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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001404-MR

GRACE PATTON — APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 08-CI-00152

ROBERT POLLARD; HAROLD COMBS;
KIMBERLY KING; LANTRE COMBS;
REX SLONE; DENNIS JACOBS;
RANDY COMBS; ANNA DIXON;
PATRICIA SLONE HACKWORTH;
CHARLES JONES; SHARON SMITH;
DIANE HALL; AND KNOTT COUNTY
BOARD OF EDUCATION — APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** ** ** **

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Grace Patton appeals from a summary judgment of the Knott Circuit Court dismissing her claims against Robert Pollard, Harold Combs, and the

Knott County Board of Education, *et al.,* (the Appellees) for retaliation and wrongful termination, violation of her First Amendment rights to free speech, breach of contract, promissory estoppel and violation of applicable statutes. Upon review, we reverse the summary judgment of the Knott Circuit Court in part and affirm in part, albeit on different grounds than those stated by the trial court.

History

Patton worked as a certified French teacher at the Knott County Central High School for six years. In her sixth year of teaching at the high school, during the 2006-2007 academic year, Patton also served on the school's Site-Based Decision-Making Council (SBDMC).

In January of 2007, the principal of the Knott County Central High School, Robert Pollard, wrote a letter of reprimand to Patton naming three items of concern. One of those items included an allegation that she called Pollard a "twit" in front of a classroom of students. The letter of reprimand also alleged that Patton had improperly used three "sick days" and that a final examination given to her students was not "rigorous" enough or in the desired format. Pollard stated in the letter that a copy of the same would be placed in Patton's personnel file.

Thereafter, on March 23, 2007, Patton responded to Pollard's letter requesting that the letter of reprimand be removed from her employee file. In support of this action, Patton alleged in the letter that the reprimand was "null and void" because (1) it was contradictory to an email sent by Pollard a few weeks earlier, (2) it had been issued and placed in her file in violation of the collective

bargaining agreement between the Knott County Education Association (the "KEA") and the Knott County Board of Education (the "Board"), (3) it violated directives of the Kentucky Department of Education (the "KDE"), (4) a doctor's excuse was never requested for the sick days in question, and (5) it was in violation of Kentucky Revised Statutes (KRS) 161.155. Patton copied this letter to the Knott County Superintendent, Harold E. Combs.

Patton alleges that Pollard called her into his office just one week later to inform her that he would be asking the SBDMC to change the school's foreign language offering from French to Spanish, thereby eliminating her position. Patton further alleges that later that day, Pollard's secretary informed her that a "special meeting" of the SBDMC had been called for the following day.

On the following day, Pollard did indeed recommend that the SBDMC change the school's foreign language offering from French to Spanish. Patton was present and advocated that French be retained in the curriculum. Patton's counsel was also present at the meeting and was prepared to address the subject; however, Pollard told counsel that the meeting was "special" and that public comment would have to wait until the regular meeting. The SBDMC then voted to table the issue until the following week.

On April 9, 2007, the SBDMC held the second meeting regarding the curriculum change from French to Spanish. Patton alleges that several people at the meeting advocated retaining French and *supplementing* it with Spanish. Patton testified that Pollard was the sole individual who spoke in favor of completely

eliminating French. The SBDMC voted in favor of changing the curriculum from French to Spanish. Patton received a letter from Superintendent Combs later that month informing her that she had been placed on a suspended status.

The letter from Superintendent Combs stated that due to the SBDMC's vote, her position "will no longer exist." It further stated that "[w]hen a position becomes available meeting your certification area, you will be called back into service in the Knott County School District." Patton was certified to teach French and Social Studies. However, Patton claims that when the Board posted an opening for a Social Studies teacher in early 2009, she was not contacted by Combs or anyone from the Board.

After Patton received the letter from Superintendent Combs, she and her attorney appeared before the Board to contest the SBDMC's decision. At this time, Patton and her counsel argued that the SBDMC had made an "unauthorized decision" to change the curriculum from French to Spanish because the SBDMC failed to follow curriculum committee procedures as outlined by statute. Patton also argued that the decision to change the curriculum from French to Spanish was "politically motivated retaliation." At the conclusion of the meeting, Combs informed Patton that she would remain on a suspended status until a decision could be made regarding the appropriateness of the SBDMC's procedure.

Patton then attempted to "appeal"[1] the SBDMC's decision by asking it to reconsider. In her request for the SBDMC to reconsider, she alleged that the process used to change the curriculum violated numerous procedural provisions of the Knott County School Systems Policies and Procedures Manual (the "Policies and Procedures Manual"). The SBDMC rejected Patton's request to reconsider the curriculum change. Patton thereafter "appealed" to the Board on May 17, 2007. The Board also rejected Patton's request to reconsider.

Patton then filed a complaint in the Knott Circuit Court alleging wrongful termination and retaliation for her exercise of protected speech, breach of contract, promissory estoppel and violation of applicable statutes. Patton alleged that the Appellees violated Board policies and procedures and that the Board allowed Pollard to take part in the SBDMC's decision despite the fact that his actions were motivated by retaliation. Patton alleged that Pollard sought to retaliate against her because she asserted her rights in filing a formal complaint about the letter of reprimand and because of her proper use of statutorily-governed sick leave under KRS 161.155. Patton also alleged that the Board impermissibly enabled an official within its control to propose and significantly influence a hasty[2] curriculum change which served to mask his constitutionally improper retaliatory motives. Finally, Patton also claimed that Superintendant Combs also failed to

[1] It does not appear that any formal administrative appeal process existed; however, Patton appears to have asked the body to reconsider and/or to provide a written record for its determination.

[2] The entire process, from proposal to enactment, occurred within a ten-day period.

perform in accord with his legal duties to her when he promised that she would be called back into service in the Knott County School District when a position meeting her certifications became available.[3] Patton makes arguments of breach of contract and promissory estoppel in this respect.

After an answer was filed and discovery was allowed to proceed, the Appellees filed a motion for summary judgment. The Knott Circuit Court entered summary judgment in favor of the Appellees, finding that the SBDMC acted within its authority and did not breach any duties arising under the constitution, statutory law, or the common law. The court further concluded that the claims against the Board and individual Board members must also fail, noting that the Board and its members enjoyed immunity and that the doctrine of *respondeat superior* could not be used to impose liability upon the Board or its members for any tortious acts allegedly committed by Pollard or the SBDMC members. Finally, the court noted that neither Pollard nor any other defendant named individually violated any ministerial duty owed to Patton.

Patton moved to alter, amend or vacate the judgment and such motion was denied by the trial court. Patton now appeals to this Court.

Analysis

On appeal, Patton argues the trial court erred in granting summary judgment in favor of the Appellees. Patton claims that her suspension was tantamount to a discharge and that her suspension was motivated, at least in part,

[3] Patton testified that she had to relocate her family to Louisiana where she was ultimately offered another teaching job.

by Pollard's retaliation against her for exercise of her federal and state constitutional rights of free speech when she alleged that he violated the KEA collective bargaining agreement, KDE directives, and statutory law. Patton also argues breach of contract, violation of applicable statutes, and promissory estoppel against Combs and the Board for failure to notify her and/or reinstate her when a position became open for which she was certified.

On review of a summary judgment, we view the record in a light most favorable to Patton and ask whether any genuine issues of material fact exist so that the Appellees would not be entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03; *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Upon review, we are mindful that summary judgment is only appropriate if it is apparent from the record that Patton "could not prevail under *any* circumstances." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991)(Emphasis added).

As a preliminary matter, we feel the need to properly frame the issues before us. Although the Appellees argue that Pollard himself had "no authority under Kentucky law to change the courses offered at the school," and thus could not have effected any retaliation against Patton, this argument is a red herring. To be clear, the thrust of Patton's argument is that Pollard exerted his influence to bypass traditional routes and advocate a hasty curriculum change before the SBDMC as a "back door" method of suspending and/or terminating her. The Appellees next aver that Patton's alleged referral to Pollard as a "twit" was not

protected speech. This is also a red herring as the speech in question was not the supposed "twit" comment made by Patton, but her speech in connection with the letter she wrote protesting Pollard's letter of reprimand. Having clarified the issues before us in connection with Patton's constitutional claims, we now address the merits.

1. State Law Claims Based on Patton's Speech

We first address Patton's state law claims for wrongful discharge and/or retaliation.

The leading case relating to wrongful discharge in Kentucky is the case of *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). In that case, our Supreme Court retreated somewhat from a blind application of the "terminable-at-will" doctrine, which often led to harsh results. The "at-will" doctrine, once considered an absolute and immovable rule of law in the Commonwealth, provides that an employer may discharge an "at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." *Id*. In *Firestone*, the high court recognized that, in certain circumstances, a strict application of the "at-will" doctrine would stand contrary to public policy. *Id* at 733. Thus, the *Firestone* Court found that exceptions to the doctrine can be made where the public policy is fundamental and well-defined. *Id*. Under this exception, the Court held that an employer could not fire an employee for exercising his right to file a claim under the Workers' Compensation Act. *Id*.

It was not long after the decision in *Firestone* when the Supreme Court saw fit to clarify its holding and limit the scope of the public policy exception. In *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985), the Court clarified the public policy exception as follows:

> 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
>
> 2) That policy must be evidenced by a constitutional or statutory provision.
>
> 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Id. at 401. The Court limited the applicability of the public policy exception, holding that:

> only two situations exist where "grounds for discharging an employee are so contrary to public policy as to be actionable" absent "explicit legislative statements prohibiting the discharge." First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative enactment."

Id. at 402 (internal citations omitted), *quoting Suchodolski v. Michigan Consolidated Gas Co*., 412 Mich. 692, 316 N.W.2d 710, 711-12 (Mich. 1982). Thus, a plaintiff may only establish a cause of action for wrongful termination by showing that the termination was contrary to well-defined public policy as evidenced by a constitutional provision or statutory law, by showing that the termination stemmed from the exercise of a right conferred by legislative

enactment, or by showing that it was the result of their refusal to violate the law in the course of their employment.

Patton's state law free speech claim is most cogently understood as a claim that she was wrongfully discharged under the public policy purview of state constitutional exceptions to the terminable-at-will doctrine.[4] Although Patton fails to adequately distinguish between her federal and state law claims for wrongful termination and/or retaliation in her brief, it is clear from her citation to Kentucky Constitution § 8 that her state law claim rests at least in part upon the argument that the actions taken against her were contrary to public policy under this provision of the Kentucky Constitution. Section 8 reads as follows:

> Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

Further, Ky. Const. § 1 reads in pertinent part:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . . The right of freely communicating their thoughts and opinions.

However, in *Grzyb,* 700 S.W.2d 399, 402, the Kentucky Supreme Court heard and rejected the claim that Kentucky Constitution § 1 could provide a

[4] Nonetheless, Patton was not a regular at-will employee. Rather, she had a continuing contract of employment that could only be terminated for cause under the terms of KRS 161.790. However, the crux of her argument is that Pollard, in an attempt to evade the mandates of KRS 161.790, had her position eliminated through improper methods. Interestingly, a position may be "suspended" by a superintendent of a district whenever enrollment or other changes in the district so dictate and the rigors of KRS 161.790 do not apply. KRS 161.800.

cause of action against private employers for wrongful discharge. In *Grzyb*, the plaintiff alleged that the employer, a private hospital, discharged him in retaliation for his fraternization with a female employee and that this violated his freedom of speech and freedom of association under Ky. Const. § 1 and the First Amendment. *Id*. The Court pointed out that Ky. Const. § 1 and the First Amendment only applied as to transgressions of the government or lawmaking bodies and did not provide a cause of action against private employers. *Id*.

Although *Grzyb* involved a private employer, rather than a public employer, the high Court followed the logic of *Grzyb* in later cases involving public employers. *See, Boykins v. Housing Authority of Louisville*, 842 S.W.2d 527 (Ky. 1992), and *Baker v. Campbell County Bd. of Educ*., 180 S.W.3d 479 (Ky. App. 2005). In both cases, the Court refused to find a cause of action against the employer under a state constitutional public policy exception to the at-will doctrine. In *Baker, supra*, the Court found that Ky. Const. § 1 cannot by itself sustain a wrongful discharge action. *Id*. Thus, there is no prior case law in Kentucky allowing suit for retaliation or wrongful discharge against an employer based on freedom of speech or association under state constitutional grounds. Therefore, we decline to entertain the claim today.

However, although Patton's claim for retaliation cannot stand under the public policy exception to the at-will doctrine on constitutional grounds, it can stand on *statutory* grounds. *See*, *Grzyb*, 700 S.W.2d at 402 (*Public policy exception exists where legislative statements would prohibit discharge.*).

Specifically, Patton's public policy argument is supported by the well-established statute KRS 61.102 because she suffered negative employment action after calling Pollard's allegedly illegal and/or improper behavior to the attention of his supervising authority, the Knott County Superintendent.[5] Indeed, the purpose of KRS 61.102 is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known. *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247 (Ky. App. 2004). KRS 61.102(1) reads, in pertinent part, that

> ***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*** 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 Commonwealth of Kentucky, or any of its political subdivisions***, or any facts or information relative to actual or suspected mismanagement, waste, fraud, [or] abuse of authority[.]

(Emphasis added). Thus, KRS 61.102 guards employees against both direct *and indirect* forms of reprisal or discrimination for exercising their rights thereunder. In the present case, Patton copied a letter to Pollard's supervising authority, Superintendent Combs, alleging that Pollard violated mandates from the Kentucky Department of Education as well as statutory law concerning her use of statutorily prescribed sick leave under KRS 161.155.

[5] Patton copied the letter challenging Pollard's reprimand to Superintendent Combs.

In her letter, Patton listed the following reasons why the letter of reprimand should be removed from her permanent file:

> Knott County Schools PN Agreement (see items 6-14-6, 8-2-1, and 13-1)
>
> [D]irectives from superiors at the Kentucky Department of Education
>
> [A] doctor's excuse for sick days mentioned in item 1 of reprimand . . . has not been requested . . . by the school nor the . . . Board
>
> KRS 161.155

Thus, Patton alleged that Pollard's action violated (1) a collective bargaining agreement, (2) Kentucky Department of Education directives, and (3) a Kentucky statute.

In order to establish a violation of KRS 61.102, an employee must show (1) that "the employer is an officer of the state" or one of its political subdivisions, (2) that "the employee is employed by the state" or one of its subdivisions, (3) that "the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law" and (4) that "the employer took action or threatened to take action to discourage [them] from [doing the same] or to punish the employee for making [the] disclosure." *Davidson*, 152 S.W.3d at 251. Patton has sufficiently demonstrated the first three of these elements and has raised a genuine issue of material fact with respect to the fourth. Indeed, it is clear from the record that she was a state employee who called to the

attention of her boss's supervising authority suspected violations of KDE directives or mandates and a Kentucky statute.

Thus, when viewing the evidence in a light most favorable to Patton, we find that the Board is not entitled to judgment as a matter of law with respect to her state law claims for retaliation. However, Robert Pollard, Harold Combs, and each of the individually named Board and SBDMC members are entitled to summary judgment because "KRS 61.101(2) does not impose individual civil liability under Kentucky's Whistleblower Act[.]" *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 434 (Ky. 2005).

In conclusion, Patton raises genuine issues of material fact which necessitate the reversal of the summary judgment with respect to her state law claims against the Board. We make no determination with regard to whether the actions taken by Pollard and others actually constituted retaliation, however, as that presents a question for the jury.

2. Federal Claims Based on Patton's Speech

We now address Patton's federal claims of retaliation under the First Amendment based on her speech in response to the letter of reprimand issued by Pollard.

This presents a somewhat difficult analysis for the Court. In *Grzyb*, 700 S.W.2d 399, the Kentucky Supreme Court held that "[t]he First and Fourteenth Amendments do not, *per se*, provide a cause of action against employers for wrongful discharge." *Id*. at 402. However, as previously noted, *Grzyb* involved a

private employer. The other state law cases on point, *Boykins* and *Baker,* echo the holding in *Grzyb,* although they do not distinguish between public and private employers.

Despite the Commonwealth's reluctance to broaden the scope of Section 1 under the Kentucky Constitution to include claims of retaliation and wrongful discharge on state law grounds, this Court recognizes federal law and the interpretation of the United States Constitution by the federal circuits and the United States Supreme Court. The Sixth Circuit and the United States Supreme Court have long recognized that allowing the government to quell the rights of free speech and freedom of political association is contrary to the Constitution and to public policy. *See, e.g., Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Pickering v. Board of Education of Tp. High School Dist. 205, Will County, IL*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). (*Teachers cannot be constitutionally compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.*).

While this Court and the Kentucky Supreme Court have previously found that the First Amendment to the United States Constitution will not support a cause of action for wrongful discharge, those holdings are limited to the question of whether state law and public policy would support a First Amendment claim. *See, e.g., Grzyb,* 700 S.W.2d 399*; Boykins,* 842 S.W.2d 527*; Baker,* 180 S.W.3d

479. Indeed, as this Court noted in *Baker*, the sole issue before it was "whether Kentucky should recognize a common law cause of action for retaliatory refusal to hire that is based *upon only* public policy." *Id*. at 482 (emphasis added).

We are cognizant of the precedent set forth in the Sixth Circuit and the United States Supreme Court which dictates that it is unlawful for a public employer to retaliate against or discharge a public employee for exercising his or her First Amendment right to engage in constitutionally protected speech. *See, e.g., Pickering,* 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Boger v. Wayne County*., 950 F.2d 316 (6th Cir. 1991); *Langford v. Lane*, 921 F.2d 677 (6th Cir. 1991). However, each of these cases proceeds under 42 U.S.C. § 1983.

We cannot reach the merits of whether Patton was subject to retaliation or wrongful discharge for engaging in constitutionally protected speech because she failed to cite to 42 U.S.C. § 1983 in any of her pleadings. *Baker,* 180 S.W.3d at 483, n.18, citing to *Henderson v. Corrections Corp. of America*, 918 F.Supp. 204, 208 (E.D.Tenn. 1996)(*A plaintiff must bring an action under § 1983 in order to bring a claim under the First or Fourteenth Amendments.*). *See also, Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). Indeed, Section 1983 is the only avenue in Kentucky by which a plaintiff may bring federal Constitutional claims under the First Amendment as our state

recognizes no public policy exception for such claims. *Baker*, 180 S.W.3d at 483. Hence, we are left with no choice but to affirm the trial court's entry of summary judgment in favor of the Appellees on Patton's First Amendment claim, as her "claim must rise or fall solely based upon Sections 1 [and 8] of the Kentucky Constitution." *Id.* at 483, n.18.

3. State Law Claims of Breach of Contract and Promissory Estoppel

We now reach Patton's claims of breach of contract and promissory estoppel in connection with Superintendent Combs's letter to her. The letter that Combs wrote to Patton on April 18, 2007, read in pertinent part:

> Ms. Patton:
>
> Due to a decision of Knott County Central School Based Council, your position as French Teacher will no longer exist.
>
> You are placed on "Suspended" status for the 2007-2008 school year. When a position becomes available meeting your certification area, you will be called back into service in the Knott County School District.

Patton alleges that Superintendent Combs made a promise of future employment to her when he stated in the letter that "[w]hen a position becomes available meeting your certification area, you will be called back into service in the Knott County School District."

The trial court held that there was no proof of record to substantiate the claim that proper procedures for her recall were not followed. We agree. Although Patton testified in her deposition that a position for a Social Studies teacher opened up at Knott Central in January of 2009, she presents no other proof that a position became available or that Superintendent Combs did not perform as promised in the alleged contract or as required by statute.[6] There is no indication in her deposition testimony as to why she believes a position became available during that time. Moreover, KRS 161.800 would have required that the position first be offered to persons with greatest seniority and we are provided with no

[6] KRS 161.800 which governs suspensions of teachers' contracts, states that "[t]eachers whose continuing contracts are suspended shall have the right of restoration in continuing service status in the order of seniority of service in the district if teaching positions become vacant or are created for which any of the teachers are or become qualified." Thus, Combs's letter states little more than what is already required by statute. However, as noted in the statute, teachers are called back in order of seniority of service in the district. The letter from Combs is silent as to seniority in the district.

evidence of record concerning what person or persons were contacted about (or hired for) the alleged job vacancy. Given the lack of evidence here, and the lack of any citation by Patton of authority which would indicate otherwise, we agree with the trial court that she has not raised a genuine issue of material fact sufficient to withstand summary judgment. Therefore, we need not reach the merits of any potential contract or estoppel claim associated therewith.

4. Violation of Applicable Statutes

We now reach Patton's final claim of "violation of applicable statutes." Patton acknowledges that the SBDMC had the statutory authority to change curriculum. However, she also insists that the SBDMC was required to exercise that authority in accordance with the law. Patton avers that the curriculum change by the SBDMC was in contravention of KRS 160.345 and various sections of the Knott County School Systems Policies and Procedures Manual.

Under KRS 160.345(2), "[e]ach local board of education shall adopt a policy for implementing school-based decision making in the district[.]" Further, "[i]f a school council establishes committees, it shall adopt a policy to facilitate the participation of interested persons . . . and shall include the number of committees, their jurisdiction, composition, and the process for membership selection[.]" KRS 160.345(2)(c)2. In addition, KRS 160.345(i) states that "[t]he school council shall adopt a policy to be implemented by the principal in the following areas: 1. Determination of curriculum, including needs assessment, [and] curriculum development[.]"

Under KRS 160.290, each local board of education "shall make and adopt . . . rules, regulations, and bylaws for its meetings and proceedings for the management of the schools and school property of the district[.]" Such rules and regulations "shall be consistent with the general school laws of the state and shall be binding on the board of education and parties dealing with it[.]" KRS 160.290(2).

Sections 6.1 and 6.2 of the Knott County Schools Systems Policies and Procedure Manuals provide that "[t]he use of committees to accomplish tasks of the council is considered vital[]" and that "[a] standing committee will be formed in . . . Curriculum[.]" Patton testified that she was a member of the SBDMC. She further testified that there was no standing curriculum committee at any time in question.[7] Section 6.5 of the Manual mandates that "[a]ll committee meetings shall be open to the public except when personnel, legal issues effecting (*sic*) the committee, rights to privacy issues are under into (*sic*) executive session." Moreover, Section 6.6 requires that "[a]ll committee meetings shall be announced via the largest media source in the district 24 hours in advance, [and] have a prepared agenda[.]" Finally, Section 7.3 mandates that "[n]o policy shall be adopted by the council at the meeting in which the policy is introduced."

Patton, a SBDMC member and department head, testified that there was never a standing committee for curriculum. Further, upon review of the

[7] Moreover, as she was the only foreign language teacher at Knott Central, Patton would have also been the department head. According to her testimony, she was not included in any curriculum meeting either as department head or as a member of the SBDMC.

minutes of the meetings present in the record, there appears no other evidence of a *standing* curriculum committee. Certainly, a few meetings cobbled together over a one-week period cannot qualify a committee as "standing."

Patton points out numerous violations of Kentucky statutes and of the Knott County School District's own policies and procedures. She argues that the trial court misapplied the law in determining that the SBDMC members and the Board members did not owe her any duty and in determining that they were otherwise immune from suit. We agree.

Under KRS 446.070, "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." *Id*.[8] A civil claim under KRS 446.070 is a tort claim, with the duty being measured by the statute allegedly violated. *Tax Ease Lein (sic) Investments 1, LLC v. Brown*, 340 S.W.3d 99, 101 (Ky. App. 2011). "KRS 446.070 . . . creates liability by virtue of the breach of duty[,]" quoting *Collins v. Hudson*, 48 S.W.3d 1, 4 (Ky. 2001). Here, while KRS 160.345 plainly gave the SBDMC discretion to establish committees, once the body exercised that discretion, it was required to adhere to the procedures and rules it voluntarily established. KRS 160.345; KRS 160.290. Clearly, the SBDMC exercised its discretion by directing that a standing curriculum committee be created and by enacting rules and procedures for the

[8] Patton appears to be alleging damages related to the loss of her job, differences in pay or status associated with her new job, and for expenditures incurred in having to relocate her family to Louisiana.

same. Once it exercised its discretion to use a curriculum committee and enact rules pertaining to it, such rules and procedures were "binding on the [Knott County] board of education and parties dealing with it[.]" KRS 160.290. Thus, we disagree with the trial court's conclusion of law that the Board and the members of the SBDMC owed Patton no duty.

We next address the issue of immunity. In the Commonwealth, "a School Board is protected by state sovereign immunity from a suit for money damages[.]" *Clevinger v. Board of Educ. of Pike County*, 789 S.W.2d 5, 12 (Ky. 1990). This includes a suit brought under KRS 446.070. Thus, the Board is entitled to summary judgment on Patton's claims of statutory violation.

However, our analysis does not end here. As explained by the Supreme Court in *Yanero v. Davis*, when an officer or employee of the state or one of its political subdivisions is sued in his or her individual capacity, he or she does not necessarily enjoy immunity. *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). Rather, the doctrine of qualified official immunity applies. *Id*. An employee sued individually is cloaked with immunity under the doctrine of qualified official immunity where the act in question: (1) was "discretionary" in nature, (2) was taken "in good faith" and (3) was "within the scope of the employee's authority." *Id.* at 522; *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011). Conversely, if the act in question involved the negligent performance of a ministerial act, the employee is not immune from suit. *Id*.

In the present case, Patton sued the SBDMC members individually, the Board members individually, as well as Pollard and Combs individually. It is clear that these individuals were all acting within the scope of their authority. Thus, each of the individually named defendants are entitled to immunity if their actions were discretionary and taken in good faith.

Patton argues it is well-settled that the "[p]romulgation of rules is a discretionary function[,]" while the "enforcement of those rules is a ministerial function." Appellant's brief, *quoting Williams v. Kentucky Dept. of Educ*., 113 S.W.3d 145, 150 (Ky. 2003). We agree. The enforcement of rules is ministerial in nature. *Id*. Thus, the trial court erred in finding that the SBDMC and Board members were immune from suit. *Id*.

Now that we have determined that a duty was owed and that the individually named Appellees are not immune from suit, we ask whether Patton has raised a genuine issue of material fact such as would survive summary judgment. We find that she has. Patton has raised a genuine issue of material fact as to whether KRS 160.345 and KRS 160.290 have been violated. Indeed, it appears there was never a standing curriculum committee and that the policies and procedures for determining curriculum espoused by the SBDMC and the Board were not followed. Indeed, it appears individuals may have been asked to leave one of the committee meetings (which were supposed to be open to interested persons), that proper minutes may not have been kept, that the curriculum change may have been proposed and voted on within the same regular meeting, and that

the meeting may not have been advertised by the largest media outlet twenty-four hours in advance.[9] Therefore, we reverse the entry of summary judgment in favor of the individually named Appellees.

Conclusion

In sum, we reverse in part and affirm in part.

We reverse the trial court's entry of summary judgment in favor of the Board for Patton's state law retaliation claim under KRS 61.102. Conversely, we affirm the trial court's entry of summary judgment against all of the individually named Appellees because the Whistleblower Act does not impose individual civil liability.

Next, we affirm the trial court's entry of summary judgment in favor of each and every Appellee on Patton's federal claims, as she failed to cite to 42 U.S.C. § 1983 in her pleadings.

Further, we affirm the trial court's entry of summary judgment on Patton's breach of contract and promissory estoppel claims because of the lack of any evidence sufficient to raise a genuine issue of material fact.

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[9] Moreover, there are even questions as to the method used for determining curriculum. The SBDMC's own policy 4.02(A) requires that the "Curriculum Review and Improvement Committee continuously develops and intensely monitors" curriculum. Instead, there is no indication in the minutes provided in the record of this. Rather, a phantom "survey" is discussed. Indeed, the record indicates that there was a lone survey given to the students asking whether there were any other courses they wanted to see offered at Knott Central which weren't currently being offered. In answer, many students allegedly responded that they wanted to see Spanish offered. However the question did not give students the opportunity to say whether they wanted Spanish in lieu of French or in addition to French. In addition, while Pollard testified that the guidance counselors tallied the results of the surveys given to the students, the deposition testimony of the guidance counselors indicates that they never saw the results of the surveys. Instead, there is a question as to whether Pollard himself may have tallied the surveys and then destroyed the originals.

Finally, we affirm the trial court's entry of summary judgment in favor of the Board on Patton's claim of statutory violation because the Board is immune from suit. However, we reverse the trial court's entry of summary judgment with respect to each of the individually named Appellees, as their actions were not discretionary.

It is so ordered.

ALL CONCUR.

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