

RENDERED: FEBRUARY 15, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001792-MR

GLEN MILLER; BEECHWOOD INDEPENDENT
SCHOOL DISTRICT; MICHAEL DAMMERT,
BOARD OF EDUCATION MEMBER; JOE MENEZ,
BOARD OF EDUCATION MEMBER; MARK GOOCH,
BOARD OF EDUCATION MEMBER; BRAD HOOD,
BOARD OF EDUCATION MEMBER; AND
MELANIE STRICKER, BOARD OF EDUCATION
MEMBER

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 09-CI-03090

KOREN SCHRAND

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This is an appeal from the circuit court's denial of the
qualified immunity defense for Glen Miller, Superintendent of Beechwood

Independent School District (Beechwood).¹ We conclude that Miller is entitled to qualified immunity in his individual capacity and, therefore, reverse and remand.

Koren Schrand was a classified employee of Beechwood for nine and a half years on a year-to-year contract. She was most recently employed as a payroll clerk on a 240-day contract and received a stipend that covered the cost of her training in a state mandated accounting program known as MUNIS.

From February 2007, through May 7, 2007, Schrand took approximately fifty days of leave under the Family and Medical Leave Act (FMLA) to care for her husband, who had suffered a serious brain injury. Schrand alleges that after her return, she was subject to ridicule and abusive behaviors by other staff because of her FMLA leave.

Miller became superintendent in July 2007. Although he worked in offices near Schrand, he did not view any improper treatment of Schrand, or receive any notification from her about improper treatment.

In January 2008, Miller asked Schrand to calculate her sick bank data, and then later accused her of deception about these figures. Schrand assumed that Miller used Schrand's computer workstation to search for the sick bank data but accessed the wrong file. After she pointed out that this accounted for the

¹ This appeal was filed by Glen Miller, Beechwood Independent School District, Michael Dammert, Board of Education Member, Joe Menez, Board of Education Member, Mark Gooch, Board of Education Member, Brad Hood, Board of Education Member, and Melanie Stricker, Board of Education Member. However, the only proper appellant in this interlocutory appeal is Miller because this Court only has jurisdiction to review the denial of his qualified immunity defense, which is the only issue presented in this appeal. Accordingly, we only refer to Miller as the appellant.

discrepancy, Miller accepted her explanation. Schrand complained to her supervisor about this access because her computer contained highly confidential HIPAA regulated information.

In the same month, Beechwood's finance officer drafted a tentative budget reflecting a 9% reduction in funding for the coming fiscal year and Miller was informed by Kentucky's Commissioner of Education that the state's funding for public education was facing a potential 12% decrease for the 2008-2009 fiscal year. The school board authorized Miller to recommend budget cuts to address the anticipated reduction in funding.

On February 18, 2008, the school board approved Miller's recommendation that Schrand's position be reduced the following school year from 240 work days to 190 work days and her MUNIS stipend be eliminated because she had completed her training. A co-worker of Schrand with more seniority also had her Munis stipend eliminated at the same time, but she did not have her work days reduced.

Miller timely gave Schrand notice of the changes. In a letter dated March 3, 2008, he explained that she no longer qualified for the MUNIS stipend because she had completed her training, and he reduced her work days because he believed that payroll could be completed in that timeframe. The letter further explained that changes were being made to her position due to the uncertain budget and the need to redistribute existing funds due to new audit rules.

In May 2008, Schrand notified Beechwood that she would not be continuing employment with the district for the following school year. She had accepted another job under less favorable terms than her original contract, but with better terms than under the modified contract.

With the school board's approval, Miller posted a job opening announcing a job similar to Schrand's former job, which included additional responsibilities with a contract term of 230 days at the same pay rate as Schrand's former job.

Schrand filed an action against Miller in his official and individual capacity, Beechwood and members of the school board alleging constructive discharge, violation of the FMLA, wrongful termination, intentional infliction of emotional distress, negligence per se, negligence, breach of contract and denial of due process. She asserted that her reduction of hours was based not upon an actual need to achieve budgetary savings but was instead orchestrated by Miller in retaliation for her taking FMLA leave and making the complaint about Miller accessing her computer. Schrand further alleged that the changes were made with the goal of her leaving her employment.

Miller and the other litigants filed a motion for summary judgment. The circuit court granted this motion in part and denied it in part. As to Miller, the court dismissed all the claims against him except the claims of negligence, breach of employment contract and violation of due process in his individual capacity.

Miller brings this interlocutory appeal challenging the circuit court's decision to deny him qualified immunity on these claims.

Schrand failed to submit a brief to this court. Accordingly, under CR 76.12(8)(c), we have the options to (i) accept the appellants' statement of the facts and issues as correct; (ii) reverse the judgment if the appellants' brief reasonably appears to sustain such action; or (iii) regard Schrand's failure as a confession of error and reverse the judgment without considering the merits of the issue. Because the record supports the appellants' arguments as set forth below, we reverse.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. Granting of a summary judgment motion "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

When a motion for summary judgment is properly supported by evidence, the party opposing the motion cannot rely on pleadings alone to make an issue of fact when there has been adequate time for discovery; instead, the party must make an affirmative showing. *Hartford Ins. Group v. Citizens Fid. Bank & Trust Co.*, 579 S.W.2d 628, 631 (Ky.App. 1979). A party's conclusory allegations and subjective beliefs do not create a genuine issue of material fact sufficient to defeat a properly supported motion for summary judgment. *Harstad v. Whiteman*, 338 S.W.3d 804, 812 (Ky.App. 2011); *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky.App. 2007).

We have authority to consider an interlocutory appeal of a denial of qualified official immunity on summary judgment. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886-887 (Ky. 2009). Whether a particular defendant is protected by qualified official immunity is a question of law. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006).

Public officers and employees enjoy qualified official immunity when they negligently perform “(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.” *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (internal citations omitted). Therefore “qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Sloas*, 201 S.W.3d at 475 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987)).

The claims of negligence, breach of employment contract and violation of due process against Miller in his individual capacity are based upon Miller's decision to reduce Schrand's hours and salary. The decision to terminate an employee is a discretionary act. *Jefferson County Fiscal Court v. Pearce*, 132 S.W.3d 824, 833 (Ky. 2004). Under KRS 161.011(8), a superintendent is authorized to make reductions in forces due to reductions in funding and other compelling reasons. Actions short of termination impacting the terms of employment are also discretionary and within a superintendent's authority. Therefore, Miller's decision to change Schrand's position to address the budget shortfall is a discretionary act within the scope of a superintendent's authority.

“Once the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith.” *Yanero*, 65 S.W.3d at 523. Good faith has both an objective and subjective component. *Id.* Objectively, the inquiry is whether the behavior demonstrates “a presumptive knowledge of and respect for basic, unquestioned constitutional rights.” *Id.* Subjectively, the inquiry is whether the official has behaved with “permissible intentions.” *Id.*

[M]ost case law addresses these elements by stating when the qualified immunity is not available, or when the public official is acting in *bad faith*. Thus, bad faith can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded a person in the plaintiff's position,

i.e., objective unreasonableness. Acting in the face of such knowledge makes the action objectively unreasonable. Or, bad faith can be predicated on whether the public employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive, which requires a subjective analysis.

Bryant v. Pulaski County Det. Ctr., 330 S.W.3d 461, 466 (Ky. 2011) (internal citations and quotations omitted). Good faith judgment calls that are made in a legally uncertain environment are entitled to qualified immunity. *Yanero*, 65 S.W.3d at 522.

Schrand has failed to show that Miller's actions violated a clearly established right or were intended to maliciously harm her on the grounds of negligence, breach of employment contract and violation of due process. Schrand's conclusory allegations and subjective belief that Miller orchestrated her reduction in hours and wages because he could not find cause to terminate her is not supported by any competent evidence. Schrand was employed under a year-to-year contract and was not entitled to automatic continued employment under the same terms. Miller acted appropriately within his authority in changing Schrand's position. There is no evidence that he knew or ignored any improper treatment of Schrand by her co-workers. Miller made no attempt to oppose Schrand using any process available to her to challenge the changes to her position.

Because Schrand failed to meet her burden of showing that Miller acted in bad faith, the circuit court erred when it denied Miller qualified official immunity.

Accordingly, we reverse the Kenton Circuit Court's denial of summary judgment to Miller and remand.

ALL CONCUR.

BRIEF FOR APPELLANT, GLEN
MILLER:

Suzanne Cassidy
Covington, Kentucky

BRIEF FOR APPELLEE:

No brief filed.