

RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001181-MR

DELORIS BOATENG

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 02-CI-03309

FAYETTE COUNTY BOARD OF
EDUCATION

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SPECIAL
JUDGE.¹

GUIDUGLI, JUDGE: Deloris Boateng has appealed from the Fayette
Circuit Court's June 4, 2004, Summary Judgment dismissing her
claims against the Fayette County Board of Education
(hereinafter "the Board"). Boateng alleged that the Board had
violated KRS 61.102 (the Kentucky Whistleblower Act), KRS
Chapter 344 (the Kentucky Civil Rights Act), as well as § 2 of

¹ Senior Judge John D. Miller, sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

the Kentucky Constitution, due to retaliatory actions taken after she made complaints regarding the assignment of children to classrooms. We affirm.

At the time she filed her complaint in 2002, Boateng was a 56-year-old African-American woman who was teaching under a continuing contract with Fayette County Public Schools at Julia R. Ewan Elementary School (hereinafter "the School"). She taught 5th grade at the School for over ten years, through the 2001-2002 school year. Early in that school year, Boateng approached her supervisor, Principal Vickie Burke, regarding her belief that she had been assigned more students with behavioral problems than the other 5th grade teachers. This assignment, she argued, violated the School's site-based council's policy for assigning students.² Boateng wanted her class size reduced and some of the children to be separated. When she did not receive the support or results she requested from Burke, Boateng contacted Burke's supervisor, Elaine Farris, the Supervisor of Elementary Schools for Fayette County. Burke had also contacted Farris to discuss the matter. In order to assist Boateng with her classroom behavioral problems, Burke contacted Denise Lawless, a resource teacher from Fayette County Public Schools' SAFE Schools Department. Lawless observed Boateng's classroom, noting that the children were often off-task, confrontational,

² After considering parent requests, the classes were to be balanced by gender, race, and enrollment in special programs.

and did not follow directions. She offered Boateng several recommendations in line with the CHAMPS³ program. Burke then placed Boateng on a corrective action plan in late October. Boateng also received assistance from social studies content literacy specialist Donna Shouse and from elementary math response teacher Beverly Dean.

In December, Boateng, through legal counsel, sent a letter to then-superintendent Dr. Robin Fankhauser complaining of Burke's treatment, and alleging that the imposition of the corrective action plan was in retaliation for her reporting of the student assignment issue to Farris. She also indicated her belief that her problems with Burke were due to race.

By an e-mail dated May 13, 2002, Burke notified Boateng that she was going to be assigned to the 2nd grade for the 2002-2003 school year, noting that the new assignment should be less stressful for her. Although she never objected to this new assignment, Boateng was not satisfied as she did not have any materials or experience for that grade level, although she was certified to teach that level. However, on June 26, 2002, Dr. Fankhauser informed Boateng by letter that she was being transferred as a teacher in the Home Hospital program. This transfer was later rescinded by interim superintendent Dr. L. Duane Tennant by letter dated August 5, 2002, and Boateng was

³ CHAMPS stands for conversation, health, activity, movement, and participation.

transferred back to the School. After receiving this notification, Burke assigned Boateng to the positions of science lab and remedial reading teacher, as the 5th and 2nd grade positions had already been filled. The transfer and subsequent change in position did not affect Boateng's salary or benefits in any way.

Boateng filed a verified complaint on August 15, 2002, alleging retaliation under Kentucky's Whistleblower and Civil Rights Acts, as well as a violation of § 2 of the Kentucky Constitution. She sought damages as well as injunctive relief. Boateng also filed a motion for a temporary injunction, in which she requested that the Board be required to re-employ her as a 2nd or 5th grade teacher at the School. This motion was overruled after Boateng conceded that she was not entitled by law to a particular position of employment or school.

Following a period of discovery, the Board filed a motion for summary judgment, arguing that Boateng had not established a viable claim under the Whistleblower Act as she did not make a disclosure as defined by KRS 61.103(1)(a), there was no adverse personnel action taken based upon this "disclosure", and because her claim was time-barred as it was not filed within 90 days of the violation of the statute. The Board also argued that Boateng did not establish a *prima facie* case of racial discrimination under KRS Chapter 344, and that no

arbitrary action had been taken to support a claim of a constitutional violation. Boateng responded only to the Whistleblower Act and constitutional arguments. In its reply, the Board again addressed Boateng's KRS Chapter 344 retaliation claim, asserting that it must be premised on an exercise of rights under KRS Chapter 344, which Boateng failed to do. Boateng, in her sur-reply, argued that she did not need to set forth a case of discrimination in order to proceed under a retaliation claim. After hearing oral argument on the motion, the circuit court entered a summary judgment and dismissed Boateng's claims. This appeal followed.

On appeal, Boateng maintains that she established a *prima facie* case of retaliation under KRS 61.101, *et seq.*; that she did not plead a racial discrimination claim; that the circuit court erred in granting a *sua sponte* summary judgment; and that she established a violation of § 2 of the Kentucky Constitution. The Board continues to argue that Boateng failed to state a claim under the Whistleblower Act and that in any event the claim was time barred; that she did not state a KRS Chapter 344 retaliation claim; and that she failed to state a claim for arbitrary action under § 2 of the Kentucky Constitution.

Our standard of review from the entry of a summary judgment is well settled:

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest[, Inc. v. Scansteel Service Center, Inc.], 807 S.W.2d 476, 480 (Ky. 1991)] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo.[⁴]

With this standard in mind, we shall review the circuit court's decision below.

We shall first address Boateng's claim under Kentucky's Whistleblower Act, KRS 61.101, *et seq.* She argues that she established a *prima facie* case under the statute, and

⁴ Lewis v. B&R Corporation, 56 S.W.3d 432, 436 (Ky.App. 2001)(citations in footnotes omitted).

that the issue before the circuit court was whether her complaint to Farris was protected under the Act. On the other hand, the Board urges us to hold that Boateng did not establish a *prima facie* case under the Act because she did not make a disclosure, as defined by the Act, to an appropriate authority and because her claim was time barred. We agree with the Board.

KRS 61.102(1) creates a cause of action for reprisal against a public employee for disclosures of law violations, and provides as follow:

No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, or any other appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. No employer shall require any employee to give

notice prior to making such a report,
disclosure, or divulgence.

"Disclosure" is defined as "a person acting on his own behalf. . . who reported or is about to report, either verbally or in writing, any matter set forth in KRS 61.102."⁵ KRS 61.103(2) permits an employee alleging a violation of KRS 61.102(1) to bring an action for relief and/or damages "within ninety (90) days after the occurrence of the alleged violation." The employee is required to "show by a preponderance of the evidence that the disclosure was a contributing factor in the personnel action."⁶ A "contributing factor" is defined as "any factor which, alone or in conjunction with other factors, tends to affect in any way the outcome of a decision."⁷ If an employee successfully establishes a *prima facie* case of reprisal and the disclosure is determined to be a contributing factor to the personnel action, "the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action."⁸

In Davidson v. Commonwealth of Kentucky, Department of Military Affairs,⁹ this Court, relying upon the Supreme Court of

⁵ KRS 61.103(1)(a).

⁶ KRS 61.103(3).

⁷ KRS 61.103(1)(b).

⁸ KRS 61.103(3).

⁹ 152 S.W.3d 247 (Ky.App. 2004).

Kentucky's decision in Woodward v. Commonwealth,¹⁰ set out the *prima facie* case for a violation of KRS 61.102:

In order to demonstrate a violation of KRS 61.102, an employee must establish the following four elements: (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.^[11]

In the present matter, there is no dispute that Boateng meets the first two prongs of the test; the questions in this case refer to the third prong: (1) whether Boateng made a disclosure to an appropriate body or agency; and (2), if so, whether she did so in a timely manner.

Here, Boateng alleges that she "blew the whistle" when she reported Burke's violation of the site-based council's policy on assigning students to Burke's supervisor, Farris, as a result of which she was assigned more students with behavioral problems. We agree with the Board that not only did Boateng fail to establish that she made a disclosure as defined by the Act, but that she did not make her "disclosure" to an appropriate body or authority. We do not agree with Boateng's

¹⁰ 984 S.W.2d 477 (Ky. 1998).

¹¹ Davidson, 152 S.W.3d at 251.

assertion that her complaint fell within the realms of mismanagement or abuse of authority. Her complaint was more in the form of an internal dispute.

Furthermore, Boateng did not make her “disclosure” to an appropriate body or authority, as she only made her disclosure to Burke’s direct supervisor, the Supervisor of Elementary Schools of Fayette County, rather than to any type of centralized agency personnel as is required by the Act. We agree with the Board that the doctrine of *ejusdem generis* is applicable in this case as a rule of statutory construction: “when a general word or phrase follows a list of specific persons or things [, t]he general word or phrase will be interpreted to include only persons or things of the same type of those listed.”¹² KRS 61.102(1) provides that the disclosure must be made to a specific list of centralized State agencies or to similar bodies. Here, Boateng made her complaint to Burke’s direct inter-office supervisor, and therefore she failed to make a “disclosure” to an appropriate agency or person as required under the Act.

Because we have determined that Boateng failed to establish a *prima facie* case of reprisal under KRS 61.102, we need not address the Board’s assertion that her claim was time-barred. However, we agree with the Board that her claim does

¹² Commonwealth v. Plowman, 86 S.W.3d 47, 50 (Ky. 2002).

appear to be time-barred. If either Burke's imposition of the corrective action plan in the Fall of 2001, or the May 13, 2002, assignment of Boateng to the 2nd grade for the following school year were to be construed as personnel actions, these dates clearly predate the filing of the complaint on August 15, 2002, by over ninety days. Dr. Fankhauser's later transfer of Boateng into the Home Hospital program has no impact because the transfer was later rescinded by Dr. Tennant, who transferred her back to the School. At that point, Burke had to be assigned to an open position other than the 5th grade (her preferred position) or the 2nd grade, as those positions had already been filled.

Because Boateng failed to establish a *prima facie* case of reprisal under KRS 61.102 even in a light most favorable to her, the circuit court as a matter of law properly granted a summary judgment in favor of the Board.

We shall next address Boateng's retaliation claim under KRS Chapter 344. At the outset, we note that Boateng argues that the circuit court *sua sponte* granted a summary judgment on this cause of action as the Board did not raise it in its motion for summary judgment. Rather, the Board, she maintained, argued that she had not established a claim for racial discrimination, which Boateng asserts she never raised or meant to raise, and did not address her retaliation claim.

Having reviewed the record, we hold that the Board sufficiently addressed Boateng's retaliation claim, both in its memorandum in support of its motion for summary judgment and to a greater extent in its sur-reply brief. Because the Board raised and argued all of the claims alleged in Boateng's complaint, the circuit court did not *sua sponte* enter a summary judgment on her retaliation claim.

KRS 344.280(1) prohibits a person from "retaliat[ing] or discriminat[ing] in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter." In Brooks v. Lexington-Fayette Urban County Housing Authority,¹³ the Supreme Court of Kentucky set out the *prima facie* case for retaliation as follows:

A prima facie case of retaliation requires a plaintiff to demonstrate "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action."

¹³ 132 S.W.3d 790, 803 (Ky. 2004), quoting Christopher v. Stouder Memorial Hospital, 936 F.2d 870, 877 (6th Cir. 1991), cert. denied, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991).

It appears that Boateng is simply arguing in her brief that she does not have to establish a racial discrimination claim in order to prove her claim of retaliation. While this might be accurate, Boateng is required to prove that she engaged in a protected activity under Chapter 344 when she was subjected to adverse treatment by her employer, assuming that she was subjected to such treatment. KRS 344.040(1) prohibits an employer from discriminating against an individual because of that person's race, color, religion, national origin, sex, age, disability, or smoking habit. Boateng has not made any effort to establish that she was indeed engaged in a protected activity under KRS Chapter 344. She has specifically denied that she made a claim for racial discrimination, even though accusations of racial discrimination are sprinkled throughout the record. Because there is an absence of proof in the record that Boateng was engaged in a protected activity under KRS Chapter 344 and because she specifically denied any racial discrimination claim, her retaliation claim under KRS 344.280 must fail. The circuit court properly entered a summary judgment in favor of the Board on this claim.

Lastly, we shall address Boateng's claim that the Board violated § 2 of the Kentucky Constitution by arbitrarily assigning her to another teaching position at the School. The Board argues that to the extent Boateng premises this claim on

her reprisal or retaliation claims, those specific statutory claims would subsume her § 2 claim. Furthermore, the Board asserts that Boateng's transfer was not based upon a constitutionally impermissible reason.

§ 2 of the Kentucky Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority." In Board of Education of Ashland v. Jayne,¹⁴ the Supreme Court of Kentucky reviewed a case in which two teachers were transferred to other schools in the same school system, but did not suffer from any reduction in pay or loss of fringe benefits. After citing KRS 161.760,¹⁵ the Court stated:

[T]he General Assembly of Kentucky has clearly established that a teacher who has a contract to teach, has no absolute right to a particular teaching job in a particular school. The legislature has clearly given discretion to school boards to transfer teachers within their district. As we have indicated, . . . Section 2 of the Kentucky Constitution is a potential curb on this power.^[16]

¹⁴ 812 S.W.2d 129 (Ky. 1991).

¹⁵ "Employment of a teacher, under either a limited or a continuing contract, is employment in the school district only and not in a particular position or school."

¹⁶ Jayne, 812 S.W.2d at 132.

The Jayne court also relied upon Bowlin v. Thomas¹⁷ for the applicable test: "Was the movant's action of transferring respondents to other jobs in the same school system, based on a 'constitutionally impermissible reason?'"¹⁸ In that case, no constitutionally improper reasons were presented to the jury, such as loss of pay or fringe benefits or evidence of some form of discrimination. Lastly, the Jayne court held that "a jury is not the proper vehicle or forum to determine whether a constitutional provision has been violated. . . . The issue of constitutionality is a *legal* one, and should only be decided by a Court."¹⁹

In the present case, Boateng argues that she was treated arbitrarily and capriciously when she was reassigned to another teaching position at the School and later to the Home Hospital program. She maintains that the reasons given for her reassignments were unjustified and came after her complaint to Farris, making those reassignments arbitrary. We disagree. Boateng presented no evidence, other than her own testimony without any supporting documentary evidence or other witness testimony, that either her reassignment to the 2nd grade or her transfer to the Home Hospital program was for any

¹⁷ 548 S.W.2d 515 (Ky.App. 1977).

¹⁸ Jayne, 812 S.W.2d at 131.

¹⁹ Id. at 132 (emphasis in original).

unconstitutionally improper reason. Burke cited poor testing results in Boateng's 5th grade classes, and indicated in her e-mail to Boateng that a 2nd grade assignment would be much less stressful for her, as the 5th grade classes for the following year were going to be filled with time-intensive students again. Regarding Dr. Fankhauser's transfer of Boateng to the Home Hospital program, that transfer was rescinded, so even if that action could be considered arbitrary, the action was nullified. Because Boateng failed to establish that the actions of reassigning and transferring her were arbitrary, the circuit court properly granted a summary judgment in favor of the Board.

For the foregoing reasons, the Fayette Circuit Court's summary judgment dismissing Boateng's complaint is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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