[Cite as *Warnsley v. Toledo Bd. of Edn.*, 2011-Ohio-3134.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Johnnye Warnsley — Court of Appeals No. L-10-1219

Appellant — Trial Court No. CI0200607540

v.

The Toledo Board of Education, et al.

Defendant — **DECISION AND JUDGMENT**

[Toledo Federation of Teachers-Appellee] — Decided: May 27, 2011

* * * * *

Dennis D. Grant and Nancy J. Manougian, for appellant.

Richard M. Kerger and Kimberly A. Conklin, for appellee.

* * * * *

SINGER, J.

{¶1} Appellant appeals a summary judgment issued to her labor union by the Lucas County Court of Common Pleas in a discrimination suit. For the reasons that follow, we affirm.

{¶2} Jesup W. Scott High School is an inner-city Toledo school with a predominately African-American student population. Scott, with an enrollment in excess of 1,500, is a part of Toledo Public Schools. Toledo teachers are represented for collective bargaining purposes by appellee, Toledo Federation of Teachers. Appellant is Johnnye Warnsley, a veteran Scott teacher and a member of appellee.

{¶3} Appellee is represented in Toledo high schools by a seven member "Building Committee," annually elected by the teachers in each respective school. The Building Committee is chaired by a "Building Representative" who is also elected by the teachers. Both act as liaison between teachers and the school administration.

{¶4} During the 2002-2003 school year, appellant and then Building Representative Carol Craven were co-coordinators of a "High Schools That Work" grant to raise student achievement in specific areas. During the same time, Craven, Scott's principal and three other Scott teachers attended a presentation announcing the availability of a significant grant from KnowledgeWorks Foundation, a part of the Bill and Melinda Gates Foundation, to implement a more sweeping reform.

{¶5} Under "Small Schools within a School," a large high school would be divided into as many as four smaller entities, each autonomous, each concentrating on a specific area of interest and each with its own leadership. Decision making in the small schools was to be democratic, through a collaborative process involving teachers and "often parents and students." Measurable progress benchmarks demonstrating student

achievement were required. The curriculum and structure of each school was to be teacher driven, subject only to a few "non-negotiable" attributes dictated by the grant source.

{¶6} Scott's principal and the teachers who attended the Small Schools within a School presentation returned convinced that the program would be beneficial to Scott's students. Craven and several others, including appellant, wrote a grant proposal that was submitted in April 2003. This proposal was not funded, but Scott reapplied in August 2003.

{¶7} Scott's August proposal was not immediately funded, but a foundation representative told Craven that it would eventually be approved. In the interim, the foundation awarded Scott approximately $30,000 to continue planning for the school's redesign. A KnowledgeWorks coach assigned to the school advised the working group that there should be four design teams, one for each of the small schools.

Temporary Design Coordinators

{¶8} According to Carol Craven, the Building Committee met to choose unpaid temporary coordinators for each of the schools. The committee chose Craven, a social studies teacher who by now had relinquished her position as co-coordinator of the High Schools that Work program, Sheilah Grogan, an art teacher, Gracy Lloyd, a Spanish teacher and Treva Jeffries, chair of the science department (Two Caucasians, an African-American and an Hispanic). All of those selected had worked on the grant team.

{¶9} Following the announcement of the selection of the interim design coordinators, appellant filed an internal harassment complaint with the school system, alleging that Craven and school administrator Stan Woody (who approved the selections) had discriminated against her on the basis of her race and/or sex when they did not select her for one of the temporary positions. Following a hearing, the school system found no discrimination.

January 2004, Teacher Leader Selection

{¶10} The small school proposal provided for each of the four small schools to have two "leaders," one drawn from the ranks of teachers, the second an administrator. Because of funding limitations, however, the school system opted to create only half of these positions at the outset of 2004.

{¶11} In December 2003, a position opening for two Scott small school teacher leaders was posted to teachers in the building. The posting listed job qualifications, including five years successful teaching experience at Scott. The posting requested interested parties to send a letter of application to Building Committee member John Kuschell and to distribute a confidential peer rating form to Building Committee and academic department members. The peer rating forms were to be returned to appellee's office for tabulation. Appellee's office then provided a results summary to the interview panel. Five teachers applied: appellant, Craven, Grogan, Lloyd and Robert Bailey. Bailey later withdrew.

{¶12} The interview committee consisted of nine persons: four department chairs, four Building Committee members, and one person who was both a Building Committee member and a department chair, all positions elected by Scott teachers. Its racial composition was five Caucasians and four African Americans. Prior to the interview, the interview committee met and developed a series of 15 questions that each candidate would be asked. The candidates were interviewed in order of seniority.

{¶13} According to John Kuschell, at the conclusion of the interviews, he surveyed the members of the panel for their first choice for teacher-leader. Carol Craven (Caucasian) was the near unanimous first choice of the members and was chosen by consensus. When polled for a second choice, the members split between Grogan and Lloyd, but, after some discussion, settled on Lloyd (Hispanic). The committee's selections were announced in January 2004, and forwarded to the school district.

{¶14} On May 18, 2004, appellant filed a discrimination charge with the Ohio Civil Rights Commission ("OCRC"), alleging that appellee had breached its duty of fair representation on the basis of her race. The record is not clear, but it appears this complaint was dismissed on procedural grounds.

June 2004, Teacher Leader Selection

{¶15} While the design committees and the initial teacher leaders were being chosen, appellee was negotiating with the school system and the organization representing school administrators for a contractual structure to govern small schools at

Scott and other Toledo high schools that were also adopting the small school model. On April 8, 2004, these three parties signed a memorandum of understanding, creating a job description for small school leaders and setting salary and work conditions for small school leaders system wide.

{¶16} The memorandum also modified the selection process for school leaders, providing that, effective in August 2004, only the three highest rated candidates from the peer review survey would be interviewed by a team comprised of the administrative small school leader, the Building Representative, four teachers, a parent, a community member and a student counsel appointee. The top two candidate's names were to be forwarded to a contractually defined School Improvement Committee for selection.

{¶17} In May 2004, John Kuschell, now Building Representative, again chaired the interview team. Kuschell posted notice for the remaining two teacher leader openings, using the same form as for the December 2003 posting with the exception of the changed qualifications contained in the April memorandum of understanding: "[f]ive years successful teaching experience [with] a minimum of three years in the Toledo Public Schools."

{¶18} Six applicants applied for the two positions. One withdrew before the interview. The interview team interviewed the remaining five; appellant, Robert Bailey, Ron Edwards, Sheilah Grogan and Brian Wagner. The interview team this time was composed of five department chairs or designees and four Building Committee members

– six Caucasians and three African-Americans. The interview team proceeded as before, developing a series of questions to be put to each candidate. According to Kuschell, at the conclusion of the interviews, he polled the interview team members and discovered a consensus for Sheilah Grogan and Robert Bailey.

{¶19} On announcement of these selections, appellant filed a grievance against Scott's principal and Carol Craven, alleging they failed to comply with the posted qualifications for a teacher leader and did not honor her system wide seniority. Appellant also alleged that the union failed to fairly represent her in the selection process and both the school system and the union did not follow the procedure stated in the April 2004 memorandum of understanding. Following correspondence on the issues, appellee concluded that the selection proceeding was in conformity with the memorandum of understanding.

Replacement Teacher Leaders

{¶20} Soon after the beginning of the 2004-2005 school year, Robert Bailey took temporary medical leave. The school system, with the approval of appellee's president, installed Robert Vail, a former consulting teacher, into Bailey's position. When Vail later resigned the temporary position, the school system, again in consultation with appellee's president, replaced him with a former administrator, Harriet Grier.

{¶21} On December 8, 2004, appellant filed a second complaint with the OCRC, alleging that, with respect to the appointment of Vail, appellee had discriminated against

her on the basis of race, gender and in retaliation for her prior complaint. On January 5, 2005, appellant filed an unfair labor practices complaint against appellee with the Ohio State Employment Relations Board with respect to the appointment of both Vail and Grier. The unfair labor practice charge was dismissed for want of probable cause and not appealed.

Permanent Replacement

{¶22} At the end of the 2004-2005 school year, the school system posted a vacancy for the teacher leader position that had been Bailey's. John Kuschell again chaired the interview committee. This time, in conformity with the 2004 memorandum of understanding, the interview team was composed of four teachers, a parent, a community member, a student, a department chair and an administrator: three Caucasians and six African-Americans. Applicants included appellant, Sara Strasbourg and Ron Edwards. The team interviewed all three. Following the interviews, the committee voted to forward the names of Strasburg and Edwards to appellee and the school system human resources office.

{¶23} Subsequent to this submission, the human resources office advised Kuschell that this process was invalid because a school compliance officer was not present. A second interview team was convened in August 2005. Again the team was composed of a team of four teachers, a parent, a community member, a student, a department chair and an administrator, although only three individuals carried over from

the first committee. The racial composition of the second committee was five Caucasians and four African-Americans. This time a compliance officer from the school system was present during the interviews. The result was the same as after the first interview for this position, a recommendation for Strasbourg and Edwards. The Toledo Board of Education eventually approved Strasbourg to fill the Bailey vacancy.

{¶24} On September 26, 2005, appellant filed complaints with the Ohio Civil Rights Commission and the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging that appellee has discriminated against her on the basis of race, gender and in retaliation for her earlier complaint concerning filling the vacant teacher-leader position at Scott.

{¶25} On October 3, 2006, the EEOC issued a notice of right to sue. On December 26, 2006, appellant instituted the suit that underlies this appeal. Appellant alleged that appellee and the Toledo Board of Education, engaged in racial discrimination and retaliation against her in the selection of small school teacher leaders at Scott High School. Appellant alleged that both defendants had violated R.C. 4112.02(A).

{¶26} After a lengthy period of discovery, on September 5, 2008, appellee moved for summary judgment, asserting, inter alia, that it was entitled to judgment as a matter of law because appellant had brought suit solely premised on the portion of R.C. 4112.02 that applies to employers. Appellee insisted that the portion of the antidiscrimination

statute that applies to labor organizations is R.C. 4112.02(C). Moreover, appellee argued, appellant's retaliation allegation failed for want of evidence.

{¶27} Appellant responded, insisting that R.C. 4112.02(A), the employer section, was a proper vehicle for her complaint because appellee had acted as an agent of the employer in the selection of the small school leaders. With respect to retaliation, appellant insisted that both Craven and Kuschell knew of her OCRC complaints prior to the June 2004, and that they "populated the January/June '04 selection committees *exclusively* with its Building Committee members and indebted department chairs." Direct evidence of this union conspiracy may be found, appellant maintains, in a question asked of all interviewees that began, "[a]lready this spring, a number of staff decisions are being *protested* by some teachers." (Emphasis appellant's.)

{¶28} On consideration, the trial court granted appellee's motion for summary judgment. The court concluded that because the employment and promotion of teachers statutorily rests solely with the board of education, see R.C. 3319.07 and 3319.11, appellee had no authority to hire a small school teacher leader. Absent some employment action by appellee, the court found, R.C. 4112.02(A) inapplicable. With respect to the retaliation claim, the court concluded that appellant had failed to show that appellee had taken any adverse employment action against her.

{¶29} From this judgment, appellant now brings this appeal. Appellant sets forth the following three assignments of error:

{¶30} "(1) The trial court erred when it ruled that a labor union, such as Defendant/Appellee Toledo Federation of Teachers ("TFT"), cannot be liable as a matter of law under R.C. §4112.02(A) and, thus, granted TFT summary judgment on Plaintiff/Appellant Johnnye Warnsley's ("Warnsley") race discrimination claim against TFT under that section.

{¶31} "(2) The trial court erred when it ruled that a labor union, such as TFT, can be liable as a matter of law only under R.C. §4112.02(C) and, thus, granted TFT summary judgment on Warnsley's race discrimination claim against TFT.

{¶32} "(3) The trial court erred when it ruled that Warnsley had not established a prima facie case of retaliation for engaging in protected activities and, thus, granted TFT summary judgment on Warnsley's retaliation claim against TFT under R.C. §4112.02(I)."

{¶33} Appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶34} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶35} A party seeking summary judgment must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶36} We shall discuss appellant's first two assignments of error together. R.C. 4112.02 provides, in material part:

{¶37} "It shall be an unlawful discriminatory practice:

{¶38} "(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

{¶39} "* * *

{¶40} "(C) For any labor organization to do any of the following:

{¶41} "(1) Limit or classify its membership on the basis of race, color, religion, sex, military status, national origin, disability, age, or ancestry;

{¶42} "(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, military status, national origin, disability, age, or ancestry."

{¶43} An "employer" is statutorily defined as including, "* * * the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer." R.C. 4112.01(A)(2). A "person" for purposes of R.C. Chapter 4112 is broadly defined, including "* * * one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. 'Person' also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesperson, appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state." R.C. 4112.01(A)(1). For this reason, it has been held that a supervisor or a manager may be held jointly and severally liable with his or her employer for the supervisor/manager's discriminatory conduct. *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 300.

{¶44} Appellant's theory of this case is that appellee labor organization, through its Building Committee and Building Representative, acted as the agent of the school board when it excluded her from the pool of applicants for the small school teacher leader position. Because, prior to the memorandum of understanding, appellee solely defined the procedure by which a teacher leader was chosen and, even after the memorandum of understanding, controlled the composition and selection of the members of the interview team, appellant insists that appellee influenced the "terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Given the expansive breadth of the definition of an "employer," appellant argues, her cause of action properly falls under R.C. 4112.02(A). Thus, appellant insists, the trial court erred when it concluded that a suit against a labor organization could not be brought under R.C. 4112.02(A) and may only be brought under R.C. 4112.02(C).

{¶45} Appellant misstates the scope of the trial court's ruling. The threshold question for the trial court was, "* * * whether, based upon the facts presented, a labor union can be held liable under R.C. 4112.02(A) as an agent of a board of education." The answer to this question is not the blanket inapplicability of R.C. 4112.02(A) to labor organizations that appellant purports. Indeed, even the trial court noted in a footnote that a labor union would be governed by this section if the claim is brought by the union's own employee.

{¶46} Moreover, supervisor/manager liability under R.C. Chapter 4112 is not based on agency. The supervisor is liable because he or she meets the statutory definition of an employer. *Edwards v. Ohio Inst. Of Cardiac Care*, 170 Ohio App.3d 619, 2007-Ohio-1333, ¶ 71. A co-worker who engages in discriminatory conduct is not similarly individually liable because he or she is not within the definition of an employer. Id.

{¶47} Appellee is not appellant's employer, neither is it her supervisor or manager. Appellee is the duly recognized organization representing teachers in the Toledo Public Schools. As such, appellee has an interest independent from the school board in ensuring that its members are met with fairness in process. It would also seem that appellee has an independent duty to ensure the selection of competent leadership from its ranks when that is at issue. Appellant has set forth no evidence suggesting that appellee operated with any other purpose. If appellant has deviated from its responsibility, recourse is available through R.C. 4112.02(C). Since she elected to forego that claim, the trial court did not err in granting appellee summary judgment on her R.C. 4112.02(A) claim. Appellant's first and second assignments of error are not well-taken.

Retaliation Claim

{¶48} In her third assignment of error, appellant asserts that the trial court erred in concluding that she had failed to present a prima facie case of retaliation against appellee.

{¶49} It is a discriminatory practice, "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful

discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." R.C. 4112.02(I).

{¶50} "To establish a retaliation claim, a plaintiff must demonstrate: (1) that she engaged in a protected activity; (2) that the defendant knew that she had engaged in a protected activity; (3) that the defendant took an adverse employment action against her; and (4) that there is a causal link between the protected activity and the adverse employment action." (Citations omitted.) *Coch v. Gem Industrial, Inc.*, 6th Dist. No. L-04-1357, 2005-Ohio-3045, ¶ 27.

{¶51} Appellee conceded that appellant engaged in a protected activity when she filed the OCRC complaint after the January 2004 selection of the first two teacher leaders. Nonetheless, appellee denied that it took any adverse employment action against appellant, that union members on the interview team knew of appellant's complaint or that appellant had shown any causal link between her complaint and her denial of the teacher leader position.

{¶52} The trial court concluded that because the responsibility for employing teachers statutorily rests solely with the school board, appellee is without any authority to hire a teacher leader. It was, therefore, the board of education alone that made this hiring decision. As a result, appellant could make no showing that appellee took an adverse

employment action against her. The interview team simply had no authority to take such an action.

{¶53} Appellant asserts that the trial court ignored that the committee had filtered her candidacy out prior to submission of the interview team's recommendation to the school board. This, appellant insists, is an equivalent to an adverse employment action sufficient to raise a question of material fact so as to avoid summary judgment.

{¶54} If appellant's argument in this regard was the sole deficiency in appellant's case, we would be inclined to agree with her. Our role in reviewing a summary judgment, however, is to view the evidence submitted de novo. In doing so we must examine those arguments that the trial court did not address.

{¶55} Appellant must not only demonstrate a question of fact as to whether there was an adverse employment action, she must also show that appellee knew of her protected activity and demonstrate a causal link between that knowledge and the action. Appellee's central office must have known of the protected activity since it was a complaint directed at the union. At Scott, however, the evidence shows that only Carol Craven and John Kuschell had direct knowledge of appellant's complaint.

{¶56} The interview teams consisted of nine members. To establish a retaliatory causal link between appellant's complaint and the action of the interview team, appellant, at a minimum, must establish that the interview team also had knowledge of the complaint. Kuschell was a member of the interview team, but denies ever informing the

rest of its members. Appellant has no testimony from any other member of the team who purports to have been informed of the prior complaint. She offers only innuendo that one of the questions referencing "staff decisions being protested by some teachers" put other members of the interview committee on notice of her protected activity, if they were "otherwise unaware."

{¶57} In his deposition testimony, Kuschell explained that the question referenced teacher protests at another Toledo high school, but this testimony was unnecessary. The question preface was simply too ambiguous to support appellant's conclusion that Kuschell's knowledge of her protected activity can be imputed to the full interview team which actually made the hiring recommendation. Absent that knowledge, appellant can present no evidentiary basis for her assertion of a link between her protected activity and an adverse employment action. Accordingly, the trial court properly awarded summary judgment to appellee on the retaliation issue and appellant's third assignment of error is not well-taken.

{¶58} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE