RENDERED: AUGUST 20, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001440-MR

BEVERLY LITTLE — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 02-CI-00255

BOARD OF EDUCATION OF
MORGAN COUNTY; AND JOE DAN GOLD,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY
AS SUPERINTENDENT OF THE MORGAN
COUNTY SCHOOLS — APPELLEE

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

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

KNOPF, JUDGE: Beverly Little appeals from a summary judgment of the Morgan Circuit Court, entered June 12, 2003, dismissing her claim for damages and other relief against the Morgan County Board of Education and its superintendent, Joe Dan Gold. Little worked as a special-education teacher in the Morgan County

school district from the mid 1980s until the beginning of the 2000/2001 school year. On August 2, 2000, as the school year was about to begin, Gold transferred Little from her position at Morgan County High School to a comparable position at Morgan County Middle School. Little contends that the transfer was untimely, in violation of KRS 161.760, and was arbitrary, in violation of Section 2 of the Kentucky Constitution. The trial court erred, she maintains, by misconstruing these laws. We affirm.

The material facts are not in dispute. Little began working at the high school at the beginning of the 1990/1991 school year. As of the end of the 1999/2000 school year she was one of six special-education teachers assigned to that school. Through the years, the number of special-education students at the high school had decreased, with the result that one of the teaching positions could be eliminated without overburdening the remaining teachers according to federal and state guidelines.

In the late winter or early spring of 2000, the district's director of special education realized that the next year would see an influx of special-education students into the middle school. She advised Gold that that school would need an additional teacher and that the high school was overstaffed. In about March of 2000, Gold informed the principal of the high school, Bruce Herdman, that one of the high school's special-

education teachers might need to the transferred. Herdman asked Gold to defer his decision, because there was a possibility that one of the special-education teachers would become a regular teacher. Gold agreed, but in the meantime learned from the high school's guidance counselor that four of the special-education teachers performed extra-curricular duties while two of them, Little and her sister, Dorothy Johnston, did not.

During the evening of July 14, 2000, Gold telephoned Little and told her that he was considering reassigning her to the middle school. Objecting that she had more seniority than some of the other special-ed teachers, she urged him to reconsider. Apparently he agreed to give the matter more thought. Not until about July 28 did Gold learn from the high school's new principal, Addison Whitt,[1] that none of the six special-ed teachers would be switching to a regular teaching assignment.

On August 2, 2000, during the high-school teachers' first day of in service, Gold asked Little to meet with him in an unoccupied office. Little's sister accompanied her to the meeting, where Gold told Little that he had decided to transfer her to the middle school and gave her written notice of that decision. Little offered Gold a note from her physician indicating that she had been diagnosed with valvular heart

[1] Sadly, Herdman had been killed in a traffic accident.

disease and asserting that transfer to a more stressful position would "affect her overall health." Gold refused to look at the note, tried to explain to Little that he had chosen her because he did not want to disrupt the extracurricular activities of the other teachers, and, according to Little, became angry when she would not accept that explanation.

Unfortunately, the transfer so upset Little that she suffered a panic attack and was hospitalized. She was subsequently diagnosed as having depression and agoraphobia. She was awarded disability retirement and apparently has not been able to return to any sort of work. She contends that the transfer was wrongful because Gold failed to comply with KRS 161.760(2).

That statute, as Little notes, provides that as a general rule teacher transfers must be completed, including written notification to the teacher,[2] by July 15 of the upcoming school year.[3] The statute, however, allows for some exceptions, including the following:

> [t]ransfer or change of appointment of teachers after July 15 shall be made only . . . to reduce or increase personnel because of a shift in school population.

[2] KRS 160.390(2).

[3] The statute has been amended since Little's transfer. We are concerned with the version in effect at that time.

The trial court ruled that Little's transfer was in response to a shift in school population and thus that it was lawful notwithstanding the fact that it was not effected until August 2.

Little does not dispute that there was a material shift in population at both the high school and the middle school, but she contends that, because the superintendent had notice of the shift well before July 15, the exception ought not to apply. The exception should be limited, she argues, to last-minute population shifts that take the district by surprise.

It may be that the General Assembly was most concerned with ensuring that superintendents would be able to respond effectively to population shifts not occurring or not detected until near the beginning of the school year. It was surely aware, however, that such shifts are often detected, as in this case, much earlier. It could easily have distinguished the two situations had it so intended. It did not, however, and we are not permitted to read into a statute what the General Assembly left out.[4] We agree with the trial court, therefore, that, because Little's transfer was in response to a shift in school population, it was lawfully effected after July 15.

Little also contends that her transfer was arbitrary in contravention of Section 2 of the Kentucky Constitution. Her

[4] Heleringer v. Brown, Ky., 104 S.W.3d 397 (2003).

argument, however, is that the transfer was arbitrary because it violated the statute. Having found that there was no statutory breach in this case, and Little having proffered no evidence tending to show that the superintendent's decision was invidiously motivated,[5] we agree with the trial court that Little's constitutional claim must fail.

Because it thus appears impossible for Little's suit to succeed, summary judgment was appropriate.[6] Accordingly, we affirm the June 12, 2003, judgment of the Morgan Circuit Court.

ALL CONCUR.

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[5] Board of Education of Ashland, Kentucky v. Jayne, Ky., 812 S.W.2d 129 (1991).

[6] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).