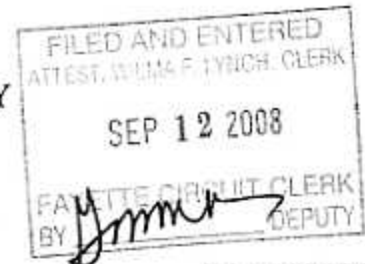


COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
THIRD DIVISION
CASE NO. 08-CI-608



PEGGY PETRILLI

PLAINTIFF

VS.

**PLAINTIFF'S RESPONSE TO MOTION
FOR SUMMARY JUDGMENT ON BEHALF OF
CARMEN COLEMAN AND MOTION FOR SUMMARY
JUDGMENT REGARDING ALL DEFAMATION CLAIMS**

STU SILBERMAN, in his Individual Capacity, and in
his Official Capacity as the Superintendent of the Fayette
County Public Schools and/or Fayette County Board of Education;
CARMEN COLEMAN, in her Individual Capacity, and in her Official
Capacity as the Director of the Fayette County Public Schools and/or
Fayette County Board of Education; BRENDA ALLEN, in her Individual
Capacity, and in her Official Capacity as General Counsel for the
Fayette County Board of Education, and THE FAYETTE COUNTY
BOARD OF EDUCATION, FAYETTE COUNTY, KENTUCKY

DEFENDANTS

*** **

Comes the Plaintiff, Peggy Petrilli, by counsel, and for her Response, hereby
states as follows:

Discovery is far from over in this case. The deposition of Carmen Coleman has
not been completed nor has the deposition of the Plaintiff, Peggy Petrilli, been
completed. In addition, Stu Silberman's deposition has not been taken.

A summary judgment is a final order and, therefore, should
not be entered "as a form of penalty for failure of the Plaintiff
to prove his case quickly enough." Conley v. Hall, 395 S.W.
2d 575, 580 (Ky. 1965). It is proper only after the party
opposing the motion has been given ample opportunity to
complete discovery and then fails to offer controverting
evidence. Pendleton Bros. Vending, Inc. v. Com. Finance &
Administration Cabinet, 758 S.W. 2d 24, 29 (Ky. 1988)(citing
Hartford Insurance Group v. Citizens Fidelity Bank & Trust
Co., 579 S.W. 2d 628 (Ky. 1979)).¹ (emphasis added)

¹ Suter v. Mazyck, 226 S.W. 3d 837, 841 (Ky. App. 2007).

[Handwritten initials]

Although the Defendants list “pertinent facts relating to Carmen Coleman”, none of the fifteen paragraphs are supported by any reference to a sworn Affidavit or sworn testimony in a deposition. The Plaintiff is not willing to stipulate the proffered facts of the Defendants. CR 56.03 states that a summary judgment can be rendered if the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with Affidavits show that there is no genuine issue as to any material fact. The “pertinent facts relating to Carmen Coleman” contained within Defendants’ brief do not satisfy any of the elements of CR 56.03 set forth above.

In addition, the Defendants rely on the testimony of Peggy Petrilli. However, the proffered testimony of Peggy Petrilli is not supported by a single reference to her sworn deposition as is required by CR 56.03. Again, the Plaintiff does not stipulate to the proffered facts set forth by the Defendant.

1. Constructive Discharge is a Fact Issue to be Decided by a Jury

The Defendants incorrectly assert that if an employer can coerce an employee to resign, that the act is voluntary and thereby precludes an action for constructive discharge. However, such is not the case. Case law clearly holds that the element of voluntariness is vitiated when one of the following is present:

- (1) An employee resigns under duress;
- (2) An employee unsuccessfully tries to withdraw his resignation before its effective date;
- (3) An employee submits a resignation under time pressure;
- (4) An employee fails to understand the situation due to mental incompetence;

- (5) The resignation may be held involuntary if obtained by agency misrepresentation or deception.²

In addition, “[a] resignation will be involuntary and coerced when the totality of the circumstances indicate the employee did not have the opportunity to make a free choice.”³

2. Standard for Constructive Discharge in Race Discrimination Cases

The correct analysis for a discharge in employment based on race discrimination can be found in the Fuelling case.⁴ Ms. Petrilli’s claim is not for a hostile work environment created by racial discrimination; rather, it is for being discharged from her employment based on racial discrimination. KRS 344.040 prohibits both categories of conduct. In Fuelling, the Court set forth the prima facie elements for establishing the prima facie case for termination of employment based on racial discrimination.

Accordingly, a Plaintiff claiming race-based discrimination supported only by circumstantial evidence must demonstrate that “(1) she is a member of a protected class, (2) she was subjected to an adverse employment action, (3) she was qualified, and (4) she was treated differently than similarly-situated male and/or non-minority employees for the same or similar conduct.” *Id.* A Plaintiff alleging discriminatory termination of employment must show under the fourth *McDonnell Douglas* prong that he or she was replaced by a person outside of the protected class. Logan v. Demi’s, Inc., 259 F. 3d 558, 567 (6th Cir. 2001).⁵

Fuelling goes on to state that whites are also a protected group under the law. Therefore, Petrilli has satisfied prong one of the prima facie elements that she must prove. Petrilli has alleged that she was constructively discharged from her employment

² Scharf v. Dept. of Air Force, 710 F.2d 1572, 1574-75 (U.S. Ct.App. Fed.Cir. 1983).

³ Parker v. Board of Regents of Tulsa Junior College, 981 F.2d 1159, 1162 (10th Cir. 1992).

⁴ Fuelling v. New Vision Med. Labs., LLC, 2008 U.S. App. LEXIS 13915; 2008 FED App. 0384 N (6th Cir.) See copy of opinion attached hereto as **Exhibit 1**. Because Kentucky’s KRS 344.040 is specifically modeled after federal law, Kentucky follows federal law in interpreting the statute. See Harker v. Federal Land Bank, 679 S.W.2d 226, 229 (Ky. 1984).

⁵ Fuelling v. New Vision Med. Labs, LLC, pages 13-14.

and constructive discharge is an issue of fact for the jury. Prong three of the prima facie elements requires that Petrilli show that she was qualified, something that will not be disputed in this case. Additionally, prong four requires that Petrilli show that she was replaced by a person outside of her protected class. It is undisputed that Petrilli was replaced by an African-American principal.

Therefore, to establish a prima facie case to allow this matter to move forward, Petrilli has already satisfied three of the four prima facie elements for a claim of discharge based on racial discrimination. The only prima facie element that Petrilli must prove is the fact that she was constructively discharged. As stated above, constructive discharge is a factual question for the jury. Certainly, it is not impossible for Petrilli to produce evidence in support of the fact that she was constructively discharged.

ARGUMENT

The Defendants' argument in support of any and all claims against Carmen Coleman contains facts that are not accompanied by references to sworn testimony or Affidavits. The Plaintiff does not stipulate to the factual statements asserted by the Defendants and does not agree that the paraphrasing set forth in the Defendants' brief is identical to the sworn testimony.

There are several facts that have been developed through the depositions that have been taken thus far to support the allegations against Defendant Carmen Coleman and others. It is clear that Jessica Berry and Alva Clark are mothers of children that attended Booker T. Washington. Jessica Berry's child suffered from separation anxiety, thereby prompting Ms. Berry to spend an enormous amount of her time at the school despite the fact that she was not a teacher or staff member. Likewise, Alva Clark spent

an extraordinary amount of time at the school due to the fact that her child is a special needs child, despite the fact that Ms. Clark is not a teacher or staff member. Ms. Berry and Ms. Clark wielded an enormous amount of power at Booker T. Washington by coming and going when they chose to, by entering the classroom in which their child was attending class, by eating lunch at the school, and by hanging out in the front office if they chose to do so. The interim principal, Jock Gum, whom Stu Silberman selected to fill in for Petrilli until a permanent replacement could be found, has already testified that he complained about Ms. Berry and Ms. Clark to Stu Silberman. Jock Gum testified that the two ladies ran the school and felt like they were in charge. His complaints to Stu Silberman about the situation were fruitless.

It turns out that Ms. Berry is the individual who organized the secret meeting that took place on August 22, 2007. Ms. Berry organized other secret meetings and even created flyers to be distributed to parents to attend the secret meeting. Again, Jock Gum testified under oath that he did not like Ms. Berry. Ms. Clark worked hand-in-hand with Ms. Berry in attempting to run the school. Each served on the site-based council and each thwarted any effort to have any site-based council policies implemented. By doing so, each manufactured a reason or justification for getting rid of Petrilli, blaming Petrilli for the lack of site-based council policies. Even under Jock Gum, only one site-based council policy was enacted. One of the reasons that Alva Clark and her husband, Buddy Clark, did not like Petrilli is because Petrilli reported that their child was living out of the school district. After Petrilli fulfilled her obligations to report that the child was out of district, the Clarks decided that they would get Petrilli fired by rallying the black community against her.

Because Buddy and Alva Clark wielded so much power, they were shocked that anyone would dare request that they comply with the school's policy regarding out-of-area children obtaining a waiver. In fact, Mr. Clark has admitted that Petrilli asked him to sign the out-of-area waiver, saying that it should be no problem for his child to attend Booker T. Washington. However, Mr. Clark became furious, and declined to ever sign such a waiver. Thereafter, unbeknownst to Petrilli, Buddy and Alva Clark brokered a secret contract with Stu Silberman. The secret contract is persuasive evidence of the fear that Stu Silberman had that the Clarks would arouse the black community against him. Attached as **Exhibit 2** is the June 22, 2007, correspondence from Buddy and Alva Clark to Stu Silberman outlining the contents of the secret contract. As the Court can see, Stu Silberman agreed that the Clarks' child could "attend the elementary, middle, and high school of [their] choosing." The Clarks even outlined the "current privileges" that Alva Clark enjoyed at the school. The contract guaranteed that Ms. Clark would continue to have "complete access to the school, veto power over [child's name] special needs teacher, and his personal assistant." The Clarks also demanded that their child's schools for the remainder of their child's tenure in the Fayette County Public School System would have state-of-the-art equipment. The Clarks also let Mr. Silberman know that they "will be invited to participate in all FCPS activities, committees, boards, etc..." In exchange for Stu Silberman giving into the many demands of the Clarks, the Clarks agreed that they would forego any lawsuits against the Fayette County Public Schools. Attached hereto as **Exhibit 3** is the June 25, 2007, response of Stu Silberman acknowledging that he had received the "draft agreement" that the Clarks had sent. Stu Silberman further stated in his correspondence, "[t]hank you for taking the time to put this together." At no time did Stu Silberman ever inform Petrilli that he was entering

into a secret contract with the Clarks and guaranteeing that Ms. Clark would continue to have “complete access to the school, veto power over [their child’s] special needs teacher, and his personal assistant.”

The next month, on July 26, 2007, Buddy Clark forwarded an e-mail to Jessica Berry and Alva Clark stating:

We need a list of everything that has happened over the past year which negatively affected black [parents], students, teachers, or the community. Include everything no matter how inconsequential it appears. Failure to develop [sic] black talent will have a future negative effect.

We need a list of parents who have been eliminated from BTWA and the reasons they were eliminated.

Buddy⁶

As this Court is aware, less than a month later, on August 22, 2007, the secret meeting was held whereby 25-30 parents showed up at Central Office to meet with Stu Silberman and Carmen Coleman. This was a secret meeting that was unbeknownst to Petrilli. Buddy Clark testified that the individuals who were present at the meeting remained anonymous. In fact, he stated that the anonymity was a condition of the meeting. At the meeting, parents became very emotional. Jessica Berry testified that she is the individual who requested the meeting with Stu Silberman. The two-and-a-half pages of parent complaints that were Exhibit 1 to the investigative report issued by Brenda Allen were handed out to all of the participants at the meeting. The list of complaints was typed out by Jessica Berry prior to the meeting. Jessica Berry and the Clarks tried to create the impression that the complaints that were drafted prior to the meeting represented the complaints of the parents that they were able to piece together

⁶ See **Exhibit 4** attached hereto.

pursuant to Buddy Clark's directives in his e-mail. Jessica Berry testified that she distributed the list of complaints to all of the people present at the meeting. Therefore, Stu Silberman knew that the list of complaints was manufactured prior to the date of the meeting. In spite of this knowledge, Stu Silberman used the complaints to force Petrilli to resign from her position as principal of Booker T. Washington.

Stu Silberman was keenly aware of the fact that he was being subjected to a power play by Jessica Berry and the Clarks. Ms. Berry and the Clarks demonstrated that they could fill a room full of angry African-American parents that were willing to be very vocal about their dislike of Petrilli. Threats of picketing Booker T. Washington and going to the media were circulating. Fearful that his political future could be jeopardized by Jessica Berry and the Clarks ability to galvanize the black community, Stu Silberman folded to the pressure rather than doing the right thing.

CONCLUSION

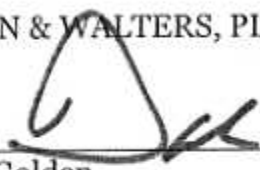
The Motion for Summary Judgment filed on behalf of Carmen Coleman does not even acknowledge that KRS 344.010(1) contains a waiver of sovereign immunity for the state and any of its political or civil subdivisions or agencies. Likewise, the Kentucky Whistleblower Act contained in KRS 61.102 is an express waiver of sovereign immunity. The summary judgment motions do not address these causes of action, nor did they even address the prima facie elements needed to prove these causes of action. The motions contain numerous factual assertions that are not supported by any citation to the depositions and are not supported by any reference to applicable case law.

The allegations regarding defamation have already been briefed before this Court. The Court has allowed discovery to take place and that discovery is ongoing. The Defendants should not be allowed to short circuit discovery by filing a premature

motion for summary judgment at this time regarding the defamation issues. Therefore, the Court is respectfully requested to overrule the Motions for Summary Judgment by the Defendants.

Respectfully submitted,

GOLDEN & WALTERS, PLLC



J. Dale Golden
Melissa M. Thompson
Corporate Plaza
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served on this the 11 day of September, 2008, by mailing and faxing a true and accurate copy to the following:

Hon. John G. McNeill
Landrum & Shouse, LLP
Post Office Box 951
Lexington, Kentucky 40588-0951
Counsel for Defendants



COUNSEL FOR PLAINTIFF

William and Alva Clark

June 22, 2007

Stu Silberman
Superintendent, Fayette County Public Schools
701 E Main St
Lexington, KY 40502

Re: Draft Agreement between Stu Silberman, Alva Clark, and William (Buddy) Clark resulting from meeting held June 20, 2007 in the Office of the Superintendent, FCPS

Dear Dr Silberman

Thanks for a productive and candid meeting. Please express our appreciation to Ms. Kennedy, she was very helpful. We trust you will find the following points accurately reflect our discussion:

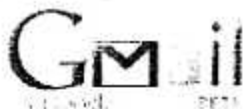
1. The June 7, 2007 letter from Gary Wiseman is retracted.
2. Residency requirements will not apply to Julian for the remainder of his tenure in the Fayette County Public Schools. Julian can attend the elementary, middle, and high school of our choosing. As I told you, we have a middle school in mind because of a specific teacher but no decision as to high school. We would only leave BTWA if Julian's continued presence becomes untenable.
3. There will be no diminution of our current privileges with regard to Julian's schooling. Thus far Alva has had complete access to the school, veto power over Julian's special needs teacher, and his personal assistant.
4. Julian's current IEP will be fully implemented. Future Arc's will be attended by a central office special needs staff person.
5. Julian's schools for the remainder of his tenure in the FCPS will be state of the art (equipment and training of personnel) with regard to special needs. Julian will not be assigned to a windowless closet at BTWA as was the case in the 2006-2007 school year.
6. We will be invited to participate in all FCPS activities, committees, boards, etc which relate to the education of special needs children
7. The Office of the Superintendent shall be responsible for implementation and administration of this agreement.
8. In consideration of this agreement, we will forego any cause of action against FCPS or any of its employees because of this incident.

We await your response. We will be out of town the week of June 25, you may contact us via email and or cell phones.

Sincerely

William & Alva Clark





FW: Response to Draft Agreement

2 messages

Silberman, Stu (FCPS) <stu.silberman@fayette.kyschools.us>

Mon, Jun 25, 2007 at 2:46 PM

William and Alva,

I received the draft agreement you sent on Friday. Thank you for taking the time to put this together. Below is my response to each of the items:

1. Not a problem to retract the letter.
2. Although I do not have the legal authority to formally waive residency requirements for any student, I do have the authority to grant out of area requests and I am committed to working with you to get the placements you want for Julian.
3. Not a problem in that there will be no diminution of current privileges.
4. Not a problem to fully implement the IEP. District office personnel will attend ARC meetings as per your request.
5. We will provide the best possible facilities and personnel for Julian.
6. Not a problem in that there will be no diminution of participation in FCPS activities. We welcome your participation and help.
7. The superintendent's office will be responsible and respond to any problems with the administration of this agreement.

Thank you for working this out and I wish you all a great summer and upcoming school year.

Stu

"It's About Kids"

~ ~
O O
)
V

William Clark

Tue, Jul 1, 2008 at 3:40 PM

[Quoted text hidden]



9/9/2008 10:50 AM