

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001329-MR

DEBORAH ROBINSON

APPELLANT

v. APPEAL FROM GRAYSON COUNTY CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 14-CI-00363

GRAYSON COUNTY BOARD OF
EDUCATION (A/K/A BOARD OF
EDUCATION OF GRAYSON COUNTY)

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, D. LAMBERT AND NICKELL, JUDGES.

COMBS, JUDGE: Appellant, Deborah Robinson, appeals from a Summary Judgment in favor of Appellee, Grayson County Board of Education (a/k/a Board of Education of Grayson County) (the Board). Finding no error, we affirm.

Robinson was employed by the Board as a school bus driver. This matter arises out of the termination of her employment. We refer to the record only as necessary to resolve the issues before us.

By letter dated November 16, 2011, the Superintendent of the Grayson County Schools, Barry Anderson, notified Robinson, in relevant part, as follows:

Please be advised that pursuant to Section 3.27 of the Policy & Procedures adopted by the Grayson County Board of Education and further pursuant to Kentucky law, I am advising you that you can be terminated for “immorality, misconduct or conduct unbecoming a school employee”.

You recently engaged in a Facebook conversation with a student in the Grayson County System that is under the age of eighteen. You made lude [*sic*] and inappropriate comments to this student. In my opinion, as Superintendent, it does not matter what this student said to you. You should never have replied to the student and engaged in this type of discourse.

You have come to my office and admitted that this infraction did occur as herein outlined. I attach a copy of the Facebook conversation that was brought to my attention and I incorporate it within this letter as though copied in full.^[1]

It is my intention to terminate your employment with the Grayson County Board of Education. This termination of employment will become final ten (10) days from the date of this letter received by you unless you request a hearing and deny the charges. I have enclosed an Employee Request for Hearing form which needs to be filled out by you, dated and returned to me within ten (10) calendar days after receiving this letter should you

¹ The content of the Facebook conversation is set forth in the parties’ briefs and is not in dispute. We need not repeat it here.

desire a hearing. It shall be determined that you have received this letter five (5) days after the date of this letter.

Robinson requested a hearing, which was conducted on January 4, 2012. On January 9, 2012, the hearing officer rendered a decision that Robinson be terminated as recommended by Superintendent Anderson.

There is no dispute that Robinson had the opportunity to be heard, nor is there any dispute that she and her attorney received the hearing officer's decision. However, Robinson contends that her employment was not *properly* terminated pursuant to KRS² 160.370, KRS 160.390, and the Board's own procedures because Superintendent Anderson did not send her a letter formally stating that her employment had been terminated *after* the hearing officer rendered his decision.

Robinson initially filed a claim in Federal Court, which resulted in entry of summary judgment for the Board. The Federal Court dismissed her federal constitutional claims and declined to exercise jurisdiction over her state law claims, which were also dismissed. Robinson then filed a Complaint in Grayson Circuit Court alleging that she was deprived of her rights to equal protection and/or due process of law under Sections 1, 2, 3 and/or 11 of the Kentucky Constitution.

Ultimately, the Board moved for summary judgment on grounds that Robinson's employment was terminated, that her testimony constituted a judicial admission barring her from asserting that it was not, and that her due process and

² Kentucky Revised Statutes.

equal protection rights had not been violated. The Board's motion was heard on July 19, 2015. On August 23, 2016, the trial court entered Summary Judgment and Order granting the Board's motion and dismissing Robinson's complaint with prejudice. On September 6, 2016, Robinson filed a Notice of Appeal to this Court.

Our review of the entry of a summary judgment is *de novo*. We must determine whether the trial court correctly found that there were no genuine issues of material fact and that the Board was entitled to judgment as a matter of law.

Collins v. Kentucky Lottery Corp., 399 S.W.3d 449, 452 (Ky. App. 2012).

Robinson contends that only the Superintendent can dismiss an employee under KRS 160.370, which provides in relevant part that the Superintendent "shall be responsible for the hiring and dismissal of all personnel in the district." Robinson further contends that her employment was not properly terminated in accordance with KRS 160.390 because she did not receive written notice of termination following the hearing officer's decision. KRS 160.390 provides in relevant part as follows:

- (1) The superintendent shall devote himself exclusively to his duties. ... He shall be responsible for all personnel actions including hiring, assignments, transfer, dismissal, suspension, reinstatement, promotion, and demotion and reporting the actions to the local board.
- (2) All personnel actions by the superintendent as described in subsection (1) shall be recorded in the minutes of the local board of education at the next meeting after the action is taken and shall not be effective prior to receipt of written notice of the personnel action by the affected employee from the superintendent.

Robinson relies upon *Burkhart v. Bd. of Educ. of Harlan County*, 649 S.W.2d 855 (Ky. App. 1983), in support of her argument that where “a change in a person’s employment is done in a manner unrecognized by the applicable statutes, that action is a NULLITY.” (emphasis original). *Burkhart* concerned the validity of teachers’ transfers under KRS 161.760 and held that the board’s failure to act by a deadlocked vote rendered any attempted transfer invalid. We agree with the Board that *Burkhart* is distinguishable on its facts.

We are persuaded that *Estreicher v. Board of Educ. of Kenton County*, Ky., 950 S.W.2d 839 (Ky. 1997), is dispositive of the issues before us. In *Estreicher*, our Supreme Court granted discretionary review “to consider, in light of prior case law, the tensions between KRS 160.390 which grants school superintendents broad power over personnel decisions and KRS 161.765, which provides heightened procedural protections for school administrators.” *Id.* at 840. The latter statute, entitled “Procedures for demotion of administrative personnel; appeal,” requires written notice of demotion which becomes final if not contested by the employee. If contested, there are additional procedural requirements.

In *Estreicher*, the Appellant, a school administrator, received a letter from the superintendent on April 26, 1994, notifying him of his impending demotion to a teaching position. On May 2, the superintendent notified the board of education of the action. On May 4, Appellant provided written notice of his intent to contest his demotion under KRS 161.765(2)(a). On May 9, the

superintendent replied and set forth -- by reference to previous correspondence -- specific reasons for Appellant's demotion and advising that Appellant had ten days to answer the charges and request a hearing. By letter of May 17, a hearing was scheduled for June 2 and was continued to June 27 at Appellant's request.

At the hearing, the Appellant moved to have the case dismissed. The board denied the motion and officially demoted Appellant. The circuit court upheld the demotion, as did this Court. On appeal, Appellant argued that "demotion of an administrator does not become final until the full procedural protections of KRS 161.765 have been observed. . . . [and that] in order to effect a demotion accompanied by a reduction in salary, a school board must pass on the decision prior to May 15 [in accordance with KRS 161.760(3)]." *Id.* at 841. KRS 161.760 (3) provides as follows.

Reduction of responsibility for a teacher may be accompanied by a corresponding reduction in salary provided that written notification stating the specific reason for the reduction shall be furnished to the teacher not later than ninety (90) days before the first student attendance day of the school year or May 15, whichever occurs earlier.

Our Supreme Court disagreed with *Estreicher's* reasoning. Noting the sweeping changes that KERA (the Kentucky Education Reform Act) brought to the Commonwealth's educational system in 1990, the Court explained that:

KRS 160.390 . . . now sets forth the duties and responsibilities of a superintendent: "[A superintendent] shall be responsible for all personnel actions including hiring, assignments, transfer, dismissal, suspension, reinstatement, promotion, and demotion and reporting the

actions to the local board.” KRS 160.390(1). . . .
KERA's broad grant of power to superintendents under
KRS 160.390 effectively supersedes the cases relied
upon by Appellant

. . . .

The fact that an administrator might contest the demotion, and thus the action might not become “final” for some time is of no consequence. KRS 161.760(2) does not require finality to effect a reduction in salary. Indeed, by its very terms, **KRS 160.390(2) makes the superintendent's personnel action effective upon receipt of written notice by the affected employee.** Because Appellant received notice of the demotion on April 26, 1994, followed by a specific statement of reasons for the demotion on May 9, the requirements of KRS 161.760(3) have been met.

Id. at 841–42 (emphasis added).

In the case before us, Superintendent Anderson’s personnel action became effective under KRS 160.390(2) when Robinson received written notice of termination by the letter dated November 16, 2011. Even if the Board’s policy manual had required that the Superintendent provide (additional) written notice of termination after the hearing, Robinson suffered no prejudice as the result of any technical failure to comply. *See Estreicher* at 843. Without question, Robinson knew that her employment had been terminated as reflected in her deposition testimony. Indeed, she filed for unemployment benefits after she was discharged.

We affirm the Summary Judgment and Order of the Grayson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry Bernard O'Donnell
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael A. Owsley
W. Cravens Priest III
Bowling Green, Kentucky