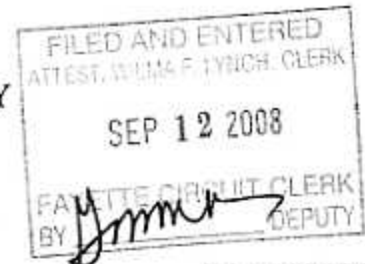


COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
THIRD DIVISION
CASE NO. 08-CI-608



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.

