

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000915-MR

ELEANOR POIGNARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLET, JUDGE  
ACTION NO. 99-CI-002523

JEFFERSON COUNTY BOARD  
OF EDUCATION, DEAN HITE,  
AND LINDA ROBINSON

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: DYCHE, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Eleanor Poignard (Ms. Poignard) appeals from the entry of summary judgment by the Jefferson Circuit Court in favor of the Jefferson County Board of Education (Board), Dean Hite, and Linda Robinson. Ms. Poignard argues on appeal that the circuit court's entry of summary judgment was improper, alleging she had set forth a prima facie case of discrimination on the basis of race and had overcome the Board's proffered non-discriminatory reason for transferring her from her position as an Exceptional Children Education (E.C.E.) teacher at Western Middle School. The court also entered summary judgment on claims

of breach of contract and intentional infliction of emotional distress. After a careful and thorough review, we affirm.

Ms. Poignard was involved in several incidents with a student at Western Middle in February 1999, wherein she was alleged to have forcefully grabbed and angrily raised her voice to a sixth-grade student with a learning disability. In the first alleged incident, Ms. Poignard raised her voice inappropriately to the child in an argument over a math problem. The child and other students who were witnesses to the incident stated that Ms. Poignard called the child "stupid" and made other demeaning comments to the child. The next day, the child's mother came to school to confront Ms. Poignard about the incident. Allegedly, Ms. Poignard grabbed the student in question by the arm and dragged him out of another teacher's class. During the meeting with the child's mother, Ms. Poignard allegedly grabbed the child by the arm several times, roughly, and said that he was a problem child, and that she, as the teacher, could do whatever she wanted with him. Ms. Poignard acknowledged that she had raised her voice to the child in the first incident, but denied improperly touching the child or calling him stupid. In any event, the child's mother complained to the school's principal, Dean Hite. Hite removed the child from Ms. Poignard's class and placed him in another class. Also, Child Protective Services was notified, and an investigation was conducted. The investigator, Carolyn Muse, concluded that "although there were witnesses that verified the teacher does yell and holler at the kids, Christopher doesn't seem to have

sustained any actual mental injury from this." The investigator closed the case with a finding of unsubstantiated mental injury. Nevertheless, the child was, in fact, transferred to another class with another team of teachers.

On March 2, 1999, another incident occurred. Ms. Poignard entered a classroom to see if another teacher, Paula Giddens, was in the room. As it happened, the same child, Christopher, was in the classroom, and allegedly Ms. Poignard stared at him. Ms. Poignard denied being aware that the child was in the classroom. The child reported the incident to his mother, and his mother reported it to Principal Hite. The next day, Principal Hite called Ms. Poignard into her office and requested an explanation for Ms. Poignard's presence in the classroom. Principal Hite ordered Ms. Poignard to have no further contact with the child, and this order was placed in writing, signed by Ms. Poignard to acknowledge that she was aware of the order.

On March 12, 1999, Ms. Poignard entered teacher Shirley Erickson's classroom, allegedly in search of food. As Ms. Poignard stated in her deposition: "So I was on the third floor, and it was about 8:30 in the morning, and I had a hunger attack, - another teacher and I had this hunger attack, so we knew that Shirley Erickson had food. So, I flew down to Shirley's room and told Shirley . . . give me a sandwich. So, I go back there to the refrigerator, get the sandwich, and I leave." (Ms. Poignard's Deposition at 67-68). However, Erickson's account differs from Ms. Poignard's in one important respect in that she

places the time that Ms. Poignard entered her room at 7:45, and states that she left at 8:50. The child was in the classroom during the time that Ms. Poignard was present, and after class was dismissed, the child ran to his mother who happened to be at the school in the youth service center and told her that Ms. Poignard had been in his classroom again. The child's mother again complained to Principal Hite, who contacted Minor Daniels, the Executive Director of Business Affairs for Jefferson County Public Schools regarding the matter. Daniels stated in his deposition that he went to Western Middle that day and remained there all day to make sure that Principal Hite handled the situation properly. When he arrived, the principal showed him the previous incident report and the previous order for Ms. Poignard to have no further contact with the child. Daniels then interviewed the child, the child's mother, and Erickson, to determine what happened. The child stated that Ms. Poignard had "walked back there where he was sitting and terrified him." (Daniels' Deposition at 15). The child did not say that Ms. Poignard said anything to him or touched him, just that her presence frightened him. After Daniels conducted his interviews, he contacted the following two people from his department: Rick Layman, Coordinator for Security for Jefferson County Public Schools, and Joe Burden, an investigator with the security office. The school security personnel asked Ms. Poignard if she had been in Erickson's class that morning and whether she understood that she was to have no contact with the child, and thereupon informed her that she needed to turn in her keys and

report to the office of Carolyn Meredith, Director of Employee Relations, on the next Monday, March 15. She was then escorted by school security to her classroom to retrieve her coat, and then out of the building. Classes were in session and no teachers or students were in the hall to witness Ms. Poignard's being escorted out of the building. The only people that were present to observe this were two custodians in the hall on the first floor. Daniels specifically stated that he was concerned that Ms. Poignard be escorted out quietly and quickly, without making a scene.

On Monday, March 15, Ms. Poignard was informed by Meredith that she was being "temporarily reassigned" from Western Middle to the C.B. Young, Jr. Service Center. Subsequently, Ms. Poignard received a written reprimand, and was informed that she would be transferred to a different school for the 1999-2000 school year, which ultimately was determined to be Frost Middle, where Ms. Poignard still works. Ms. Poignard's salary has also been increased since the transfer, a fact the circuit court noted in its opinion.

Ms. Poignard filed this action in the Jefferson Circuit Court, alleging that she was discriminated against on the basis of race, that the school had breached its contract with her, and that the school had defamed her and subjected her to the intentional infliction of emotional distress. In granting summary judgment, the circuit court held that Ms. Poignard could not maintain an action for discrimination, as she had suffered no "adverse employment action" within the meaning of Dobbs-Weinstein

v. Vanderbilt University, 185 F.3d 542 (6<sup>th</sup> Cir. 1999). The court also held that Ms. Poignard could not maintain an action for intentional infliction of emotional distress, even viewing all the facts in the light most favorable to her, nor could she maintain an action for defamation, as the action taken by the school board did not constitute publication for purposes of defamation. Lastly, the court held that Ms. Poignard received all due process to which she was entitled under her contract and the applicable statute, Kentucky Revised Statute (KRS) 161.760(2). This appeal followed.

Turning first to the question of whether Ms. Poignard suffered an "adverse employment action" under Dobbs-Weinstein, we must agree with the circuit court that she did not. In order to show a prima facie case of discrimination, Ms. Poignard would have to show that (1) she was a member of a protected class, (2) that she was qualified for the position, and (3) that she suffered an adverse employment action due to her membership in the protected class. Dobbs-Weinstein at 544. The school Board could then rebut the prima facie case by showing a legitimate, non-discriminatory reason for the adverse employment action, which Ms. Poignard would then have to demonstrate was a mere pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248,255 (1981). The circuit court, in holding that Ms. Poignard had not demonstrated a prima facie case of discrimination, stated:

As an African American female, Ms. Poignard satisfies the first prong of the test for discrimination. Additionally, Ms. Poignard was qualified for her position as an E. C. E.

teacher at Western. However, Ms. Poignard fails the third prong of the prima facie test in that she has not suffered an adverse employment action. Due to the incidents involving [the child], Ms. Poignard was temporarily reassigned to C.B. Young. She was permanently transferred to Frost Middle School for the 1999-2000 school year. Additionally, Ms. Poignard has benefitted [sic] from the transfer as her salary has increased from \$49,650 to \$54,738, and there has been no evidence that she lost any benefits. Thus, Ms. Poignard has suffered no adverse employment action.

The court went on to hold that even if Ms. Poignard had established a prima facie case of discrimination, the school Board had articulated a legitimate, non-discriminatory reason for her transfer, specifically the incident with the child. The court found that the school Board had conducted a proper investigation of the incidents, and acted within its authority in transferring Ms. Poignard as a result of those incidents. The court also noted that Ms. Poignard had a history of similar incidents, and concluded that the Board's action was not unreasonable.

We must agree with the circuit court that Ms. Poignard did not suffer an adverse employment action. A transfer without a loss of benefits or which does not amount to a constructive discharge does not constitute an adverse employment action under the guiding precedent. Darnell v. Campbell County Fiscal Court, 731 F.Supp. 1309, 1313 (E.D. Ky. 1990), *aff'd*, 924 F.2d 1057 (6<sup>th</sup> Cir. 1991). A constructive discharge is a transfer to a new position that is so difficult or unpleasant that a reasonable person in the employee's situation would be forced to resign. Yates v. AVCO Corp., 819 F.2d 630, 636-37 (6<sup>th</sup> Cir. 1987). Even

though Ms. Poignard states that she was at Western Middle for many years and that Frost Middle is further away from her home, resulting in a longer commute, we cannot hold that this is sufficient to constitute an adverse employment action. Likewise, we cannot agree with Ms. Poignard that because the Kentucky Civil Rights Act authorizes recovery of damages for emotional distress, embarrassment and humiliation, that an adverse employment action therefore occurred because she claims those damages. The fact that a remedy is provided for those damages does not change the requirement that an adverse employment action must be proven; those are damages that flow from an adverse employment action and not the adverse employment action itself. While perhaps unique, we do not find Ms. Poignard's argument persuasive. We need not address whether the school board articulated a legitimate, non-discriminatory reason, as we hold that Ms. Poignard failed to first establish a prima facie case of discrimination.

Next, we address the argument that the school board breached its contract with Ms. Poignard by transferring her to Frost Middle School. The circuit court held that the school board had not violated the collective bargaining agreement by transferring her, as it had given adequate notice of the transfer under KRS 161.760(2). The court noted that "[a] teacher does not have a right to a particular teaching assignment. Pursuant to KRS 161.720(4), a teacher is employed by the school district only and 'not in a particular position or school.'" We agree that under the applicable statute, adequate notice of the transfer was given. The statute requires notification of a transfer by July



15 of the new school year. Notice of the permanent transfer was given on June 17. Therefore, Ms. Poignard's argument that the school board gave inadequate notice of the transfer is without merit.

Ms. Poignard also argues that the school board breached the collective bargaining agreement by disciplining her without an adequate investigation. We disagree. Article IX of the Collective Bargaining Agreement states that an employee may not be disciplined without "just cause," which is defined as follows:

1. The employee has had opportunity to have foreknowledge of the possible or probable disciplinary consequences of the conduct or performance.
2. The rule or order is reasonably related to the efficient and safe operation of the district.
3. Before administering discipline, the employer did make an effort to discover whether the employee did, in fact, violate a rule, regulation or order of management.
4. The employer's investigation was conducted fairly and objectively.
5. The investigation produced substantial evidence of proof that the employee was guilty as charged.
6. The district applied its rules, orders and penalties without discrimination.
7. The degree of discipline administered in the particular case is reasonably related to (a) the seriousness of the employee's proven offense, and (b) the employee's record of district service.

We agree with the circuit court that the school board followed these criteria in disciplining Ms. Poignard. The action of the

Board was supported by substantial evidence upon which it could base its decision. Therefore, the Board clearly was entitled to summary judgment on this issue as well.

With respect to Ms. Poignard's claim for intentional infliction of emotional distress, on review it is apparent that the school board was also entitled to summary judgment on this issue. The elements of the tort of intentional infliction of emotional distress are set forth in Humana of Kentucky v. Seitz, Ky., 796 S.W.2d 1 (1990), and Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61 (1996). In order to recover damages for intentional infliction of emotional distress, a plaintiff must show: (1) that the wrongdoer's conduct was intentional or reckless; (2) the conduct was so outrageous and intolerable that it offends the generally accepted standards of decency and morality; (3) there is a causal connection between the wrongdoer's conduct and the plaintiff's emotional distress; and finally (4) the emotional distress must be severe. Humana at 2-3, Kroger at 65. Further, the plaintiff's belief that the wrongdoer acted intentionally or recklessly will not of itself create a genuine issue of material fact. Humana at 3. Ms. Poignard alleges that being escorted from the building by school security was outrageous and humiliating, and therefore caused her severe emotional distress. Here, even viewing the evidence in the light most favorable to her, Ms. Poignard has not established either that the school board's conduct violated the generally accepted standards of decency and morality, nor that she has suffered severe emotional distress as a result. Indeed, rather than deliberately

subjecting Ms. Poignard to scorn and ridicule, it appears that both Daniels and Hite did everything in their power to resolve the situation without creating a scene. Ms. Poignard cannot name even a single witness who saw her being escorted from the building, only that two custodians on the first floor saw what happened. This is, on its face, not enough to satisfy the requirement that the conduct complained of violates the generally accepted standards of decency and morality in the community. Further, Ms. Poignard has not sufficiently demonstrated that her emotional distress was severe. She has provided no records of treatment for health problems, physical or mental, resulting from severe emotional distress, nor has she provided any other evidence beyond her feelings of humiliation resulting from being escorted from the school. On these grounds, as a matter of law, this is insufficient to establish severe emotional distress under controlling case law. Accordingly, the circuit court's grant of summary judgment was proper.

Finally, we address Ms. Poignard's claim for defamation. She alleges that the child's mother, defamed her by falsely alleging to school authorities that Ms. Poignard abused her child, that Hite defamed her by reporting those allegations to Child Protective Services, and that the school board defamed her during the course of the investigation. We disagree, and note, as did the circuit court, that KRS 620.030(1) imposes a duty upon "any person who knows or has reasonable cause to believe that a child is . . . abused" to "immediately cause an oral or written report to be made to a local law enforcement

agency . . . ." We believe that the child's mother reported the allegations made by her son in good faith to Hite, and that Hite acted in good faith and in accordance with the law in referring the matter to Child Protective Services. Further, there is no evidence that in the course of the investigation and disciplinary action against Ms. Poignard that the school board in any way publicized any reports concerning the investigation, as it appears that all communications regarding the matter were internal. Therefore, we also affirm the circuit court's grant of summary judgment on this issue.

Based on the entire record and our careful review thereof, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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