

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000499-MR

JOHN HICKS

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 03-CI-00711

FLOYD COUNTY BOARD OF EDUCATION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: This matter is before the Court for review of summary judgment granted to Appellee Floyd County Board of Education by the Floyd Circuit Court against Appellant John Hicks. Hicks claims that the Board violated KRS<sup>2</sup> 161.100 by refusing to hire him, a certified special education teacher, rather than a teacher with an emergency certification in special education. Upon review, we affirm.

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Revised Statute

Hicks was employed by the Board as a special education teacher for twelve years. In a letter dated October 4, 1999, Hicks was discharged by Superintendent Paul Fanning pursuant to KRS 161.790(1) for immoral conduct or conduct unbecoming a teacher after investigations were conducted by the Board and by the Division of Management Assistance with the Department of Education. The investigation revealed that during state mandated CATS assessment testing, despite the fact that Hicks had been trained and was a certified special education teacher and therefore should have known the regulations for administering tests to students with special needs, Hicks provided students with answers to questions, wrote entries for state mandated student portfolios, provided accommodations during testing to his students that were not outlined in their respective Individual Education Plans (IEP's) and provided accommodations to students whose IEP's had expired. Because of these irregularities, all of the students whom Hicks assisted received a lower score (a novice level) which also lowered the school's overall score. Hicks's assistance also caused students to rely on him without exerting their own abilities. Students told other teachers that Hicks “tells us the answers.”

The investigation also revealed that Hicks failed to keep current IEP's for some of his students, violating both state and federal laws. *See* KRS 157.196, KRS 157.200, *et seq.*, 707 KAR<sup>3</sup> 1.320, and 20 U.S.C.A. § 1400 *et seq.* An IEP is only applicable for the time period for which it is drafted. Accordingly, IEP's are required to be reviewed at least annually by an Annual Review Committee. An IEP dictates the education and accommodations to which a student with special needs is entitled.

<sup>3</sup> Kentucky Administrative Regulations

Hicks was also involved in other inappropriate conduct. When he was a homebound teacher, he failed to turn in homework completed by a student who was homebound due to medical problems. The student was required to attend an extra year of school because of this.

After he received the letter of discharge, Hicks exercised his right to a tribunal hearing pursuant to KRS 161.790. However, on the day on which the hearing was scheduled, the parties entered into an agreed order wherein Hicks was permitted to complete the teaching year, under the direction of Superintendent Fanning, in exchange for Hicks's resignation. Hicks was not permitted to finish the year where he had previously taught or at South Floyd High School.

Despite his resignation and the fact that he had received a letter of discharge from Superintendent Fanning for immoral conduct and conduct unbecoming a teacher, Hicks applied for the same position wherein the above described conduct occurred. After he was not hired, he filed suit in Floyd Circuit Court claiming that the Board violated KRS 161.100 by refusing to hire him, a certified special education teacher, and instead hired an individual with an emergency certificate in special education.<sup>4</sup> Summary judgment was granted to the Board, and Hicks now appeals that decision.

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<sup>4</sup> Hicks also filed suit in the United States District Court, Eastern District of Kentucky, Pikeville Division, asserting *inter alia* gender discrimination, hostile work environment, retaliatory discharge and violations of his equal rights under the Fifth and Fourteenth Amendments. A jury returned a verdict in the Board's favor, and the verdict was upheld by the Sixth Circuit Court of Appeals. See *Hicks v. Floyd County Bd. of Educ.*, 99 Fed. Appx. 603 (6th Cir. 2004).

On summary judgment, our review is limited to determining “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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted).

The statute under review, KRS 161.100, provides that

[w]hen a district board of education satisfies the Education Professional Standards Board that it is impossible to secure qualified teachers for a position in a school under the control of the district board, the Education Professional Standards Board may issue emergency certificates to persons who meet the qualifications determined by the Education Professional Standards Board for emergency certificates. An emergency certificate shall be valid only for the specific job for which issued and for the current school term. The Education Professional Standards Board may require the passing of a written examination before an emergency certificate is issued. The examination shall be prepared and administered and the papers graded in the state offices of the Education Professional Standards Board under the direction of the executive director, in accordance with administrative regulations approved by the Education Professional Standards Board.

To determine if a teacher is qualified under KRS 161.100, KAR 2.120(1) defines a “[q]ualified teacher” as “a teacher who holds the appropriate certification for the position unless the superintendent of the employing school district has documented evidence that the teacher is unsuitable for appointment.” In granting summary judgment

to the Board, the trial court decided that there was sufficient documentation for Superintendent Fanning to determine that Hicks was “unsuitable for appointment” pursuant to 16 KAR 2:120.

The record in the case at hand is replete with serious violations of Hicks's obligations as a teacher, particularly as a special education teacher. Violations which ultimately lead to his resignation. Superintendent Fanning had more than sufficient documentation to determine that Hicks was not a qualified teacher, and Hicks presents no affirmative evidence that the necessary documentation mandated under 16 KAR 2:120 does not exist. Accordingly, Hicks cannot state a claim under KRS 161.100, and we hereby affirm the circuit court's decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy A. Parker  
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BRIEF FOR APPELLEE:

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