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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001925-MR

PEGGY PETRILLI — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CI-00608

STU SILBERMAN, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE FAYETTE COUNTY PUBLIC SCHOOLS AND/OR FAYETTE COUNTY BOARD OF EDUCATION; CARMEN COLEMAN IN HER INDIVIDUAL CAPACITY AND IN HER OFFICIAL CAPACITY AS DIRECTOR OF FAYETTE COUNTY PUBLIC SCHOOLS AND/OR FAYETTE COUNTY BOARD OF EDUCATION; BRENDA ALLEN IN HER INDIVIDUAL CAPACITY, AND IN HER OFFICIAL CAPACITY AS GENERAL COUNSEL FOR THE FAYETTE COUNTY BOARD OF EDUCATION; AND THE FAYETTE COUNTY BOARD OF EDUCATION, FAYETTE COUNTY, KENTUCKY — APPELLEES

AND NO. 2009-CA-002050-MR

STU SILBERMAN IN HIS INDIVIDUAL

CAPACITY AND IN HIS OFFICIAL CAPACITY
AS THE SUPERINTENDENT OF THE FAYETTE
COUNTY PUBLIC SCHOOLS AND FAYETTE
COUNTY BOARD OF EDUCATION; AND
FAYETTE COUNTYBOARD OF EDUCATION,
FAYETTE COUNTY, KENTUCKY CROSS-APPELLANT

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CI-00608

PEGGY PETRILLI CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Peggy Petrilli appeals from the August 14, 2009, judgment of the Fayette Circuit Court dismissing with prejudice her claims against the Defendants, Stu Silberman, in his individual capacity, and in his official capacity as the Superintendent of the Fayette County Public Schools, and the Fayette County Board of Education. Stu Silberman and the Fayette County Board of Education (hereinafter the appellees) cross appeal, asserting several errors by the trial court as will be developed below. After careful review and for the reasons set forth herein, we affirm the judgment of the Fayette Circuit Court.

In 2005, Superintendent Silberman (hereinafter Silberman) decided to merge two low performing schools, the Lexington Academy and Booker T. Washington Montessori, into the Booker T. Washington Academy (hereinafter BTWA). The merged school was part of the Great School Initiative Program, and it partnered with the University of Kentucky and other community agencies. The ultimate goal was to resurrect a strong school in the Booker T. Washington neighborhood.

When BTWA was formed, Silberman had an idea whom he wanted as principal of the new school. He asked Peggy Petrilli, who had received the 2005 Principal of the Year award for her work in turning around Northern Elementary School, a predominately minority, free-lunch school in Fayette County that had historically low performance level, to apply and interview for the position, and Petrilli was ultimately selected. She was charged with the task of getting the school up and running.

Normally the Site-Based Decision Making Council (SBDM) selected and hired a principal, but as this was a new school with no SBDM council in place, Silberman was permitted to make the ultimate selection of Petrilli as principal. Silberman explained the selection process for a school without a SBDM council to the community; however, some members of the BTWA community apparently thought that they were going to have input into the decision on the new principal. In fact, prior to Petrilli's selection, some community individuals and parents met on several occasions to discuss what they wanted in a principal and established a

list of qualities that included diversity and a preference for an African American principal.

Petrilli served as the principal of BTWA throughout the 2005-2006 and 2006-2007 school years. During these years, Jessica Berry was the president of the Parent Teachers Association (PTA) and the SBDM council. Ms. Berry was at BTWA on a daily basis and sometimes spent the entire day at the school, sitting in her child's classroom. Likewise, Alva Clark spent an extraordinary amount of time at the school, and she served as the Vice President of the PTA and as a member of the SBDM council. Like Ms. Berry, Ms. Clark would also sit in her child's classroom.

There is some discrepancy as to Petrilli's relationship with Ms. Berry and Ms. Clark. While Ms. Petrilli alleges and testified at trial that these two families conspired against her and wanted an African-American principal, there is also testimony in the record that at least in the beginning of Petrilli's work at BTWA, both Ms. Berry and Ms. Clark were strong supporters of Petrilli and her work at the school.

The testimony was also conflicting about Petrilli's performance at BTWA. Petrilli had strong instructional skills and brought with her a loyal staff from Northern Elementary. However, the testimony at trial indicated that Petrilli had weaknesses in consensus building, communication with staff and parents, collaboration, relationship building, and complying with policies and protocols.

Ms. Petrilli's supervisor, Bob McLaughlin, testified at trial. McLaughlin was the Director of Elementary Schools for the Fayette County School System and worked with Petrilli during her first year as principal at BTWA, the 2005-2006 school year. McLaughlin testified that Petrilli had issues with following through on her statements to parents. In particular, McLaughlin stated that Petrilli would meet with parents in the school, reach an agreement and consensus, and then do something completely different, which would frustrate and anger the parents. McLaughlin was aware of some complaints of Petrilli not doing what she had agreed to do. He testified in particular about an issue where her actions had possibly jeopardized the district wide funding of the Read First Program, complaints about her not following special education IEPs, and not following or implementing SBDM council matters. McLaughlin testified that had issues with Petrilli that he did not have with other principals, although he had a good working relationship with Petrilli and acted as a mentor to her. His testimony reflected that while he respected Petrilli, she did have issues with communicating with parents and following through on discussed procedures.

Carmen Coleman replaced McLaughlin as the Director of Elementary Schools for the Fayette County School System, and she supervised Petrilli during the 2006-2007 year and remained in that position during the 2007-2008 school year. She testified about similar issues with Petrilli, but again, she considered herself a personal friend and supporter of Petrilli. She testified that both she and

Superintendent Silberman wanted Petrilli to succeed and worked with Petrilli to resolve issues as they arose.

During Petrilli's tenure, parents became frustrated and complaints started coming into the PTA and the SBDM council. Those complaints included curriculum issues, placement of students, special education needs, treatment of students, lack of respect to parents, removing students from classes, cultural awareness issues, retention of students, and other issues. Petrilli had meetings with parents, and parents met amongst themselves and through the PTA to discuss the concerns.

Of particular importance to Petrilli's claims of retaliation and violation of the Kentucky Whistleblower's Act, are the allegations concerning Alva and Buddy Clark's child being an out-of-area student. At trial, Buddy Clark testified that his child has three different addresses, one in Chicago, Illinois, and one with each grandparent in Lexington, Kentucky. He testified that their primary residential address was on Bishop Drive. According to Gary Wiseman, the Director of Pupil Personnel (DPP), Bishop Drive is not in the BTWA school area. No out of area request had been made for the Clarks' child, and when this was reported to Petrilli, she followed protocol and reported the information to Wiseman in May 2007. At trial Petrilli testified that this single act is what led to her eventual demise at BTWA.

After receiving Petrilli's report about the Clarks' child, Wiseman did his normal investigation, which revealed that the Clarks' child did not reside within

the BTWA school area. As a result, on June 7, 2007, Wiseman sent the Clarks a letter to notify them that, "[a]fter careful investigation, I have determined that [your child] does not live at the address you provided to Booker T. Washington Elementary." The Clarks spoke with Jack Hayes, Wiseman's supervisor, about the Clarks' out of area status. Hayes asked the Clarks to sign an out-of-area request so that the matter could be resolved immediately. Apparently, Mr. Clark refused to sign the form, as he believed that his child was properly enrolled at the school.

According to Petrilli, when a teacher at BTWA informed the Clarks that Petrilli had reported that their child was out of area, the Clarks, along with Ms. Berry, intensified their efforts to oust Petrilli as principal of BTWA. According to Petrilli, Mr. Clark "stormed into Petrilli's office" for a meeting and was angry, intimidating, and hostile. Petrilli testified that he told her he fights for a living, was not through with her, and had friends in high places. Petrilli reported this behavior to Silberman and her then-supervisor, Ms. Coleman.

On June 18, 2007, the Clarks advised Vince Mattox, the Director of Community/SBDM/Equity/Government Support for the Fayette County Public Schools, of their concerns via email. That email states:

> Word has leaked that BTW has attempted to disrupt [the Clarks' child's] education and there is a groundswell of requests for us to go after Petrilli rather than simply protect [our child]. Our interest is to protect [our child], however we are concerned about other [children]. What do you think?

In Mattox's response email to the Clarks, he simply stated, "I applaud your commitment." According to Petrilli, the first step in the Clarks' campaign to get

rid of her was to threaten to initiate a lawsuit against the appellees over the out-of-area issue during a meeting with Silberman. This meeting was memorialized in a June 22, 2007, letter outlining the "points that accurately reflect our discussion." Mr. Clark, who had allegedly been suspended from the practice of law, advised Silberman that he would "forego any cause of action against FCPS or any of its employees" in exchange for, among other things, overruling Wiseman on the out-of-area issue. In lieu of filing any claims, the Clarks also demanded free choice of any school they wanted their child to attend, and that Ms. Clark be given "complete access to the school, [and] veto power over [her child's] special needs teacher and [] personal assistant."

Ms. Petrilli alleges that during July of 2007, Ms. Berry and the Clarks were collaborating on a draft email to send to Silberman to discuss their issues with her as Principal. The draft emails are included in the record and we have reviewed them on appeal. Eventually the emails culminated in a request for a private meeting with Silberman. Ms. Berry and the Clarks presented the problems as "community concerns;" however, Petrilli argues that it was nothing more than Ms. Berry and the Clarks' attempts to replace her as Principal.

The record indicates that initially, Silberman instructed the parents to meet with Petrilli first to discuss their concerns. The parents expressed a desire to speak with Silberman, and he ultimately agreed to meet with them but expressed his desire to have Petrilli present to defend her actions and position. However, the parents, staff, and community partners explained to Silberman that they feared

retribution against their children and indicated that if they could not meet with Silberman alone, they would have no choice but to go to the Office of Educational Assessment and/or the media.

In support of her arguments that the Clarks were only concerned with race, Petrilli points to a July 26, 2007, email wherein Mr. Clark instructs Ms. Clark and Ms. Berry to make "…a list of everything that has happened over the past year which negatively effected [sic] black parents, students, teachers, or the community. Include everything no matter how inconsequential it appears. Failure to develop black talent will have a future negative effect."

Silberman then agreed to meet with the parents. This meeting occurred on August 22, 2007. Carmen Coleman was present at this meeting, and she testified that the parents went around the room expressing their concerns. Her testimony was that the meeting was a free exchange of ideas, and the parents also provided a two and a half page list of issues and concerns about Petrilli and the school. Petrilli argues on appeal that while Ms. Berry and Ms. Clark tried to create the impression that the list of complaints were from parents who attended the meeting, it was instead a list Ms. Berry typed prior to the meeting and reflected only her and the Clarks' ideas. Nonetheless, the list included allegations of test score fabrications, manipulating students in the classroom, misappropriation of funds, inadequate supplies and teaching materials, and concerns over curriculum and staffing issues. After listening to the group, Silberman told the parents that he would meet with Petrilli, look into the issues, and get back with them.

On Thursday August 23, 2007, Silberman and Coleman met with Petrilli. Silberman advised Petrilli of the meeting the previous evening and presented her with the parents' list of issues. Petrilli admitted to some of the allegations, such as the SBDM council issues, but denied others. At that time, Silberman told Petrilli that he did not believe everything on the list was true, but that he had an obligation to investigate. He also expressed to Petrilli that they could fight or defend most of the allegations. Both Petrilli and Coleman testified that at this point in the meeting, Petrilli put her head down on the table and stated to Silberman and Coleman that she could not go back to BTWA because she had "lost" her parents and her community.

Coleman testified that it was a stressful meeting, and no one really knew what to say or how to respond. She further testified that it was Petrilli who stated that she would have to resign or retire, and that she would investigate her options in Frankfort. At this point, Silberman offered to let her return to Northern Elementary and act as interim principle there. Petrilli stated something to the effect of, "I can't go back there with this cloud over my head." Ms. Coleman testified that at the conclusion of this meeting, Petrilli was going to think about her options, meet with her pastor, and advise them of her decision. When they did not hear from her over the weekend, Coleman and Silberman began to discuss what their course of action would be if Petrilli did not resign or retire. According to Ms. Coleman, they were worried about letting the BTWA staff know about Petrilli's decision because the school year had just started.

That Sunday, Silberman had still not heard from Petrilli. At a cabinet meeting, he discussed Petrilli and involved the Board of Education general counsel, Brenda Allen. Ms. Allen recommended that Silberman suspend Petrilli with pay pending an investigation into the allegations. Apparently, Ms. Allen was to draft a letter to that effect, but while she was drafting the letter, Silberman changed his mind and decided to wait to hear from Petrilli about her choice.

Finally, sometime on that Sunday, Silberman received word from Petrilli that she was going to resign, and the discussion indicated that she was to have a letter of resignation to him by the following morning. However on Monday morning, Silberman received a call from Petrilli's attorney indicating that Petrilli was not going to resign. At that point, Silberman indicated that he would have to suspend her with pay pending an investigation. However, Ms. Petrilli resigned her position with the Fayette County Public Schools on Monday August 27, 2007, as demonstrated in a single lined typed statement with her signature on it addressed to Silberman as Superintendent. The testimony at trial evidenced that Petrilli had been advised by her attorney and her former supervisor McLaughlin that standard procedure was to suspend with pay pending an investigation. Both Petrilli's attorney and McLaughlin testified that Silberman never threatened demotion or termination.

According to Petrilli's attorney at the time she resigned, her prior supervisor McLaughlin, her then-current supervisor Coleman, and Superintendent Silberman, Petrilli voluntarily resigned her position as the principal of BTWA. In

fact, she negotiated the terms and conditions of her resignation and received consideration for her resignation letter. This included negotiations about when the resignation would take effect, continued benefits, and letters of recommendation for future employment outside Fayette County. Finally, Ms. Petrilli negotiated the language contained in the release to the media.

Once Petrilli resigned and did not return for employment, Silberman selected an interim principal, Jock Gum, a white male, to act as principal because the school year had already begun. As stated above, an interim principal is one of the few circumstances where the Superintendent has the authority to pick a principal. Otherwise, that duty is vested in the SBDM council for the school. At that same time, the SBDM began to meet to select a permanent principal for the upcoming year. The SBDM and Superintendent ultimately decided on Wendy Brown, an African American female. Jock Gum testified, however, that race was never mentioned during his time as interim principal, and that BTWA parents wanted him to remain as principal past his interim period, including Jessica Berry, who Petrilli accuses of conspiring to replace her with an African American principal. The decision to select Wendy Brown was unanimous by the SBDM council, which was not only comprised of a majority of Caucasians, but was also made up of many members of Petrilli's own leadership team of teachers and staff she had brought with her from Northern Elementary.

After her resignation, Petrilli sued the Fayette County Board of Education, Superintendent Silberman, both in his individual and official capacity,

Carmen Coleman, her Director, both in her individual and official capacity, and Brenda Allen, General Counsel for the Board of Education, in her individual and official capacity. Petrilli brought a host of different claims against them, including race discrimination and constructive discharge, abuse of legal process, defamation, civil conspiracy, violation of the Kentucky Whistleblower Act, abuse of a teacher, intentional infliction of emotional distress, retaliation, and some vague violations of her constitutional rights.

After extensive written discovery and depositions, the trial court granted summary judgment on behalf of all the defendants on the claims of abuse of process, civil conspiracy, and defamation. In addition, the trial court granted summary judgment on behalf of Carmen Coleman on all issues in her individual and official capacity. Next, the trial court granted summary judgment on behalf of Brenda Allen in her official capacity and individual capacity. The court also granted summary judgment for Superintendent Silberman, individually, for the claims of race discrimination and whistle blowing. However, the rest of the claims were not dismissed against Silberman in his official and individual capacity or against the Board of Education.

The claims remaining for the jury against Superintendent Silberman and the Board of Education were the allegations of reverse race discrimination, retaliation, and violation of the Kentucky Whistleblowers Act. At trial, the appellees moved for directed verdict both at the close of Petrilli's proof and at the close of all proof, but the trial court denied both motions. Although the jury

ultimately found in favor of Silberman and the Board of Education, the appellees have filed a cross-appeal to preserve potential errors in the event this Court reverses or vacates the judgment.

As her first assignment of error on appeal, Petrilli argues that the trial court erred in creating a threshold jury instruction that superseded the elements for reverse discrimination, retaliation, and violation of the Kentucky Whistleblower Act. The jury was given the following threshold jury instruction: "Do you believe from the evidence that the Plaintiff, Peggy Petrilli, voluntarily resigned from her position as principal of Booker T. Washington Academy on August 27, 2007?" The jury marked "yes" and returned to the courtroom where the trial judge discharged them from further duties. Ms. Petrilli argues that the threshold instruction was given in error because it is completely different from the elements of her claims for reverse discrimination, retaliation, and violation of the Kentucky Whistleblower Act.

The appellees argue that Petrilli did not preserve the issue of the threshold jury instruction for appellate review. In support of this argument, the appellees argue that Petrilli cites a discussion before the close of proof for the preservation of this issue. However, the record reveals that this was a preliminary discussion over the general structure of the jury instructions. According to the appellees, the trial court made it clear that it had put together an amalgamation set of instructions which included elements of both the Plaintiff and Defendant's tendered instructions "for a place to start" in drafting the final instructions.

According to the appellees, the trial court did not issue its final jury instructions until later that day, and only after the close of proof. Petrilli made no objection at that time to the threshold Question No. 1, and instead only objected to Jury Instruction No. 1, and her objection only dealt with whether the instruction should include a finding that Petrilli was a member of a protected class as it pertained to the reverse discrimination claim.

The "failure to specifically object to the final written instructions means the objection to the language. . . has not been properly preserved for our review." *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 690 (Ky. App. 2009). Kentucky Rules of Civil Procedure (CR) 51(2) and (3) provide:

> (2) After considering any tendered instructions ... the court shall show the parties the written instructions it will give the jury, allowing them an opportunity to make objections out of the hearing of the jury.
>
> (3) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, **stating specifically** the matter to which he objects and the **ground or grounds** of his objection.

(Emphasis added). Because Ms. Petrilli did not object to the threshold jury instruction at the close of proof, we agree with the appellees that she did not preserve this argument for review on appeal.

Petrilli argues that simply tendering her own jury instructions preserved this issue for appeal. We disagree. In *Boland*, the Appellant submitted its own instructions, and in lieu of objecting to the language they later took issue with on

appeal, asked the court if they could "stand on their instructions as submitted." *Id.* at 690. A panel of this Court held that the particular language the Appellant argued on appeal was improper, had not been objected to specifically, and thus the matter was not properly preserved for appeal. In the instant case, Petrilli objected to a different jury instruction regarding her inclusion in a protected class for her reverse discrimination claim, but did not specifically object to the "voluntary" language contained threshold Question No. 1. Accordingly, Petrilli did not preserve this argument for appeal to this Court.

Even if the alleged error had been properly preserved, it fails on the merits. "Alleged errors regarding jury instructions are considered questions of law that we examine under a de novo standard of review." *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). "The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict." *Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 652-53, 208 S.W.2d 940, 943 (1948).

Petrilli argues that she was entitled to a jury instruction regarding her claim of constructive discharge, since her claims of retaliation, reverse discrimination, and violation of the Kentucky Whistleblower Act all include the essential element of an adverse employment action, which in this case, Petrilli claims, is a constructive discharge. The standard for constructive discharge is whether the "conditions created by the employer's actions are so intolerable that a

reasonable person would feel compelled to resign." *Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 807 (Ky. 2004).

After hearing nearly two weeks of evidence, the jury found that Petrilli had voluntarily resigned her position at BTWA, as designated by its response of "yes" to the threshold jury question asking whether they believe she **voluntarily** resigned. We agree with the appellees that the trial court's reasoning for including the threshold jury instruction/question was basic and correct. If the jury believed from the evidence that Petrilli voluntarily resigned, then necessarily they must not have believed she was constructively discharged. We believe that the jury was fully capable of determining the everyday meaning of "voluntarily" and did so in its deliberations. It is axiomatic that if Petrilli voluntarily resigned, she could not have been "constructively discharged." Thus, even if her arguments were properly preserved, this argument fails on the merits.

Petrilli next argues that she was entitled to a directed verdict on her reverse race discrimination claim. The controlling statute for race discrimination in Kentucky is Kentucky Revised Statutes (KRS) 344.040. Kentucky has adopted the factors set forth in *McDonnell Douglas v. Green*, 414 U.S. 811, 94 S.Ct. 31, 38 L.Ed.2d 46 (1973), when evaluating a case of reverse discrimination. To prevail, the plaintiff must show that 1) she is a member of a protected class; 2) she suffered an adverse employment action; 3) she was qualified for the position; and 4) she was replaced by a person of a different race. *Id.*

Our standard of review upon denial of a motion for directed verdict and

motion for judgment notwithstanding the verdict is as follows:

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ. *See Sutton v. Combs*, 419 S.W.2d 775 (Ky. 1967).

Taylor v. Kennedy, 700 S.W. 2d 415, 416 (Ky. App. 1985). Upon appellate review, the standard utilized for a motion for directed verdict and motion for a judgment notwithstanding the verdict is identical. *Dollar General Partners v. Upchurch*, 214 S.W.3d 910 (Ky. App. 2006).

In support of her argument, Petrilli argues that it was error for the trial court not to grant a directed verdict on the issue of who is a protected class and to instruct the jury using the words "protected class," without advising that, as a matter of law, everyone is a member of a protected class. However, Petrilli fails to note that in addition to determining that she was a member of a protected class, the jury would have also had to find that Petrilli experienced an adverse employment action. Because the jury determined that Petrilli voluntarily resigned from her position as principal of BTWA, they necessarily determined that she had not suffered an adverse employment action. The existence (or lack thereof) of an adverse employment action was a highly contested issue throughout the trial, and it is the central issue on appeal. Given the jury's finding Petrilli voluntarily resigned

and was not subject to an adverse employment action, as well as our determination that the threshold jury instruction was proper, her argument that a directed verdict should have been entered in her favor on the reverse discrimination claim is without merit. Given that the issue of constructive discharge was highly contested throughout the trial, a directed verdict was also improper in favor of the appellees, and their claim in the cross-appeal arguing that a directed verdict was warranted is also without merit.

Petrilli's third argument on appeal is that her motion for a directed verdict on her retaliation claim should have been granted. The appellees again argue that Petrilli was not entitled to a directed verdict, but that the trial court erred in not granting their motion for a directed verdict on Petrilli's retaliation claim. After reviewing the arguments of both parties and the extensive record on appeal, we again affirm the trial court's ruling on both motions.

Petrilli cites no proof to support a favorable finding on this claim, but instead presents her earlier argument that the threshold jury instruction was erroneously presented to the jury. As the appellees point out, to establish a *prima facie* case of retaliation pursuant to KRS 344.280, Petrilli must demonstrate that 1) she engaged in an activity protected by KRS Chapter 344; 2) the exercise of her civil rights was known by the appellees; 3) the defendant thereafter took an adverse employment action to her; and 4) there was a causal connection between the protected activity and the adverse employment action. *Brooks*, 132 S.W.3d at 803.

The retaliation elements, as applied to the proof in this case, were set out in the trial court's Jury Instruction No. 2:

> You will find for the Plaintiff, Peggy Petrilli, on her claim of retaliation if you believe from the evidence that:
>
> (1) She complained about racial issue(s) committed by the agents, representatives, or employees of the Fayette County Board of Education;
>
> (2) The Defendants knew about her complaint(s);
>
> (3) She was subjected to an adverse employment action;
>
> (4) There was a causal connection between the complaint(s) and the adverse employment action.

The trial proof did not establish any assertion that Petrilli reported a protected activity. She did not "oppose a practice," file a complaint, testify, or participate in an investigation, proceeding or hearing for any violations of KRS Chapter 344 by the school board or its employees. *See* KRS 344.280. Instead, Petrilli alleges that the appellees retaliated or discriminated against her because she opposed a practice declared unlawful by KRS 344 by making complaints to Silberman and Coleman relating to the race discrimination she underwent. She alleges that the appellees aided and abetted the parents and SBDM council in discriminating against her.

Presumably, Petrilli is referring to her June 2007 meeting with Buddy Clark, where she alleges he was rude, hostile, threatening, and intimidating. Petrilli reported this behavior to Silberman, who met with the Clarks and reported back to Petrilli on what had occurred. At trial, Petrilli admitted that she was happy with

the resolution of this issue at that time. There was another occasion where the Clarks met with Petrilli about their special needs son. Again Petrilli reported that meeting to Ms. Coleman, who then met with the Clarks and reported back to Petrilli about the resolution by email. Again, there was no indication of any retaliation by the Superintendent or the School Board against Petrilli. Instead, it appears they investigated her allegations and supported her by resolving them.

Finally, the fact that the jury found that Petrilli voluntarily resigned negates the element of an adverse employment action. Again, because the issue of an adverse employment action was highly contested, the trial court properly submitted the issue of an adverse employment action to the jury, and a directed verdict on behalf of either party would have been improper. Without an adverse employment action, Petrilli's *prima facie* case for retaliation fails.

Petrilli next argues that the trial court erred in denying her motion for a directed verdict on her Whistleblower claim, and the Appellees argue that the trial court erred in not granting their motion for a directed verdict on this claim. Once again, Petrilli cannot show she suffered any adverse employment action because the jury determined she voluntarily resigned. Further, Petrilli did not present sufficient proof to support her claim that she reported any conduct which would have been protected by statute.

The Whistleblower elements, as applied to proof in this case, were set out in the trial court's Jury Instruction No. 3:

You will find for the Plaintiff, Peggy Petrilli, on her claim under the Whistleblower statute if you believe from the evidence that:

1) She reported information regarding actual or suspected violation of law, mandate, rule and/or policy of the Fayette County Board of Education to the Fayette County Board of Education, through its agents, representatives, or employees;

2) The Fayette County Board of Education caused her to be subjected to reprisal, or directly or indirectly used official authority, or influence against her as a direct result of her reporting said information.

The purpose of the Whistleblower Act is to "protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 255 (Ky. App. 2004) (quoting *Meuwissen v. Dept of Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000). Specifically, the intent of the Act is to encourage state employees to report the wrongdoing by a **state agency** by protecting that employee from reprisal. "KRS 61.102 prohibits employers from subjecting public employees to reprisal for reporting information **relating to the employers violation of the law**, alleged fraud, or abuse, etc." *Cabinet for Families & Children v. Cummings*, 163 S.W.3d 425, 428 (Ky. 2005) (emphasis added).

Petrilli has not alleged any wrongdoing by her employer necessary to satisfy the first element; instead, she claims wrongdoing by the **parents** within the school. Petrilli's first alleged violation sounds in "abuse of a teacher" under KRS 161.190. This allegation goes back to the June 2007 discussion Petrilli had with Buddy

Clark regarding his belief that someone at the School Board had made a mistake regarding his child being out of area. However, Petrilli did not plead any facts supporting the essential element of a claim for abuse of a teacher. KRS 161.190 states:

> Whenever a teacher or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school.

The predecessor to the current KRS 161.190 prohibited any instances where a person was hostile to a teacher or administrator. This statute was expressly repealed by the Supreme Court of Kentucky as violating First Amendment speech. *See Commonwealth v. Ashcraft*, 691 S.W.2d 229 (Ky. App. 1985) (statute providing that no person shall upbraid, insult, or abuse a teacher of the public schools is an unconstitutional violation of the constitutional right to free speech).

Thus, a parent has a federally protected, constitutional right to address a principal with his concerns and to be forceful in his language. The current enactment of KRS 161.190 recognizes this. Petrilli testified at her deposition that she has dealt with disgruntled parents who were emotional and angry and that she believes it comes with the territory of the job. Furthermore, even if Petrilli reported the alleged abuse of a teacher, she was reporting conduct by a parent, and not by the school board or her employer.

Petrilli's other theory also surrounds the out-of-area issue with the Clarks' child. Again, Petrilli fails to establish that a violation by her employer occurred. Instead, she reported the Clarks' child as being out-of-area, and thus she was reporting a violation by a **parent**. Petrilli has failed to establish the *Cummings* requirement that a school board employee violated a state or federal rule or regulation with regards to the Clarks' child's enrollment. Without a violation of the law, there can be no whistleblower claim. Had the Clarks' child actually been in violation of the out-of- area rules and the issue not resolved between the school board and the Clarks, that would have been a violation caused by **the Clarks**, not an employee or administrator of the Board of Education.

Petrilli next argues that the trial court's failure to include a punitive damages instruction was error, based on her contention that an award of punitive damages is the appropriate remedy for a violation of KRS 61.102. The appellees argue that Petrilli again failed to preserve this argument for appeal because she failed to object after the Court's jury instructions were issued to the parties. We believe this argument fails on the merits. The award of punitive damages set forth in KRS 61.990(4) is discretionary along with several other potential remedies in whistleblower cases. The trial court exercised its discretion by ruling that there was no testimony which would support a claim for punitive damages. We find no abuse of the trial court's discretion in this regard.

Petrilli next argues that the trial court erred by dismissing her constitutional claims and by failing to grant her a directed verdict on those claims. In support of

this argument, Petrilli vaguely argues that Sections 1, 2, and 3 of the Kentucky Constitution provide equal protection and due process that she was somehow denied. Petrilli does not specifically state which of these sections would afford her relief, nor does she provide the factual basis to support that relief. Petrilli cites *Board of Education v. Jayne*, 812 S.W.2d 129 (Ky. 1991), for the proposition that the Kentucky Supreme Court permitted a direct action against a board of education or a superintendent for violation of an educator's constitutional rights as contained within Section 2 of the Kentucky Constitution.

Petrilli also cites *Blackburn v. Breckinridge County Board of Education*, 564 S.W.2d 35 (Ky. App. 1978), for the proposition that detailed charges and allegations are required when a teacher is terminated. The appellees counter that since Petrilli is not a teacher and was not terminated, but resigned, this case is not applicable to the case at bar.

Instead, they argue that the demotion of a Principal is controlled by KRS 161.765, and the Court of Appeals has held that this separate scheme for principals is constitutional and is not violative of equal protection. *See Hooks v. Smith*, 781 S.W.2d 522 (Ky. App. 1989). In *Hooks*, a panel of this Court found no constitutionally protected property right in a principal's job. At best, the statute gives an administrator with at least three years' experience an additional procedural opportunity to convince the board of the lack of merit in the superintendent's recommendation of demotion, or that it violates a constitutional or statutory right. *Id.* at 523-24.

Because Petrilli was not demoted, but instead resigned, she was not afforded the procedural opportunity to convince the board that the demotion violated her constitutional or statutory rights.[1] Based on the totality of the evidence, we agree with the appellees that Petrilli simply does not have a direct cause of action against Silberman or the Board of Education for violation of any constitutional rights. The trial court was correct in denying her motion for directed verdict.

Next, Petrilli argues that the trial court erred by dismissing her claims against Brenda Allen, individually. Petrilli concedes that the dismissal of Brenda Allen, in her official capacity as the Board Attorney, was correct, but now complains that the court improperly dismissed the claims against her in her individual capacity. In *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (internal citations and quotations omitted), the Kentucky Supreme Court held:

> But when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.

Petrilli argues that Brenda Allen's duty to investigate parental complaints and to produce a report of her findings following Petrilli's resignation was not a

[1] Interestingly, a lateral transfer of a principal is not even considered a demotion as defined by the statute. *See* KRS 161.720(9). Therefore, Silberman could have sent Petrilli back to Northern Elementary without her consent and without recourse. However, she declined the lateral transfer and instead resigned her position.

discretionary act because Allen was required to make the report, and thus Allen did not enjoy qualified immunity. Alternatively, Petrilli argues that even if Allen's duty to investigate and make a report was a discretionary function, her immunity is nullified by her lack of "good faith."

This Court has previously held that an investigative report into allegations relating to a staff member was a discretionary act. *See Boles v. Gibson*, 2005 WL 32810, 2 (Ky. App. 2005). Further, the Kentucky Supreme Court made clear:

> Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful and where it is left to the will or judgment of the performer to determine in which way it shall be performed.

James v. Wilson, 95 S.W.3d 875, 905-06 (Ky. 2002) (quoting *Franklin County, Ky. v. Malone*, 957 S.W.2d 195 (1997)). The manner and method of the investigation, the time taken to review the allegations, and the authoring of the final report required significant judgment on the part of Brenda Allen. Further, there was no proof of improper motive or bad faith as Petrilli alleges. The trial court permitted Petrilli extra discovery time to attempt to establish bad faith on Allen's part, but Petrilli did not provide such proof to the trial court.

Because Allen's actions were discretionary under *Wilson* and *Gibson*, were undertaken in good faith, and were within the scope of her employment as Board

Attorney, the trial court properly dismissed the claims against her in her individual capacity.

Petrilli next argues that the trial court erred in its handling of a *Batson* challenge during jury selection. We initially note that the standard for determining whether to exclude a juror for cause lies within the sound discretion of the trial court. Unless the action is an abuse of discretion or clearly erroneous, the trial court's decision is not reviewable. *Hunt v. Commonwealth*, 304 S.W.3d 15 (Ky. 2009); *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009).

Specifically, Petrilli alleges that during jury selection, she used two peremptory strikes to strike two African American jurors, and the defense made a *Batson* challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Petrilli then articulated her reason for striking juror 668 because he had a niece who is a substitute teacher in the Fayette County School system who hoped to be a substitute the next year. Petrilli also claimed this juror appeared to be impaired or under the influence. Petrilli articulated that she struck juror 733 because he or she had the same last name as a party involved in the case and was reading a book authored by Blair Underwood, an African American actor and author who is deeply involved in civil rights issues.

The trial court then re-questioned juror 668 and learned that the niece lived in a different household and was only seen at holiday meals. Further, the trial court assessed the juror for "impairment" and found nothing. The court then questioned juror 733 and found that the book was in fact a Hollywood murder

mystery, and was not some form of civil rights literature as Petrilli had claimed. While making its ruling to void Petrilli's initial peremptory strikes, the trial Court commented on the record that this was the first time it had heard such strained reasons for striking jurors, and the strained reasons appeared pre-textual.

After the court voided the strikes of the two African American jurors, Petrilli requested that the two strikes be reinstated. The trial court then recessed while all parties were given the opportunity to research the issue of the appropriate remedy/sanction for a successful *Batson* challenge. Apparently no authority was found. The appellees then objected to re-instating the two strikes because, they argued, that would give Petrilli a "do over" and no disincentive for using the peremptory challenges in a discriminatory manner. Counsel for Petrilli then decided not to use the peremptory challenges, after a one and a half hour delay in the jury selection process.

Petrilli presents no sound argument on appeal that the trial court's wide discretion in the jury selection process was abused, nor does she present any argument whatsoever as to how she was prejudiced by what amounted to her own decision not to use the peremptory strikes. Accordingly, we find no error in the trial court's ruling on the *Batson* challenge by the appellees.

Next, Petrilli argues that the trial court erred in denying her motion in limine to exclude bad character evidence. Petrilli argues that the appellees should not have been permitted to introduce evidence of the allegations she claims were concocted by Ms. Berry and the Clarks, nor should they have been permitted to

introduce evidence of other issues with Petrilli during her time as principal at BTWA. However, the trial court found that these events were relevant and demonstrated the ongoing issues Petrilli was having with parents and staff, which led to the parents meeting with Superintendent Silberman. We agree. Further, the evidence was relevant to rebut Petrilli's allegations that complaints were racially motivated. The trial court did not err in this regard.

Petrilli next argues that the trial court erred by refusing to sanction the appellees' attorney for his misconduct throughout discovery and the trial. At the same time, Petrilli argues that she should have been allowed to take a second deposition of Doug Adams. Petrilli argues that the appellees' attorney perceived Adams as a sympathetic witness to Petrilli, and therefore acted in a hostile, abusive, and unprofessional manner throughout Adams' first deposition. Petrilli is moving for reversal of the jury verdict based on the fact that she was deprived of any meaningful discovery regarding Adams.

The trial court reviewed the material Petrilli presented in her motion for sanctions and her request to take a second deposition of Doug Adams. It did not find any sanctionable conduct or misconduct. The question of sanctions was completely within the sound discretion of the trial court, and we will not disturb those findings on appeal, absent a clear indication that the discretion was abused. In this case, based on our careful review of the entire record which was replete with **numerous** objections on behalf of both parties, the trial court properly ruled on these issues.

Petrilli's next argument on appeal is that the trial court erred by preventing her from calling Brenda Allen to the stand to test the sufficiency of the advice of defense counsel. Petrilli attempted to call Allen to the stand to question her about her communications with Superintendent Silberman. Once Silberman indicated that he had conferred with his Board attorney, the trial court found that Petrilli could not ask about these communications. As Petrilli presents no authority for her position regarding this issue, we find no error by the trial court in prohibiting Petrilli from asking Brenda Allen about her communications with Silberman.

Finally, Petrilli argues that the trial court erroneously allowed the appellees' attorney to read from deposition transcripts. Petrilli cites three instances where counsel for the appellees was permitted to read from deposition transcripts. The first instance involved impeaching Petrilli's testimony from her deposition transcript. Petrilli testified on direct examination that she had reported instances of race issues to the Superintendent and Carmen Coleman at two meetings. On cross-examination, it was pointed out by counsel that in her discovery deposition, Petrilli stated that she could not recall any instances of reporting race problems to Silberman or Coleman.

The Appellees argue that the thrust of Petrilli's allegations was that her complaints of race issues went unaddressed and that attempts to oust her as Principal were racially motivated. The appellees argue that Petrilli's credibility was undoubtedly called into question, and thus impeachment was warranted and appropriate. Petrilli makes no argument to the contrary, and instead states that this

method of impeachment is contrary to the method outlined in Kentucky Rules of Evidence (KRE) 613. Based on Petrilli's failure to articulate an argument as to how this is improper, we find no error in the trial court allowing counsel for the appellees to impeach Petrilli's testimony with that testimony from her deposition.

Because Petrilli makes no specific argument as to how it was improper for counsel for the appellees to read portions of deposition transcripts to impeach or rebut testimony in the other two instances she cites in a footnote, we shall not address the merits of those arguments on appeal. We find no error by the trial court in allowing counsel to impeach or rebut testimony, and furthermore Petrilli has not presented any evidence that she was prejudiced by such testimony.

As part of their cross-appeal, the appellees argue that the trial court erred in failing to dismiss Silberman in both his official and individual capacities, and that they were entitled to summary judgment on the issue involving the threshold jury instruction as to whether Petrilli voluntarily resigned. In light of the jury's finding that Petrilli did voluntarily resign, which amounts to a dismissal of the charges against Silberman officially and individually, we need not reach the appellees' argument that Silberman should have been dismissed as a defendant.

As stated above, the issue of whether Petrilli voluntarily resigned was a question of fact appropriate for and properly submitted to the jury. Summary judgment on that issue was appropriately denied. The appellees argue that the trial court even acknowledged that "these were issues of law that he may have to deal with post-trial depending on what the jury found." However, that gives credence

to the fact that the trial court properly submitted the question of Petrilli's voluntary or involuntary resignation to the jury and dismissed the remaining claims upon the jury's determination that Petrilli's resignation was, in fact, voluntary. Thus, summary judgment was properly denied to both parties on this issue.

Based on the foregoing, we affirm the trial verdict and judgment entered in this case.

ACREE, JUDGE, CONCURS IN RESULT ONLY, FOR THE REASONS STATED IN JUDGE THOMPSON'S CONCURRING OPINION.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur with the result reached by the majority but write separately to express my disagreement with its legal analysis regarding the threshold jury instruction. The instruction merely asked if the jury believed Petrilli "voluntarily resigned" from her position without a definition of the term "voluntarily." I do not believe that the threshold jury instruction was appropriate in this complex litigation. Although Petrilli's resignation may have been "voluntary" to the extent that she initiated the resignation, if harassment, intimidation, coercion, or discrimination was a substantial factor in her decision to resign, Petrilli would not be precluded from seeking damages for reverse discrimination, retaliation, and violation of the Whistleblower Act. To clarify the term "voluntarily," the threshold instruction

should have included a definition of the term as used in the context of the litigation.

Despite my disagreement with the majority's legal analysis, I nevertheless concur in the result because, at the close of trial, the appellees were entitled to a directed verdict. The evidence established that the parents, not the school board, were the perpetrators of the conduct complained of by Petrilli.

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