

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000528-MR

MARYETTA CHARISSE KEELING

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 97-CI-004233

JEFFERSON COUNTY BOARD OF EDUCATION,
SAM CORBETT, CAROL ANN HADDAD, ANN V. ELMORE,
JOSPEH L. HARDESTY, JOYCE MCCLAIN, BEVERLY MOORE,
DOTTIE PRIDDY, STEPHEN W. DAESCHNER, MARTIN L.
BELL, CAROLYN MEREDITH, WILLIAMS PERKINS, LARRY
FOLEY, SHARON EARNST, AND JEFFERSON COUNTY TEACHERS
ASSOCIATION, STEPHEN B. NEAL, AND DIANE PRICE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KNOPF AND TACKETT, JUDGES.

TACKETT, JUDGE: Maryetta Charisse Keeling appeals *pro se* from an opinion and order of the Jefferson Circuit Court, rendered February 8, 2002, granting summary judgment in favor of the appellees. We affirm.

Keeling was employed by the Jefferson County Board of Education (JCBE) as a teacher. Entering the 1990-91 school year, Keeling was a tenured teacher with approximately eighteen (18) years experience. During this time period, Keeling was also a member of the Jefferson County Teachers Association (JCTA), an unincorporated association that collectively bargains with JCBE on behalf of its members.

In August 1990, Keeling transferred to Jeffersontown Elementary School where she was supervised by Principal Larry Foley (Foley). In the fall of 1991, Foley reprimanded Keeling after receiving a complaint that Keeling scratched an unnamed student. In November 1991, Foley again reprimanded Keeling after receiving complaints that Keeling physically punished students. After receiving these reprimands, Keeling contacted JCTA. A JCTA representative told Keeling that JCTA received numerous complaints concerning Foley each year and told her to do nothing unless Foley took additional action against her.

On January 10, 1992, Foley met with Keeling and gave her an unfavorable written evaluation concerning a lesson Keeling presented to her students the previous day. Also during this meeting, Foley tendered a Notice of Significant Deficiency to Keeling concerning her teaching performance. The notice indicated that Keeling's failure to comply with its provisions could result in the termination of her employment with JCBE.

Keeling believed Foley's actions were unfair, undeserved and contained numerous misrepresentations concerning her teaching performance. At about the same time Keeling also received a written reprimand for her failure to desist from grabbing, scratching, hitting and otherwise corporally punishing students.¹ After receiving these personnel actions from Foley, Keeling contacted JCTA. By July 1992, JCTA filed three grievances against Foley on Keeling's behalf. These grievances alleged that Foley, through his personnel actions against Keeling, violated the 1992 collective bargaining agreement between JCBE and JCTA by engaging in improper, arbitrary or discriminatory conduct. These grievances were reviewed and rejected by Carolyn Meredith (Meredith), JCBE's Director of Employee Relations.

In July 1992, Stephen B. Neal (Neal), JCTA's Executive Director, learned that JCBE intended to terminate Keeling's teaching contract pursuant to Kentucky Revised Statute (KRS) 161.790. Neal immediately met with Keeling concerning her options.² During this meeting, Neal told Keeling that she could

¹ The record also contains allegations that, during the 1991-92 school year, Keeling was observed leaving students unattended numerous times, pushed a student into a wall and was the subject of numerous complaints from other JCBE employees concerning her "bizarre behavior." The record also contains numerous requests from parents indicating their desire to have their children removed from Keeling's classroom.

² Keeling claims that she received a notice of written termination from JCBE, threw it away and contacted Neal. Regardless which party, Neal or Keeling, initiated the contact,

either request arbitration pursuant to the collective bargaining agreement or invoke her right to a hearing under KRS 161.790. Neal advised Keeling that the arbitration process could take several months, but KRS 161.790 required a hearing within forty-five (45) days of her written request. Keeling, however, informed Neal that she could not financially pursue either option. Keeling then insisted that JCTA arrange some alternate arrangement with JCBE so that she could keep her employment due to her financial situation. To accommodate Keeling's request, Neal arranged a meeting with Meredith to discuss an alternative arrangement.

The meeting between Keeling, Neal and Meredith commenced on July 29, 1992. During this meeting, Meredith offered Keeling a compromise. Rather than filing formal charges to terminate Keeling's employment pursuant to KRS 161.790, JCBE offered to conditionally re-employ Keeling for the 1992-93 school year if she agreed to four conditions. First, Keeling must agree to be evaluated by a neutral principal during the first nine weeks of the 1992-93 school year. The principal would then report the outcome of the evaluation to JCBE. Second, Keeling must immediately submit a letter of resignation, which would become effective December 18, 1992, if the principal

the parties do not dispute that they met to discuss Keeling's termination notice and her options.

submitted a negative performance evaluation. However, if Keeling's job performance was sufficient, Keeling's resignation would be rescinded. Foley's complaints against Keeling would remain in Keeling's personnel file. Third, Keeling must agree to drop all pending grievances against Foley and JCBE. Finally, Keeling must agree not to call upon JCTA concerning any grievances that might arise out of the settlement agreement.

Keeling bitterly complained about the terms of this settlement offer. She asked Meredith why all of the grievances against Foley had to be included in this settlement. Keeling also questioned waiving any future action by JCTA. In response, Meredith informed Keeling that those were the terms of JCBE's settlement offer and advised her that she was free to reject this offer and invoke one of her other options. Keeling, however, maintained that she did not wish to participate in arbitration or a tribunal hearing. Keeling acknowledged as well that Neal fully informed her of all possible options and of the consequences of accepting JCBE's proposed settlement agreement. Further Keeling admits that Neal specifically and repeatedly told her that, by accepting JCBE's offer, Keeling was effectively resigning her teaching position. Despite her concerns about the terms of the settlement, and contrary to Neal's advice, Keeling accepted JCBE's offer and executed a document entitled "Grievance Resolution/Settlement." Keeling,

also in a handwritten letter to Meredith indicated that she understood the agreement and would submit her "letter of resignation effective December 18, 1992, should I receive an unsatisfactory evaluation by the new principal."

Pursuant to the terms of the agreement, JCBE re-employed Keeling for the 1992-93 educational year and transferred her to Rutherford Elementary School. During the first nine-week period, Principal William Perkins (Perkins) evaluated Keeling's performance and found it to be unsatisfactory. As a result of the evaluation and in light of their agreement, Keeling was reassigned to a non-instructional position and her resignation became effective on December 18, 1992. JCBE notified the Kentucky Educational Professional Standards Board (EPSB) of Keeling's resignation. Based upon numerous incidents occurring during Keeling's employment, the EPSB charged Keeling with incompetency, misconduct in office and willful neglect of duty.

In December 1994 and January 1995, the EPSB held an extensive hearing concerning its charges against Keeling. Following the hearing, an administrative law judge ("ALJ") rendered her decision which found that Keeling's behavior as a teacher constituted misconduct in office, incompetency and neglect of duty under KRS 161.120(1). On March 21, 1995, the EPSB accepted the ALJ's opinion and revoked Keeling's teaching

certificate for twenty (20) years. Keeling filed an untimely appeal with the Franklin Circuit Court that was eventually dismissed on April 15, 1996. A subsequent action against the EPSB, filed in 2000, was also dismissed.

On July 29, 1997, Keeling filed the current action with the Jefferson Circuit Court against the appellees. Keeling alleges that she was the object of a conspiracy to defraud her of her teaching contract, that these appellees forced her to sign the agreement with JCBE under duress, that JCTA wrongfully denied her representation, the appellees denied her due process, the settlement agreement with JCBE is illegal, that Neal and Diane Price³ breached a fiduciary duty to Keeling, and JCBE breached various contracts. In July 2000, Keeling filed a Second Amended Complaint and compiled a significant documentary record in an attempt to support her claims. After consideration of the entire record⁴, the pleadings, motions and extensive oral argument, the trial court granted summary judgment on all claims in favor of the several appellees. This appeal followed.

Keeling asserts that the trial court erred by granting summary judgment because there were numerous issues of dispute as to material facts. We disagree.

³ Price is a former president of JCTA.

⁴ The record submitted to this Court by the trial court contained twelve volumes with 2,616 pages, as well as one videotape containing oral arguments concerning the appellees's motions for summary judgment heard on October 26, 2001.

Summary judgment should 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 trial warranting a judgment in her favor and against the movant. Steelvest v. Scansteel Service Center Inc., Ky., 807 S.W.2d 476, 483 (1991). The standard of review of a summary judgment is "whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law." Moore v. Mack Trucks, Inc., Ky. App., 40 S.W.3d 888, 890 (2001) (citations omitted).

Keeling presents numerous arguments for our review. First, Keeling argues that the trial court erred by not finding her resignation ineffectual and void since she gave it with no intent to sever her employment with JCBE. Keeling further contends that her agreement with JCBE was void because it circumvents the Kentucky Teachers Tenure Law. We find these arguments to be totally without merit.

KRS 161.780(2) provides for the voluntary termination of a contract by a teacher as follows:

If a teacher voluntarily resigns his contract during the school term, the resignation shall be in writing and shall become binding on the date the resignation is accepted by the superintendent. No further action by the employing board is necessary. The resignation is effective on the date specified in the letter of resignation. A resignation, once accepted,

may be withdrawn only with the approval of the employing board of education. Nothing in this subsection shall release the teacher from liability to the local board of education for breach of contract.

Here, there is no dispute that Keeling submitted her resignation pursuant to an agreement with JCBE. On July 29, 1992, Keeling, in her own handwriting, acknowledged that she understood the agreement and submitted her resignation to become effective December 18, 1992, should she receive a negative evaluation from the neutral principal. This agreement stopped all termination proceedings JCBE was pursuing and allowed Keeling one last opportunity to keep her employment. According to her letter, Keeling willingly, freely and voluntarily entered into this agreement and submitted her resignation despite being advised by Neal of the potential consequences. Accordingly after receiving a negative evaluation, Keeling's resignation was accepted by the superintendent and became effective December 18, 1992. At no time did Keeling ever attempt to rescind this resignation. Furthermore, there is no evidence in the record proving that Keeling never intended to submit this handwritten resignation or abide by the terms of her agreement. Keeling's resignation clearly complies with the provisions of KRS 161.780(2). Consequently all arguments concerning the invalidity of this resignation, as well as the agreement prompting her resignation, are without merit.

Next, Keeling argues that she clearly demonstrated an actionable claim of fraud against these appellees. We disagree.

In Kentucky, a party claiming fraud must:

[E]stablish six elements of fraud by clear and convincing evidence as follows: (a) material representation (b) which is false (c) known to be false or made recklessly (d) made with inducement to be acted upon (e) acted in reliance thereon and (f) causing injury.

United Parcel Service Co., v. Rickert, Ky., 996 S.W.2d 464, 468

(1999). While Keeling repeatedly asserts that the settlement agreement was reached fraudulently, the record provides no evidence of any misrepresentations by any of the appellees. It is undisputed that Neal advised Keeling not to enter into the agreement with JCBE and not to submit her resignation letter. Keeling, in her Second Amended Complaint, admits that Neal immediately informed her: "Charisse, if you sign that you've resigned." Moreover, Meredith gave Keeling the opportunity to reject this agreement and pursue arbitration or an administrative hearing. Fraud may be committed either by intentionally asserting false information or by willfully failing to disclose the truth. Chamberlain v. National Life & Accident Ins. Co., Ky., 256 Ky. 548, 76 S.W.2d 628, 631 (1934). By her own admissions, it is apparent that the appellees did not intentionally misrepresent the agreement or its consequences to Keeling. Thus, Keeling's fraud claims are without merit.

Keeling also argues that the trial court erred by dismissing her conspiracy claims. Again, we find this argument is without merit. KRS 413.140(1)(c) provides a one-year statute of limitation for civil actions alleging conspiracy. Keeling's teaching certificate was revoked on March 21, 1995, by the EPSB. This is the last date in which Keeling can provide any proof concerning a conspiracy undertaken against her. Keeling filed her First Amended Complaint on July 29, 1997, more than two years and four months after the occurrence of the last possible act in furtherance of this alleged conspiracy. Hence, the trial court correctly held that Keeling's conspiracy claims were time-barred.

Keeling next claims that the trial court erred by ruling that JCTA is not subject to suit under Kentucky law. We disagree. Kentucky law clearly provides that an unincorporated association, such as JCTA, cannot be sued solely in its own name. Business Realty, Inc. v. Noah's Dove Lodge #20, Ky., 375 S.W.2d 389, 390 (1963); American Collectors Exchange, Inc. v. Kentucky State Democratic Central Executive Committee, Ky. App., 566 S.W.2d 759, 761 (1978). Keeling contends that the trial court failed to recognize that her suit against JCTA was a class action. While Keeling did make a vague reference in her Second Amended Complaint that JCTA satisfies the requirements for a class action under Kentucky Rules of Civil Procedure (CR) 23,

the trial court made no findings of fact and failed to certify this action as a class action. The Kentucky Supreme Court, in Rose v. Council for Better Educ., Inc., Ky., 790 S.W.2d 186 (1989), held that no class action exists if the trial court fails to make appropriate findings of fact and fails to certify evidence of a class. Since the trial court failed to certify evidence of a class, Keeling's assertion that a class action existed in this matter is incorrect.

Keeling next asserts that the trial court erred by finding that her claims of duress fail as a matter of law. Again, we disagree. For actionable civil duress to have occurred, there must be "an actual or threatened violation or restraint on a man's person, contrary to law, to compel him to enter into a contract." Boatwright v. Walker, Ky. App., 715 S.W.2d 237, 243 (1986). Here, Keeling cannot prove that she was acting under duress when she agreed to the settlement offered by JCBE. Keeling's handwritten resignation indicates that she accepted the terms of JCBE's settlement offer, despite reservations about its fairness, because "I cannot afford to be without a job" due to financial difficulties. While financial difficulties may make one more susceptible to duress, they are insufficient to constitute civil duress. Id. Moreover, nothing in the record shows that Keeling was threatened or compelled by the appellees to execute the settlement agreement. While JCBE

was pursuing termination proceedings against Keeling in July 1992, Keeling told Neal that she did not want to pursue arbitration or a hearing. Pursuant to Keeling's request, Neal arranged the meeting with Meredith at which time JCBE's settlement offer was proposed. Despite Neal's advice to the contrary, Keeling executed the agreement and waived her rights under both the collective bargaining agreement and KRS 161.790. Keeling's voluntary action, taken after consultation with Neal and full disclosure of the agreement and its consequences, undermines her claim of duress.

Additionally, "it is not duress to threaten to do what one has a legal right to do, nor is it duress to threaten to take any measure authorized by law and circumstances of the case." Redmon v. McDaniel, Ky., 540 S.W.2d 870, 872 (1976). Moreover, a mere threat by an employer to fire an employee unless the employee resigns does not, on its face, constitute duress. Humana, Inc. v. Fairchild, Ky. App., 603 S.W.2d 918, 920 (1980). KRS 161.790 permits the termination of a tenured teacher's contract for immoral character, conduct unbecoming a teacher, incompetency or neglect of duty. Thus, JCBE had a legal right to threaten to terminate Keeling's employment for either performance or other significant concerns. According to the record, JCBE had legitimate, substantial and disturbing evidence supporting its decision to begin termination

proceedings. This evidence, presented to an ALJ during a hearing, caused the EPSB to revoke Keeling's teaching certificate for twenty years. Accordingly, we agree with the trial court that the appellees were entitled to summary judgment as to her claim of duress.

Keeling also submits that the trial court erred by granting summary judgment to Neal and Price on her breach of fiduciary duty claims. While Keeling alleges that Neal and Price both breached a fiduciary duty to her during the events occurring herein, she failed to identify any evidence supporting these claims. Therefore summary judgment was proper.

Keeling also argues that the trial court erred by not holding that the decision of the EPSB was void. We must reject this argument. Decisions of an administrative agency acting in a judicial capacity are entitled to the same *res judicata* effect as judgments of a court. Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988); Godbey v. University Hosp., Ky. App., 975 S.W.2d 104 (1998). Here, KRS 161.120(5) requires the EPSB to schedule and conduct a hearing prior to revoking a teaching certificate. Keeling was provided and took advantage of her opportunity to present evidence concerning the charges against her. From our review of the ALJ's recommendations and the decision of the EPSB, Keeling was provided an adequate opportunity to litigate those issues at the hearing. Further, Keeling's untimely appeal

from the decision of the EPSB, allowed the administrative agency's decision to become final. Clearly, the EPSB's decision is entitled to the same *res judicata* effect as the judgment of a court in this Commonwealth. Supra.

Finally, the appellees argue that the doctrine of collateral estoppel prevents Keeling from re-litigating issues presented to the EPSB. In Kentucky, the essential elements of collateral estoppel are identity of issues, a final decision or judgment on the merits, and a prior full and fair opportunity for the estopped party to have litigated the issues. Moore v. Com., Cabinet for Human Res., Ky., 954 S.W.2d 317 (1997). All of these elements are present herein. Keeling had a full and fair opportunity to make her claims in the EPSB hearing, and she took advantage of that opportunity. The issues Keeling brought before the EPSB concerning her resignation are the same issues she now presents on appeal. It was her failure to timely appeal the EPSB's decision which allowed it to become final. Thus, the trial court correctly determined that Keeling's re-litigation of issues presented before the EPSB was precluded as a matter of law.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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