

RENDERED: February 23, 2001; 2:00 p.m.
 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001224-MR

GINA LAWSON BROWN

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 98-CI-00508

BOARD OF EDUCATION OF
CORBIN INDEPENDENT SCHOOL AND
ED McNEEL

APPELLEES

OPINION
AFFIRMING
*** * * * *** *

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

MILLER, JUDGE: Gina Lawson Brown brings this appeal from an May 5, 2000, summary judgment of the Whitley Circuit Court. We affirm.

In January 1997, appellant was hired at the Whitley Day Treatment Center (center) operated by the Corbin County Independent School System. The center is an alternative educational placement for middle and high school students who are at high risk. Appellant was hired as a certified teacher, but by the end of the 1997-1998 school year, she was performing a dual

role as part-time teacher and part-time counselor. She was paid as a certified teacher.

On April 21, 1998, appellant observed one, Kyle Jones, a part-time teacher at the center, bringing a male student into the building from the recreation area. Appellant thought Jones was extremely upset with the boy and asked what was the problem. Jones replied that the boy had made an offensive remark, and he told the student to repeat the remark to appellant. The student denied making same. According to appellant, Jones then took the student into a classroom and ordered him to write a specific sentence 200 times as punishment. Appellant was concerned about the situation and followed the pair into the classroom. Appellant testified that the boy refused to cooperate with Jones. Jones made the student sit at a desk, forced a pen into his hand, and told him to write. When the boy continued to refuse, appellant testified that Jones smacked the pen out of the student's hand. Appellant testified that she heard a commotion and turned to see Jones shoving the desk into the student's body. Appellant testified that Jones and the student were yelling and the situation was out of control. The student apparently suffered injury as a result. Appellant reported the occurrence to officials at the center and additionally contacted social services about the incident.

In April 1998, appellant received notice of non-renewal of her contract for the 1998-1999 school year. As a teacher, on a limited contract, appellant was subject to non-renewal pursuant to the provisions of Kentucky Revised Statute (KRS) 161.750. The

reason given for non-renewal was the need to eliminate one of the four full-time teaching positions at the treatment center. It appears that the center was being served by four teachers and a classified counselor. Ed McNeil, superintendent of the school system, and Earl Gregory, principal of the center, determined that the system could save money by employing three teachers and two classified counselors. In order to realign staff accordingly, McNeil provided notice of non-renewal to appellant and Jones. A full-time teaching position and a full-time counseling position became available. They were duly posted. Both appellant and Jones applied for the teaching position. Jones was selected for the position on June 17, 1998. He was informed by letter dated June 18, 1998. Appellees contend that Brown was informed of such on the same day. In any event, Brown was hand-delivered a letter on June 23, 1998, indicating Jones had been hired in the teaching position. This letter was dated June 18, 1998.

On September 18, 1998, appellant filed a complaint in the Whitley Circuit Court against appellees. Therein, appellant alleged that her contract non-renewal and the failure to re-hire her in the posted teaching position were in retaliation for reporting the incident between Jones and the student to social services. She alleged that such retaliation violated Kentucky's Whistle Blower Act (KRS 61.101-61.103). She also alleged gender discrimination in violation of KRS 344.040.¹ Finally, she alleged deprivation of her right of free expression in violation

¹This allegation is not separately presented on appeal.

of the First and Fourteenth Amendments to the United States Constitution and in violation of 42 U.S.C. §1983. On May 5, 2000, the circuit court entered summary judgment in favor of appellees. This appeal follows.

Appellant contends the circuit court committed error by entering summary judgment. Summary judgment is appropriate where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). We agree with the circuit court that there exists no material issue of fact. It is not the existence of any issue of fact, but a material and controlling issue that precludes the entry of summary judgment. See Bennett v. Southern Bell Telephone and Telegraph Company, Ky., 407 S.W.2d 403 (1966).

The circuit court was of the opinion that appellant's whistle blower claim was untimely. Her notice of the non-renewal of her teaching contract was effective April 28, 1998. See Estreicher v. Board of Education of Kenton County, Kentucky, Ky., 950 S.W.2d 839 (1997). Her complaint was filed on September 18, 1998, clearly outside KRS 61.103(2), which provides that an action must be filed "within ninety (90) days after the occurrence of the alleged violation." Brown argues the ninety-day period did not begin to run until she was notified that Jones had been hired to fill the teaching position for which she also applied. This she claims was when she received the hand-delivered letter on June 23, 1998. This, of course, would bring her within the ninety-day period provided in the statute.

We think the date Brown received actual notice that Jones had been hired in her stead, is not dispositive of the issue before us. It is our opinion that after April 28, 1998, Brown was no longer employed by the Whitley County School Board. As such, she was not entitled to the protection of the Whistle Blower Act. The act protects employees, not applicants for employment. Cf. Creech v. McQuinn, Ky. App., 957 S.W.2d 261 (1997).

Finally, we address Brown's contention that she was deprived of her right of free expression and was subject to gender discrimination. We attach no merit to these contentions. They are but naked allegations. There is no reasonable probability that Brown can prevail upon these claims. See Steelvest, Inc., 807 S.W.2d 476. Brown's action is against both Superintendent McNeel and the board. The board is, of course, charged with the ultimate responsibility of hiring and dismissing employees. KRS 160.290 and KRS 160.340. There is no demonstration the board possessed a policy or a custom effecting the termination of whistle blowers or the employment of males in preference to females. Cf. Monell v. Department of Social Services, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Further, there is insufficient demonstration that McNeel was even aware of Brown's conduct underlying the whistle blowing charge at the time he decided to reduce the number of teachers in order to conserve money.

Upon the whole of the case, we are of the opinion that McNeel, as well as the board, acted well within their

responsibilities in eliminating a teaching position and hiring Jones as a replacement.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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