prong of *McDonnell Douglas*.

2. Defendants Cannot Present a Legitimate Reason for Terminating Mr. Cottrell.

Defendants have not presented legitimate reasons for terminating Mr. Cottrell, and will become increasingly unable to support any alleged legitimate reasons as the record develops.

Under *McDonnell Douglas*, once the plaintiff has satisfied its light burden of establishing a *prima facie* case of discrimination, "the burden then shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its decision." *Creggett v. Bd. of Educ.*, 2011 U.S. Dist. LEXIS 121383, *6 (W.D. Ky. 2011). Defendants have only formally offered one reason for terminating Mr. Cottrell: that he abandoned his job. (DN #12 at PageID #: 197.) Mr. Cottrell was on sick leave, had kept Greenwell and French updated at every point that he received new information about his knee (along with the entire BCSO), and was not on the schedule to have any shifts that he could have missed. (Cottrell Affidavit at pars. 64 and 68, p. 10; *id.* at *supra*; French Testimony at p. 22.) The Court is not required to accept just any reason as a "legitimate, nondiscriminatory" explanation where those explanations have no basis in fact, are demonstrably false in context. Defendants fail the second prong of *McDonnell Douglas*.

3. Mr. Cottrell Can Show that Any Allegedly Legitimate Reason Presented for his Termination is Pretext.

Mr. Cottrell has proven that any allegedly legitimate reasons for his termination provided by Defendants were merely pretext, and his evidence to support a showing of pretext will grow stronger as the record develops. Plaintiffs can show pretext by establishing that the allegedly legitimate reasons provided (1) have no basis in fact; (2) did not actually motivate the employer's challenged conduct; and/or (3) were insufficient to warrant the challenged conduct. *Brooks v. Davey Tree Expert Co.*, 478 Fed. Appx. 934, 941 (6th Cir. 2012.).

First, Defendants have no basis in fact for terminating Mr. Cottrell for job abandonment. Under Supreme Court case *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000) "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 147 (emphasis removed). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may

permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. Defendants have no basis in fact for the claim that Mr. Cottrell abandoned his job without notice.

Second, job abandonment did not actually motivate Defendants' decision to terminate Mr. Cottrell. In *Bhama v. Mercy Mem. Hosp. Corp.*, 416 Fed. Appx. 542 (6th Cir. 2011), the court stated that the plaintiff must show "circumstances which tend to prove that an illegal motivation [(i.e., disability discrimination)] was more likely than that offered by [the defendant]--i.e., that the stated reasons 'did not actually motivate' the [adverse employment] decision." *Id.* at 551. Mr. Cottrell as presented a plethora of factors that would lead to Greenwell to want him terminated. "Job abandonment" did not motivate Defendants' conduct.

Third, Mr. Cottrell's actions of having a knee injury and investigating a drug-trafficking sheriff were insufficient to warrant termination. The court in *Hale v. ABF Freight Sys.*, 503 Fed. Appx. 323 (6th Cir. 2012) held that a reasonable jury could have found that the defendant's "given explanation was not sufficient to warrant termination and infer that [the plaintiff] was in fact terminated because of his [class]," and therefore summary judgment was improper. *Id.* at 335. The evidence provided by the plaintiff to support that the defendant's explanation was not sufficient to warrant termination was that the conduct cited in those explanations "was common and accepted practice before and after his termination." *Id.* at 334. Mr. Cottrell's actions did not warrant termination.

Besides, at the summary judgment stage, plaintiffs only have to show "evidence from which a jury could reasonably doubt the employer's explanation." *Creggett*, 2011 U.S. Dist. at 14. Mr. Cottrell has provided enough evidence that a reasonable jury could decide there is reasonable doubt as to Defendants' explanation of Mr. Cottrell's termination. (*See supra*.) Mr. Cottrell passes the third prong of *McDonald Douglass* for the standard of the summary judgment

stage, and Defendant's Motion for Summary Judgment as to Mr. Cottrell's KCRA claim should be denied.

C. Mr. Cottrell's Retaliation Claims Under the Worker's Compensation Act, KRS § 342.197 Do Not Fail as a Matter of Law.

The developing record taken as a whole could lead a rational trier of fact to find for Mr. Cottrell as there is a genuine issue of material fact to be determined regarding his claim of retaliation under the Worker's Compensation Act, KRS § 342.197. KRS § 342.197(1) reads as follows:

> No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter [regarding employees who want to file worker's compensation claims].

Dollar Gen. Partners v. Upchurch, 214 S.W.3d 910, 915 (Ky. Ct. App. 2006) (citing KRS § 342.197(1)). Employers cannot retaliate against employees for filing, or attempting to file, workers compensation claims. The *prima facie* case for workers compensation retaliation involves proving that:

(1) [Plaintiff] engaged in a protected activity;
(2) The defendant knew that the plaintiff had done so;
(3) Adverse employment action was taken; and
(4) There was a causal connection between the protected activity and the adverse employment action.

Id. Mr. Cottrell has provided evidence to support that (1) he attempted to file a worker's compensation claim; (2) French, who was Greenwell's Office Manager and was an accepted channel to get information to Greenwell, knew that Mr. Cottrell wanted to file a worker's compensation claim; and (3) Mr. Cottrell was terminated. The only element that requires some expanding upon is establishing a causal connection between Mr. Cottrell's attempt to file for worker's compensation and his termination.

It is common for there to be a lack of direct evidence in worker's compensation cases. *Id.* Therefore, inference may be used, broken down into proof of two elements:

(1) The decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and
(2) There is a close temporal relationship between the protected activity and the adverse action.

Id. Regarding element one, French knew that Mr. Cottrell wanted to file a worker's compensation claim, and would have told Greenwell as his Office Manager. (French Testimony at pp. 11 and 17.) Besides, Greenwell knew about Mr. Cottrell's knee, that he had injured it on the job, that he was going to bring in proof of treatment, and knew worker's compensation was a risk. Regarding element two, Mr. Cottrell was terminated a mere fifteen days after he asked French about filing a worker's compensation claim. (French testimony at p. 17; Cottrell Affidavit at pars. 64 and 68, p. 10.) "The sooner adverse action is taken after the protected activity, the stronger the implication that the protected activity caused the adverse action, particularly if no legitimate reason for the adverse action is evident." *Dollar Gen.*, 214 S.W.3d at 916 quoting *Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130, 135 (Ky. 2003).

Perhaps the most telling evidence here is the many inconsistencies in French's testimony. She said that Mr. Cottrell asked about worker's compensation on September 20, 2016, then that he didn't ask about it after he was terminated. (*See* French Testimony at pp. 11, 17-18; *see* DN #10-5 at par. 9, PageID #: 102, April 4, 2017.) French also admitted that she had discussed Mr. Cottrell bringing in medical documentation after his October 5, 2016 appointment, then turned around and said that he never brought in documentation or talked to her about it. (*See* French Testimony at 24; *see* DN #10-5 at pars. 3-7, PageID #: 101.) Once discovery continues and both sides can access the many alleged texts that were exchanged, the truth will come out.

Mr. Cottrell has established a *prima facie* case of worker's compensation retaliation, and Defendants' Motion for Summary judgment as to this claim should be denied.

D. Mr. Cottrell's Claims Under the Family Medical Leave Act, 29 USC § 2601 et seq. Do Not Fail as a Matter of Law.

The developing record taken as a whole could lead a rational trier of fact to find for Mr. Cottrell as there is a genuine issue of material fact to be determined regarding his claim under the Family Medical Leave Act, 29 USC § 2601 *et seq.*

Under *Darby v. Gordon Food Servs.*, 2015 U.S. Dis. LEXIS 74135, *19-20 (W.D. Ky. 2015), three considerations are examined when determining if someone is substantially limited in a major life activity:

(1) The nature and severity of the impairment,
(2) Duration or expected duration of impairment, and
(3) The permanent or long-term impact of the impairment.

Id. at *19. In *Darby*, a manual laborer who could no longer lift heavy items met this standard because it was significant *to him*. Here, Mr. Cottrell could not put weight on his left knee. According to his medical records, he has had continuing problems as recent as June 27, 2017. (Medical Records at p. 2.) Mr. Cottrell continues to have to have the fluid drained form his knee regularly, suggesting that this will be a long process. Mr. Cottrell's injuries were significant to him in his role as a police officer, even if they are not significant in his role as a police escort for businesses moving valuable equipment. In a different case where the plaintiff had a knee injury, a surgery was sufficient to treat the knee, and the plaintiff did not miss a substantial amount of work. *Wells v. Huish Detergents, Inc.*, 1999 U.S. Dist. LEXIS 23938, *2 (W.D. Ky. 1999). This is very different from the case at hand in which Mr. Cottrell has had continuing trouble with his knee and it substantially interfered with his police duties as Greenwell refused to put Mr. Cottrell on desk duty as requested.

Defendants center their argument around two points: (1) Defendants attempt to draw the Court's attention to out-of-district cases *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973 (5th Cir. 1998) and *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001) rather than purely focusing on controlling law, and (2) Defendants insist multiple times that Mr. Cottrell did not provide notice of his knee injury and the extent of its serious nature. This is yet another claim in which more discovery is so pinitol. Text messages will reveal notice. It would be unjust to end this case before that opportunity is provided.

Mr. Cottrell provided his employer notice of his serious injury through documented updates and medical documentation of treatment, was refused the opportunity to take a desk job, and then was terminated. When examining the burden-shifting *McDonnell Douglas* framework from above, it is plane that Mr. Cottrell has established a *prima facie* case in this area. (*See supra* at § II(B).) Defendant's Motion for Summary Judgment as to Mr. Cottrell's FMLA claim should be denied.

CONCLUSION

Defendants' 12(b)(6) Motion to Dismiss should be denied on all three claims because the original Verified Complaint had to be vague in parts to avoid obstruction of justice, and the First Amended Complaint fills in any gaps in the Verified Complaint. Defendant's Motion for Summary Judgment should be denied on all three claims because the parties have not yet had an opportunity to conduct discovery. This Court should deny all of Defendants' motions and allow this case to proceed in discovery upon the foundation of its First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was electronically filed on January 12, 2018, with the Court's CM/EFS system and such system will send electronic notice to counsel of record.

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