IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

KELLY BROWN, ROBERT BROWN, and SHANA CLAUD-WEST Plaintiffs, vs. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and FRED CARR Defendants.	JURY DEMANDED Case No. _____

COMPLAINT

Comes now Plaintiffs Kelly Brown, Robert Brown, and Shana Claud West, for their causes of action against the Defendants state as follows:

PARTIES

1. Plaintiffs Kelly Brown and Robert Brown are citizens and residents of Davidson County, Tennessee. Plaintiff Shana Claud-West is a citizen and resident of Sumner County, Tennessee. All three Plaintiffs are, and have been at all times material hereto, employees of the Metropolitan Nashville Public Schools.
2. Defendant Metropolitan Government of Nashville and Davidson County ("Metro") is a municipality organized under the laws of the State of Tennessee and because Davidson has adopted the Metropolitan form of Government, Metro is the proper party for claims against the Metropolitan Nashville Public Schools ("MNPS").

3. The Defendant Fred Carr is, upon information and belief, a citizen and resident of Davidson County Tennessee. He previously served as chief operating officer of Metropolitan Nashville Public Schools and acted in this capacity at all times material to this Complaint.

JURISDICTION AND VENUE

4. This is a claim brought pursuant to 42 U.S.C. § 1983 and a federal question is therefore presented under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). Claims are also brought pursuant to the Education Truth in Reporting, and Employee Protection Act of 1989, T.C.A. §§ 49-15-1401 et seq. These statutory claims are within the supplemental jurisdiction of this court pursuant to 28 U.S.C. § 1367 because such claims are so related to the claims in the original action that they are a part of the same case or controversy under Article III of the Constitution of the United States.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because all of the Defendants reside in or are organized within this district, and the events, errors, or omissions complained of all occurred within the Middle District of Tennessee. Each defendant may be served in this district.

ALLEGATIONS OF FACT

Background of the MNPS End-of-Course Exam.

6. In 2002, the No Child Left Behind Act ("NCLBA") was signed into law, amending the Elementary and Secondary Education Act of 1989. The NCLBA requires states to set standards for "highly qualified teacher" and to set "one high, challenging standard" for its students.

7. Certain provisions of the NCLBA establish requirements for: (1) yearly testing and assessments of student performance; (2) state standards for and assessments of adequate yearly progress (AYP); (3) local educational agency identification of schools for improvement and

corrective actions, (4) reporting to parents and the public on school performance and teacher quality, (5) eligibility requirements for school wide programs, and (6) increased qualifications of teachers and paraprofessionals. 20 U.S.C. § 6311.

8. Nashville's school system is organized into "clusters," with one cluster for each comprehensive high school. Between 2003 and 2007, the Metro Nashville Public School District failed the NCLBA benchmarks four times, despite the fact that Tennessee's benchmarks rank 46th out of the 50 states in difficulty. MNPS became one of the first two school districts in Tennessee to achieve Corrective Action status under the NCLBA, mandating state intervention to address the academic problems.

9. In 2010, Tennessee moved to a data-driven system of school and teacher evaluation in order to secure a large federal "Race to the Top" grant. On January 16, 2010, then-Governor Bredesen signed into law the First to the Top Act, codified at T.C.A. § 49-1-101 *et seq.*

10. The First to the Top Act and State Board of Education Policy 5.201 require that 35% of each teacher's evaluation criteria be comprised of "growth" data represented by Tennessee Value-Added Assessment System ("TVAAS") results.

11. TVAAS is described in T.C.A. § 49-1-603(a)(1) as a statistical system for educational outcome assessment that uses measures of student learning to enable the estimation of teacher, school and school district statistical distributions.

12. The purpose of the Tennessee Value-Added Assessment System ("TVAAS") is to measure the impact schools and teachers have on their student's academic progress. TVAAS measures student growth, not whether the student is proficient on the state assessment.

13. The First to the Top Act and State Board of Education Policy 5.201 mandate that TVAAS estimates be used in consequential decisions affecting a teacher's employment.

14. The data used to produce TVAAS results are student scores on standardized tests administered in the Tennessee Comprehensive Assessment Program (TCAP) and state-approved End of Course (EOC) exams.

15. Pursuant to Tenn. Comp. R. & Regs. 0520-01-03-.06:

> "End-of-course examinations will be given in English I, English II, English III, Algebra I, Geometry, Algebra II, Integrated Math I, Integrated Math II, Integrated Math III, U.S. History, Biology I, Chemistry, and Physics, upon development. Students are not required to pass any one (1) examination, but instead need to achieve a passing score for the course average in accordance with the State Board of Education's uniform grading policy."

16. MNPS policy does not allow for the promotion of a high school student to the next grade level unless that student has the number and types of credits required to be on track for a four-year graduation.

17. MNPS publishes a Student Progression Plan ("SPP") for high school students which sets forth, *inter alia*, the standard course curriculum for all MNPS students.

18. MNPS utilizes a program called "A+ for Course Retake" which is "the MNPS approved computer based program for recovering failed credit." (P. 70 of 2013-14 SPP). MNPS approved A+ enrollments for students who have failed a resource course.

19. In order for students to use the A+ Program for first time credit, they must seek approval from the Executive Lead Principal and submit a form to request first time credit via A+, which must be returned to the Executive Director of School Counseling.

20. The primary focus of re-taking a course is to allow students the opportunity to earn credit for a course that was previously failed. (P. 59 of 2013-14 SPP). Students must complete an application, have parental permission, and approval of the executive principal or their designee.

21. Pursuant to the SPP, "[w]hen a student's progress is marginal or unsatisfactory, a 'Notice of Concern' regarding the student's academic progress will be sent to their parent or guardian at

the end of the first and third nine-week grading period. When a student is failing, teacher's must issue a 'Notice of Concern' at any time. Communication between the home and the school shall be such that issuing a failing grade to the student will not occur unless there has been documented notification." (PP. 63-64 of 2013-14 SPP).

Plaintiffs Kelly and Robert Brown.

22. Plaintiff Kelly Brown was a high school counselor at MNPS for 11 years. She served as Lead Counselor and Building Testing Coordinator for nine years. She transferred to Pearl Cohn High School and was the lead guidance counselor from July 2012 to June 2015. She possesses a Master's Degree in Pre-K-12 Guidance and School Counseling, and is a licensed School Counselor in the State of Tennessee. Her job duties consisted of, *inter alia*, conducting regular student transcript audits, teaching classroom guidance lessons focusing on promotion and graduation requirements, and identifying students at risk of not graduating on time.

23. Plaintiff Robert Brown is a licensed teacher who possesses a Master's Degree in Educational Administration and Supervision. He has taught in high schools throughout Middle Tennessee for over thirty years, and has been a teacher and coach at MNPS since 2004.

24. In April 2014, the principal at Pearl-Cohn, Sonia Stewart, directed Kelly Brown to remove certain students from End of Course ("EOC") courses into an "A+ Credit Recovery Program" or another elective course. Sonia Stewart informed Plaintiff that she also directed three other counselors to do the same.

25. The students were removed without any prior or subsequent notice to their parents, in violation of MNPS policies. Several of them were actually passing their courses.

26. On April 3, 2014, Plaintiff Kelly Brown confirmed with the other counselors that Principal Stewart had directed them to remove certain students out of their EOC courses. On April 4,

2014, Principal Stewart asked Plaintiff to confirm that she had removed the students from their courses, as requested.

27. The EOC exams were administered from May 5th to May 9th, 2014. On May 14, 2014, Plaintiff Kelly Brown received a phone call from Principal Stewart, who was noticeably upset that one of the counselors had failed to pull all of her students from EOC courses as she had directed her to do back in April. On May 15, 2014, Stewart and Assistant Principal Sloss berated the counselor for failing to remove the students.

28. In May 2014, Assistant Principal Sanders notified Plaintiff Kelly Brown that she was completing student's lessons in the A+ program for seniors who needed credit to graduate. Plaintiff witnessed A+ lessons on Sander's laptop screen, and Sanders admitted that she was completing lessons for students.

29. On May 21, 2014, Plaintiff Kelly Brown confronted Sanders in her office about the impropriety of completing student's A+ lessons.

30. On May 26, 2014, Plaintiff Kelly Brown met with Principal Stewart and confronted her about the unethical testing practices and Sander's unethical conduct. Stewart informed her that she had been directed to remove the students by a superior.

31. On May 29, 2014, Plaintiff Robert Brown reported what was taking place at Pearl Cohn to his principal, Steve Chauncy. Mr. Chauncy reported the situation to his Lead Principal, Steve Ball, who then reported it to his supervisor, Executive Lead Principal Aimee Wyatt. Wyatt sent email to Principal Stewart's supervisor, Executive Lead Principal Michelle Wilcox and her supervisor, Chief Academic Officer Jay Steele.

32. On May 30, 2014, Plaintiff Kelly Brown met with Principal Steward and Sanders to discuss Plaintiff's complaint regarding Sanders. Principal Stewart berated Plaintiff, and accused her of

attempting to undermine Stewart and Sanders by sharing information with people outside of Pearl Cohn High School.

33. Plaintiff Kelly Brown was approached by students who had been removed from their courses and placed in A+ Credit Recovery. These students had been confronted by their peers about why they were no longer in class, and informed her that they felt humiliated and embarrassed. Many of the students in the A+ Credit Recovery did not even have the benefit of a licensed or certified teacher.

Plaintiff Shana Claud-West.

34. Plaintiff Shana Claud-West is a Licensed Professional School Counselor who worked as a counselor for Glencliff High School from July 2007 to July 2013. In July 2013, Plaintiff transferred to Hunter's Lane High School. She was an academic advisor for students, monitored their graduation requirements, and assisted with scheduling their courses.

35. In July 2013, Plaintiff Claud-West discovered that numerous student's schedules at Hunters Lane had been changed and that they had been removed from the EOC courses and placed in the A+ Program for "credit recovery" even though they had not previously failed the course. Plaintiff Claud-West began inquiring about the reason why so many students were being pulled from classes that required state-mandated EOC testing and being placed in courses that were not required classes for graduation. Removing students under these circumstances not only prolongs their graduation date, but also places students at a marked disadvantage by having to make up a course via the A+ Program when they had not previously failed it, all of which causes these students unnecessary stress.

36. On February 17, 2014, the Assistant Principal of Hunters Lane High School, April Snodgrass, removed students from EOC courses in order to prevent their scores from negatively impacting the school's test score statistics.

37. On February 18, 2014, Plaintiff Claud-West emailed Assistant Principal April Snodgrass notifying her of the situation. Plaintiff stated that she was unaware of the reason why these students would have their schedules changed, and she asked how the school was going to handle the classes these students needed in order to be promoted to the next grade level. Plaintiff also asked how a student could take a credit recovery for a course they had not failed. Snodgrass never responded to Plaintiff's email.

38. On March 11, 2014, shortly after Plaintiff Claud-West questioned the legitimacy of removing students from EOC classes, Mrs. Claud-West was accused of being incompetent and insubordinate, and was informed by Principal Kessler that she would be placed on an "Intervention Plan," which required, *inter alia*, that Plaintiff meet Assistant Principal Snodgrass bi-weekly, and discuss her work. Plaintiff never received any negative feedback during these meetings, and never presented Plaintiff with notice of any deficiency in her performance.

39. Plaintiff Claud-West was also subjected to demeaning work assignments, including that of a "bathroom monitor" in the girl's bathroom twice a day.

40. The Intervention Plan also which required Plaintiff to perform tasks by deadlines that were impossible to meet. Although Snodgrass never gave any feedback or stated that Plaintiff was not meeting benchmarks, Snodgrass reported to Principal Kessler that Plaintiff was not meeting expectations. Kessler stated that Plaintiff would be referred to human resources for them to determine whether or not she would be terminated.

41. On May 28, 2014, Principal Kessler called Plaintiff Claud-West into her office and stated that she had not successfully achieved the targets of the Intervention Plan. Kessler stated that Aimee Wyatt and Nicole Cobb would determine whether she would be recommended for termination or continued employment.

42. On June 16, 2014, Plaintiff Claud-West sent a letter to Principal Kessler, Scott Lindsay of MNPS Employee Relations, and Dr. Ott, Director of Human resources, informing them about the students that were pulled out of EOC courses by Assistant Principal Snodgrass at the direction of Principal Kessler for the purpose of artificially inflating test scores. Plaintiff further informed them that Snodgrass had removed students who were actually passing their EOC courses.

43. In July 2014, Plaintiff Claud-West returned to Hunters Lane after summer break and was presented with a large stack of student's schedules. Principal Kessler, Assistant Principal Snodgrass, Lead High School Principal Aimee Wyatt, and Union Representative Erick Huth were present. They stated that Plaintiff had incorrectly entered approximately 120 student schedules and failed to retain students that should have been retained. Thereafter, Plaintiff reviewed copies of the report she had submitted prior to the 2014 summer break, and discovered that the schedules had intentionally been changed by someone else in order to discredit her. Plaintiff was informed that she would be terminated.

44. Plaintiff Claud-West provided MNPS Director Jesse Register with evidence demonstrating that students were being improperly removed from EOC courses. Plaintiff requested a transfer from Hunters Lane because of the retaliation she was facing at Hunter's Lane. Dr. Register made no effort to investigate the claims. He merely agreed to transfer Plaintiff to Madison Middle School, which is a low performing school that is in jeopardy of being taken over by the State. At Madison Middle, Plaintiff was not provided with an office. Ultimately, she was administratively transferred to Dupont Tyler, where she was forced to work in a small broom closet with only enough room for a single chair.

Plaintiffs File Complaint with U.S. Department of Education.

45. On July 14, 2014, Plaintiffs Kelly Brown and Shana Claud-West filed a complaint with the U.S. Department of Education regarding the MNPS' testing practices and removal of students from EOC courses.

46. In July 2014, Plaintiff Kelly Brown returned to Pearl Cohn, where she was informed that she had additional job duties and would report directly to Sanders. Plaintiff's additional job duties consisted of impossible tasks with deadlines that required her to work long hours without overtime compensation, in retaliation for reporting the unethical testing practices taking place at Pearl-Cohn.

47. In September 2014, Plaintiff Claud-West discovered that student transcripts had been falsified to show that they completed the courses in which they had been previously removed.

Plaintiffs Meet with Rep. Womick and Rep. Brooks.

48. Because MNPS refused to investigate or address the unethical and illegal testing practices taking place throughout the district, the Plaintiffs compiled evidence demonstrating that students were improperly removed from EOC courses. On October 14, 2014, Plaintiff Kelly Brown emailed Representative Rick Womick, a legislative member of the Joint Education Committee for the Tennessee General Assembly, outlining the wrongdoings occurring within MNPS and requesting his assistance.

49. In November 2014, Mrs. Brown and Mrs. Claud-West provided Rep. Rick Womick and with the evidence they had gathered. Plaintiffs had redacted information that identified any of the individual students.

50. Rep. Womick contacted the Tennessee Department of Education and requested that they investigate the Plaintiffs' allegations.

51. Between February and April 2015, Plaintiffs and Rep. Womick met with numerous individuals from various state agencies, including the Tennessee Comptroller, the Department of Education, and various investigators. Despite their efforts, no official investigation into the MNPS testing practices was conducted.

WTVF Channel 5 News Investigative Report of MNPS' Testing Practices.

52. Plaintiffs were interviewed by Phil Williams, Investigative Reporter for WTVF News Channel 5. Plaintiff's provided Mr. Williams with several redacted student records which demonstrated their allegations against MNPS.

53. On November 2, 2015, the first of several media reports aired regarding the removal of low-performing students from EOC courses in order to manipulate school statistics. During the interview, Plaintiffs Kelly Brown and Shana Claud-West described how students, even those that were not failing the course, were removed from EOC courses without any prior or subsequent notice to their parents.

54. On November 2, 2015, Attorney for Plaintiffs, W. Gary Blackburn, sent Interim Director of MNPS Chris Henson a letter regarding Plaintiffs' unqualified first amendment rights to speak out on matters of public concern and that their report was privileged from any retaliation from MNPS. The Letter, attached as Exhibit A to this Complaint, requested that those who report to Henson be advised that retaliation in any form against Kelly Brown or Shana Claud-West will not be tolerated. Mr. Henson did not respond.

55. On November 3, 2015, News Channel 5 aired an interview with a testing expert, Bob Schaeffer, who works with the National Center for Fair and Open Testing. Mr. Schaeffer referred to MNPS' practices as "gamesmanship" designed to manipulate test scores so that the district's educational policies appeared more favorable.

56. Thereafter, additional news agencies covered the testing situation within MNPS, including The Tennessean, BreitBart, and numerous others.

57. On November 10, 2015, MNPS Chief Academic Officer Jay Steele attended a faculty meeting at Pearl-Cohn and discredited Plaintiffs Kelly Brown and Shana Claud-West. Steele made false accusations against Plaintiffs to intimidate others from further disclosing evidence of MNPS's wrongdoing.

58. On November 12, 2015, Rep. Womick disseminated an official notice, a copy of which is attached to this Complaint as Exhibit B. The public notice states:

> "The Speaker of the Tennessee House of Representatives, Representative Beth Harwell, House Education Administration and Planning Chairman Representative Harry Brooks, and House Education Instruction and Programs Chairman John Fogerty have authorized a special study by members of the House Education Committee to hear testimony regarding presented evidence and alleged manipulation of End of Course Examinations, school performance scores, and district performance scores by Metropolitan Nashville Public Schools (MNPS).
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> […]
>
> "All individuals who have information regarding the removal of students from these courses prior to end of course examinations by MNPS and who are willing to offer testimony to or testify before the Tennessee House of Representatives Education Study, will be afforded the full protection and immunity afforded to them under TCA 8-50-116, known as the 'Tennessee Whistle Blower Law.' (See attached)
>
> I encourage all teachers, counselors, principals, and administrators to come forward and reveal any information as it pertains to the aforementioned allegations and evidence. The integrity of our school system, the education of our children, and the confidence of the public depends on revealing and correcting any improprieties that exist in our schools, districts, or state run testing system."

59. On December 10, 2015, Plaintiffs testified before members of the House Education Committee of the Tennessee General Assembly regarding MNPS' testing practices.

60. The Committee had request redacted and unredacted copies of the student records in order to investigate the situation. After testifying, Plaintiffs discovered that a few items in the redacted copy had not been redacted.

61. Plaintiffs contacted Rep. Womick and Rep. Brooks to request the return of the binders of redacted information out of an abundance of caution. He assured them that the documents, whether redacted or unredacted, had been provided only to those authorized by law to view the material.

62. Rep. Womick then informed MNPS that Plaintiffs provided the unredacted copy of the student records to him and Rep. Brooks in a sealed envelope, which were forwarded to individuals in the Tennessee Department of Education and House Education Committee. Rep. Womick and Rep. Brooks only shared the documents, whether redacted or unredacted, with individuals authorized to view the material in accordance with FERPA and Tennessee law.

63. On December 30, 2015, MNPS Chief Operating Officer Fred Carr sent letters to the Plaintiffs requesting a meeting to discuss their "apparent violation of the Family Education Rights and Privacy Act (FERPA)." The stated reason for this meeting was to gather information regarding Plaintiffs access and release of "protected student data."

64. FERPA's nondisclosure provisions speak only in terms of institutional policy and practice, not individual instances of disclosure. 20 U.S.C. §§ 1232g(b)(1)-(2)(prohibiting the funding of "any educational agency or institution which has a *policy or practice* of permitting the release of education records.")

65. Pursuant to 20 U.S.C. § 1232g(3) of the FERPA law: "Nothing contained in this section shall preclude authorized representatives of . . . (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported educations programs, or in connection with the enforecement of the Federal legal

66. Furthermore, FERPA does not authorize an individual cause of action for a purported violation, and no student or parent has ever complained to MNPS or filed a complaint with the Department of Education regarding any purported violation of FERPA due to Plaintiffs' disclosure of student records.

67. On January 5, 2016, Attorney for Plaintiffs responded to Fred Carr's accusations that Plaintiffs had violated FERPA. A copy of the January 5 Letter is attached as Exhibit C. The letter stated that the records were provided to a Committee of the General Assembly charged with overseeing various aspects of public education in Tennessee, that Plaintiffs had a First Amendment right to speak out on this matter of public concern, and that Rep. Womick had stated that Plaintiffs were not to be retaliated against in any way.

68. On January 6, 2016, Plaintiffs met with Fred Carr and other MNPS officials pursuant to their purported investigation. Carr stated that Plaintiffs would be reprimanded and he threatened their termination.

69. On January 8, 2016, Rep. Womick sent a letter to MNPS, a copy of which is attached as Exhibit D. The letter states:

"Metropolitan Nashville Public Schools
2601 Bransford Avenue
Nashville, Tennessee 37204

To Whom It May Concern:

This letter is to inform all individuals and interested parties on the handling of redacted and unredacted evidence given to the Tennessee House of Representatives by Kelly Brown, Robert Brown, and Shana West, employees of Metro Nashville Public Schools (MNPS). The evidence given by these three individuals, who are protected under the Tennessee "Whistle Blower" statute, proves that MNPS removed students just prior to end of course exams during the students second semester, and did not allow these students to take the end of course exams as is required by state law.

All redacted and unredacted copies of evidence provided to Representative Harry Brooks, Chairman of the House Education Committee, by Mr. and Mrs. Brown and Mrs. West, were turned over to House of Representative lawyers for review in accordance with all privacy laws, in particular the Family Educational Rights and Privacy Act (FERPA). No other state

legislators had access to the redacted or unredacted copies and Chairman Brooks opted to turn his redacted copy over the House Education Committee Attorney for her preliminary review and analysis. All redacted and unredacted copies are being used by investigators of the Tennessee General Assembly and the Tennessee Department of Education in accordance to the FERPA to verify the presented evidence and the students involved.

In this investigative process, MNPS Central Office has been given copies of this evidence, redacted and/or unredacted, by state investigators for the sole purpose to assists investigators in verifying its authenticity and determining the students involved in the removal from classes prior to the end of course exams. […]"

70. On January 15, 2016, Carr issued Plaintiffs written reprimands for violating FERPA, even though Plaintiffs' disclosures were privileged. The written reprimands were placed in Plaintiffs' files as part of their permanent personnel file.

71. On January 19, 2015, Carr sent a letter to the U.S. Department of Education's Family Policy Compliance Office to report what he called "an intentional data breach." In that letter, Carr falsely stated that a "television news report was released which showed a brief view of a student's transcript with the name visible." In fact, the clip identified by MNPS was a report that showed only the names of classes and teachers at her former school.

72. The actions of Fred Carr and other MNPS employees who have retaliated against Plaintiffs for publicly disclosing the unethical MNPS testing practices has caused Plaintiffs emotional distress and irreparable damage to their unblemished professional reputations.

CAUSES OF ACTION

COUNT I: VIOLATION OF PLAINTIFFS' RIGHTS
UNDER THE FIRST AMENDMENT.
42 U.S.C. § 1983

73. The Defendant engaged in wrongful disciplinary action prompted by the Plaintiffs' exercise of their First Amendment rights to speak out on matters of public concern, which right was exercised by exposing the unethical and improper testing practices occurring within the Defendant's district.

74. The Defendant knew or should have known that the Plaintiffs' First Amendment rights were clearly established.

75. The law as determined by the Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit is, and was at the time of the conduct complained of herein, clearly established, to wit:

    a. That a public employee has a right to free speech protected by the First Amendment to the Constitution of the United States where such speech concerns matters of public interest and concern;

    b. That the First Amendment protects the right of each and every citizen speak on behalf of, or in opposition to or to criticize public officials in the performance of their duties;

    c. That the First Amendment protects the right of each citizen to advocate for or against matters of public policy which may be acted upon by local governments, and that this protection specifically extends to criticisms of the conduct of public education in Davidson County, Tennessee.

    d. Those who, under color of law, engage in any form of retaliation for the exercise of such rights do so in violation of the constitution and must answer for their conduct at law.

2. The Defendant Metro and the Defendant Carr acted under color of law to deprive the Plaintiffs of the rights, privileges, and immunities of citizenship by acts of retaliation with the intention of intimidating the Plaintiffs and others from the exercise of their rights under the First Amendment as alleged herein.

3. Plaintiffs' First Amendment protected activity was the substantial or motivating factor for the wrongful disciplinary action taken against the Plaintiffs.

76. Metro, and the Defendant Carr, having been duly warned, adopted and participated in a practice, policy, and custom in violation of the constitutional rights of the Plaintiffs and are therefore liable.

COUNT II: VIOLATION OF THE EDUCATION TRUTH IN REPORTING AND EMPLOYEE PROTECTION ACT OF 1989

77. The State of Tennessee has enacted T.C.A. §§ 49-50-1401, et seq. The purpose of this statute was stated by the General Assembly in T.C.A. § 49-50-1402 as follows:

> (a) The purpose of this part is to discourage persons, whether employed, elected or appointed, who are required to furnish statistical data, reports or other information to local or state departments, agencies or legislative bodies, from knowingly and willfully making or causing to be made any false or inaccurate compilation of statistical data, reports or information related to the operation of an LEA as defined in § 49-1-103. It is the intent of the general assembly to reduce the waste and mismanagement of public education funds, to reduce abuses in governmental authority and to prevent illegal and unethical practices.
>
> (b) To help achieve these objectives, the general assembly declares that public education employees should be encouraged to disclose information on actions of LEAs that are not in the public interest and that legislation is needed to ensure that any employee making those disclosures shall not be subject to disciplinary measures, discrimination or harassment by any public official.

78. This statute is remedial in nature and under the law of the State of Tennessee should be interpreted and construed liberally.

79. T.C.A. § 49-50-1403 (1) defines "disciplinary action" as "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, reprimand, admonishment, reduction enforced, withholding of work, unsatisfactory or below standard performance evaluation, whether threat such discipline or penalty. All three plaintiffs have been subjected to disciplinary actions, including, but not limited to, reprimands, transferring and reassignments and unsatisfactory or below standard performance evaluations.

80. T.C.A. § 49-50-1403 (2) defines "disclosure of information" as the "written provision of evidence to any person, the Department of Education, a legislator or individual employee of the department of general assembly, testimony before any committee of the general assembly regarding any action, policy, regulation, practice or procedure, including, but not limited to, the waste of public education funds, mismanagement, falsification of state required reports, inaccurate compilation of statistical data or reports or abuse of authority by locally employed, elected, or appointed officials, or employees of an LEA.

81. T.C.A. § 49-50-1403(3) defines "person" or "persons" to include members of the local Board of Education, the director of the school system, supervisors, principals, and other individual school system employees.

82. T.C.A. § 49-50-1404 provides that "No person or persons required by state law, or rules or regulations promulgated pursuant to those laws to collect, manage, review and maintain accurate records pertaining to the operation of an LEA shall knowingly and willfully make or cause to be made any false statement in any detail of statistical or financial data, reports or other information requested or required by a state official, employee, agency, department, board, commission or other body in the executive branch of state government, or any board, commission, committee, member or employee of the legislative branch of state government."

83. MNPS' manipulation of the EOC tests and the data which was to be reported to the state pursuant to the First to the Top Act, T.C.A. § 49-1-302 *et seq.* constitute false statements made to state agencies in violation of T.C.A. § 49-50-1404.

84. T.C.A. § 49-50-1408 specifically permits disclosure of the falsification, waste, or mismanagement to the Tennessee Department of Education or to a committee of the General Assembly or to an individual official, member, or employee of the department or committee.

85. Plaintiffs disclosed information within the meaning of this statute to the Department of Education and to the House Education Committee of the Tennessee General Assembly and to Representative Rick Womick, and Representative Harry Brooks.

86. T.C.A. § 49-50-1408(c) provides "... a person reporting shall be presumed to be acting in good faith and shall thereby be immune from any liability, civil or criminal, that might otherwise be incurred or imposed for the reporting."

87. T.C.A. § 49-50-1409 creates a civil cause of action in the persons reporting against any person or employer who causes a disciplinary action or threat of disciplinary action against the reporting person. The statute permits the party to "seek appropriate injunctive relief or damages for each violation" of the law.

88. T.C.A. § 49-50-1409 further permits the trial court to order a variety of damages together with the costs of the litigation and a reasonable attorney's fee.

WHEREFORE, Plaintiffs demand:

1. That process be issued and the Defendants to answer within the time required by law;
2. That the Court upon final hearing declare and find that the actions and policy of the Defendants have violated Plaintiffs' rights to free speech, which rights are guaranteed by the First Amendment to the U.S. Constitution.
3. That the Court issue a permanent injunction enjoining the Defendants from further deprivation of the constitutional rights of the Plaintiffs.
4. That the Court upon final hearing declare that the Defendants are liable for violating the Education Truth in Reporting Act of 1989, T.C.A. § 40-50-1401 *et seq.*
5. The Plaintiffs be awarded such damages as will fully compensate Plaintiffs for all injury caused by the Defendants actions and failure to act as alleged herein;

6. That Plaintiffs be awarded attorney's fees, expenses, and costs as authorized under 42 USC § 1988 and T.C.A. § 49-50-1409.

7. That Plaintiffs be awarded such additional and general relief to which they may be entitled, at law or in equity.

Plaintiffs demand a trial by jury for all issues so triable.

Respectfully Submitted,

W. Gary Blackburn (#3484)
Bryant Kroll (#33394)
THE BLACKBURN FIRM, PLLC
213 5TH Avenue North, Suite 300
Nashville, TN 37219
Telephone: (615) 254-7770
Facsimile: (866) 895-7272
Email: gblackburn@wgaryblackburn.com
bkroll@wgaryblackburn.com

Attorneys for Plaintiffs

RICK WOMICK
STATE REPRESENTATIVE
34TH LEGISLATIVE DISTRICT

TELEPHONE: (615) 741-2804
FAX: (615) 253-0322

House of Representatives
State of Tennessee

Nashville

LEGISLATIVE OFFICE:
G29 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0134

COMMITTEES:
EDUCATION ADMINSTRATION
EDUCATION ADMINISTRATION - SUB
CONSUMER AND HUMAN RESOURCES

January 8, 2016

Metropolitan Nashville Public Schools
2601 Bransford Avenue
Nashville, Tennessee 37204

To Whom It May Concern:

This letter is to inform all individuals and interested parties on the handling of redacted and unredacted evidence given to the Tennessee House of Representatives by Kelly Brown, Robert Brown, and Shana West, employees of Metro Nashville Public Schools (MNPS). The evidence given by these three individuals, who are protected under the Tennessee "Whistle Blower" statute, proves that MNPS removed students just prior to end of course exams during the students second semester, and did not allow these students to take the end of course exams as is required by state law.

All redacted and unredacted copies of evidence provided to Representative Harry Brooks, Chairman of the House Education Committee, by Mr. and Mrs. Brown and Mrs. West, were turned over to House of Representative lawyers for review in accordance with all privacy laws, in particular the Family Educational Rights and Privacy Act (FERPA). No other state legislators had access to the redacted or unredacted copies and Chairman Brooks opted to turn his redacted copy over the House Education Committee Attorney for her preliminary review and analysis. All redacted and unredacted copies are being used by investigators of the Tennessee General Assembly and the Tennessee Department of Education in accordance to the FERPA to verify the presented evidence and the students involved.

In this investigative process, MNPS Central Office has been given copies of this evidence, redacted and/or unredacted, by state investigators for the sole purpose to assists investigators in verifying its authenticity and determining the students involved in the removal from classes prior to the end of course exams.

rep.rick.womick@capitol.tn.gov

Any use of the evidence provided to the MNPS Central Office by the State of Tennessee for purposes outside of the investigation, such as attempted retribution against protected witnesses under the "Whistle Blower" statute, may in and of itself be a violation of the FERPA by MNPS. Additionally, any such retribution attempts by MNPS may necessitate the involvement of the State's Attorney's General in the enforcement of the "Whistle Blower" statute.

Sincerely,

Rick Womick

Rick Womick
State Representative
34th Legislative District

RW:scs

RICK WOMICK
STATE REPRESENTATIVE
34TH LEGISLATIVE DISTRICT

TELEPHONE: (615) 741-2804
FAX: (615) 253-0322

House of Representatives
State of Tennessee

Nashville

LEGISLATIVE OFFICE:
G29 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0134

COMMITTEES:
EDUCATION ADMINSTRATION
EDUCATION ADMINISTRATION - SUB
CONSUMER AND HUMAN RESOURCES

For Public Dissemination:

The Speaker of the Tennessee House of Representatives, Representative Beth Harwell, House Education Administration and Planning Chairman Representative Harry Brooks, and House Education Instruction and Programs Chairman John Forgety have authorized a special study by members of the House Education Committee to hear testimony regarding presented evidence and alleged manipulation of End of Course Examinations, school performance scores, and district performance scores by Metropolitan Nashville Public Schools (MNPS).

Tennessee Code Annotated 49-6-6001 requires that all end of course examinations be given to students in English I,II,II, Algebra I,II, Geometry, U.S. History, Biology I, Chemistry, and Physics, with the results being factored into the students final grade.

All individuals who have information regarding the removal of students from these courses prior to end of course examinations by MNPS and who are willing to offer testimony to or testify before the Tennessee House of Representatives Education Study, will be afforded the full protection and immunity afforded to them under TCA 8-50-116, known as the "Tennessee Whistle Blower Law." (See attached)

I encourage all teachers, counselors, principals, and administrators to come forward and reveal any information as it pertains to the aforementioned allegations and evidence. The integrity of our school system, the education of our children, and the confidence of the public depends on revealing and correcting any improprieties that exist in our schools, districts, or state run testing system.

Thank you.

Respectfully,

Rick Womick

Rick Womick
State Representative
34th Legislative District

RW:scs
Attachments

EXHIBIT B

rep.rick.womick@capitol.tn.gov

8-50-116. Reporting violations of state agency, employee, or contractor.

(a) (1) It is the intent of the general assembly that state employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority or entity, evidence of activity by a state agency or state employee or state contractor constituting violations of state or federal law or regulations, fraud in the operations of government programs, misappropriation of state or federal resources, acts which endanger the health or safety of the public or employees, and mismanagement of programs, funds, or abuses of authority.

(2) The general assembly further finds and declares that public servants best serve the citizens when they can be candid and honest without reservation in conducting the public's business.

(3) It is the further intent of the general assembly that state employees be free of intimidation or harassment when reporting to public bodies about matters of public concern, including offering testimony to, or testifying before, appropriate legislative panels.

(b) (1) No head of any state department, agency or institution, state employee exercising supervisory authority, other state employee or state contractor shall recommend or act to discharge, demote, suspend, reassign, transfer, discipline, threaten or otherwise discriminate against a state employee regarding the state employee's evaluation, promotion, compensation, terms, conditions, location or privileges of employment, nor may any state employee or state contractor retaliate against another state employee because the employee, or a person acting on behalf of the employee, reports or attempts to report, verbally or in writing:

(A) The willful efforts of such person or agency or contractor to violate a state or federal law, rule or regulation which had or would have had a material and adverse effect upon program operations or program integrity, or the willful efforts to conceal such a violation;

(B) Acts which constituted fraud against the state, the federal government, the public or any fellow employee;

(C) The willful misappropriation of state or federal resources;

(D) Acts which posed an unreasonable and specific danger to the health or safety of the public or employees; or

(E) Acts constituting gross mismanagement of a program, gross waste of state or federal funds, or gross abuse of authority;

(2) The head of the state department, agency or institution or other state employee exercising supervisory authority over the state employee may, however, take any appropriate

action or appropriate disciplinary action in relation to the reporting or attempted reporting of any information which is believed in good faith by such department head or other state employee exercising supervisory authority to be fraudulent, dishonest or with willful disregard for the truth or falsity of the information.

(3) No head of any state department, agency, or institution, state employee exercising supervisory authority, other state employee or state contractor shall recommend or act to discharge, demote, suspend, reassign, transfer, discipline, threaten or otherwise retaliate or discriminate against a state employee regarding the state employee's evaluation, promotion, compensation, terms, conditions, location, or privileges of employment because the employee refused to carry out a directive if the directive constitutes a violation of state or federal law, rule or regulation, written policy or procedure which materially and adversely affects the operations or integrity of a program or if the directive poses an unreasonable and specific danger to the health or safety of the employee, the employees or the public.

(c) Any state employee injured by a violation of subsection (b) may maintain an action in circuit or chancery court within one (1) year after the occurrence of the alleged violation of this section for actual damages, injunctive relief, or other remedies provided in this section against the person or agency or state contractor, or any of them, who committed the violation. An act or conduct constituting part of an alleged continuing pattern of violations of this section shall only be considered in calculating any damages if an action is brought within one (1) year of the occurrence of the act.

(d) (1) A court, in rendering a judgment in an action brought pursuant to this section, may order injunctive relief, actual damages, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, costs, reasonable attorney's fees or any combination thereof.

(2) If an application for a permanent injunction is granted, the employee shall be awarded costs and reasonable attorney's fees.

(3) If in an action for damages the court finds that the employee was injured by a willful and malicious violation of this section, by a criminal violation based upon this section or by a violation based upon an effort to obtain personal gain, the court may award as damages up to three (3) times the amount of actual damage plus costs and reasonable attorney's fees against the individual or individuals found to be in violation of this section.

(e) No head of any state department, agency or institution or other state employee exercising supervisory authority nor any agency of the state of Tennessee shall be found liable pursuant to this section if the head of any state department, agency or institution or other state employee exercising supervisory authority was acting within the scope of such employee's apparent lawful orders or authority and in good faith in such person's reasonable interpretation of any rule or

regulation or was acting in good faith in such person's direction to the employee to implement any law, regulation, policy or procedure related to the operation of any program of such agency which is the subject of the report or attempted report pursuant to this section.

(f) Notwithstanding any law to the contrary, any head of any state department, agency or institution or other state employee exercising authority shall be subject to the protections of § 8-42-103 if it is determined such person was acting within the scope of such person's apparent lawful orders or authority and was not acting willfully, maliciously, criminally or for personal gain; and such person shall be further subject to the protection contained in the provisions for the board of claims under § 9-8-112 relative to the payment of any judgments, costs and attorney's fees where it is determined that such person was acting within the scope of such person's apparent lawful orders or authority and was not acting willfully, maliciously, criminally or for personal gain.

(g) Nothing in this section shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or state law or regulation.

Acts 2000, ch. 709, § 1.

Section to Section References. This section is referred to in §§ 4-35-107, 8-4-409, 49-14-103.

NOTES TO DECISIONS

1. Summary Judgment Proper.

1. Summary Judgment Proper.

Trial court did not err in granting the Tennessee Department of Mental Health and Developmental Disabilities and the Commissioner of the Department summary judgment because they presented evidence that the doctor's position was included in the reduction in force since he was the least qualified; the doctor presented no evidence of an actual causal connection between his reports and the elimination of his position. Morson v. Tenn. Dep't of Mental Health & Developmental Disabilities, — S.W.3d —, 2014 Tenn. App. LEXIS 283 (Tenn. Ct. App. May 14, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 795 (Tenn. Sept. 18, 2014).

Collateral References.

What constitutes activity of private-sector employee protected under state whistleblower protection statute covering employee's "report," "disclosure," "notification," or the like of wrongdoing — Nature of activity reported. 36 A.L.R.6th 203.

What constitutes activity of public or state employee protected under state whistleblower protection statute covering employee's "report," "disclosure," "notification," or the like of wrongdoing — Nature of activity reported. 37 A.L.R.6th 137.

8-42-103. Defense counsel for state employees.

(a) When a civil action for damages is commenced in any court by any person against any state employee as defined in this chapter for any acts or omissions of the state employee within the scope of the employee's employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain, the attorney general and reporter has the discretion to provide representation to the employee. Such representation may be provided by:

(1) The attorney general and reporter's assistants;

(2) Attorneys appointed by the attorney general and reporter; or

(3) Payment of reasonable compensation of counsel approved by the attorney general and reporter. Attorney's compensation, court costs, and other necessary incidental expenses in connection with the action shall be paid from the funds appropriated to the attorney general and reporter pursuant to this chapter. The method of providing representation is within the sole discretion of the attorney general and reporter. Notwithstanding any provision of the law to the contrary, the attorney general and reporter is specifically authorized to appoint attorneys and to determine their compensation to fulfill the purpose of this chapter.

(b) For the exclusive purpose of this section, "state employee" also includes attorneys appointed by a court, or other agency authorized by law to make such appointments, to represent an indigent when a civil action for damages is commenced against such attorney for any act or omission in the course of representing such indigent. Notwithstanding any provision of law to the contrary, such attorney shall not be considered a state employee for any other purpose including, but not limited to, §§ 9-8-112 and 9-8-307.

(c) For the exclusive purpose of this section, "state employee" also includes any person who performs the functions of disciplinary counsel or other investigatory or prosecutorial functions pursuant to title 17, chapter 5 when a civil action for damages is commenced against such person for any act or omission in the course of performing the duties described in title 17, chapter 5. Notwithstanding any law to the contrary, such person shall not be considered a state employee for any other purpose including, but not limited to, §§ 9-8-112 and 9-8-307.

(d) For the exclusive purpose of this section, "state employee" also includes any expert witness appearing and testifying on behalf of the department of health at any administrative hearing or other similar proceeding held with respect to a disciplinary or other action against any person or entity required to be licensed, permitted, certified, or authorized by any board, council, committee, or agency created pursuant to title 63 and title 68, when a civil action for damages is commenced against such expert witness for any act or omission in the course of appearing and

testifying. Notwithstanding any law to the contrary, such witness shall not be considered a state employee for any other purpose including, but not limited to, §§ 9-8-112 and 9-8-307.

Acts 1973, ch. 128, § 3; T.C.A., § 8-4203; Acts 1980, ch. 681, § 1; 1983, ch. 67, §§ 1, 3; 1984, ch. 972, § 19; 1988, ch. 768, § 1; 1995, ch. 370, § 2; 2012, ch. 949, § 1; 2013, ch. 212, § 1.

Amendments. The 2012 amendment added (c).

The 2013 amendment added (d).

Effective Dates. Acts 2012, ch. 949, § 2. May 10, 2012.

Acts 2013, ch. 212, § 2. April 23, 2013.

Cross-References. Counsel for national guardsmen, § 58-1-227.

Defense of local education agencies and employees in asbestos-related litigation, § 8-6-109.

Section to Section References. This section is referred to in §§ 4-51-135, 8-50-116.

Law Reviews.

Selected Tennessee Legislation of 1983 (N. L. Resener, J. A. Whitson, K. J. Miller), 50 Tenn. L. Rev. 785 (1983).

Attorney General Opinions. Defense of substitute judge designated by Supreme Court, OAG 97-004 (1/24/97).

Claims against general sessions judge for conduct while sitting by interchange, OAG 97-005 (1/24/97).

Defense of community service agencies and their boards, OAG 97-092 (6/26/97).

Cited: Williams v. State, 139 S.W.3d 308, 2004 Tenn. App. LEXIS 43 (Tenn. Ct. App. 2004).

9-8-112. Final judgments against state employees.

(a) (1) The board of claims is authorized to pay final judgments for state employees, as defined in § 8-42-101, for any damages, including interest thereon, which are awarded in a final judgment in a civil lawsuit against the employee in a court of competent jurisdiction where it is determined by the board that the incident on which such damages were awarded occurred when the employee was acting in good faith within the scope of such employee's official duty and under apparent lawful authority or orders.

(2) No final judgment or interest thereon shall be paid where the employee's conduct amounted to gross negligence or willful, intentional or malicious conduct.

(3) Any portion of the judgment covered by liability insurance will not be paid.

(4) Settlements or compromises of litigation reached out of court by mutual agreement between the parties may be disallowed by the board if the board determines that the terms of the proposed settlement have no relationship to the employee's liability and the injury or damage caused.

(b) In order for any payment to be made as authorized herein, the employee must have exercised such employee's right to retain counsel in accordance with title 8, chapter 42, to defend such employee in the action filed or must be represented by the attorney general and reporter. No payment shall be made unless the employee shall notify, in writing, the attorney general and reporter of the existence of such action within ten (10) days after process is served personally on the employee. This requirement shall be met by an employee's timely filing of a request for the employment of counsel with the defense counsel commission, and shall not be required where process has been served on the attorney general and reporter.

(c) Any final judgment against an employee whose act or omission gave rise to the claim shall constitute a complete bar to any action, by reason of the same subject matter, against the state of Tennessee. Likewise, any judgment, if permitted or awarded by the state, shall constitute a complete bar to any action, by reason of the same subject matter, against a state employee as defined in § 8-42-101.

(d) This section shall not be construed as a waiver of official or sovereign immunity where the injury arises from the act, or failure to act, of an employee where the act is the type of act for which the employee would be or heretofore has been personally immune from liability nor as a waiver of any other defense or jurisdictional bar available to the employee. Furthermore, this section shall not be construed under any circumstances as making the state an insurer of the aforementioned state employees nor as constituting a waiver of the sovereign immunity of the state.

(e) In order for payments to be made as authorized herein, an employee must submit a written request to the board, together with a certified copy of the judgment against the employee, within fifteen (15) days following the entry of the judgment. The board shall act on a request promptly and shall give the employee written notice of its action. The board's decision shall be judicially reviewable by the employee as a final decision in a contested case pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, part 3.

(f) This section applies to final judgments rendered on or after July 1, 1979.

(g) This section shall apply to causes of action arising on or after January 1, 1985, only as set forth in subsection (h).

(h) (1) The board of claims, upon determining that the officer or employee was acting within the scope of the officer's or employee's official duties, shall reimburse the affected officer or employee for actual damages and costs, including attorneys fees, awarded by judgment or settlement up to the limits found in § 9-8-307(e), against state officers and employees for any cause of action arising on or after January 1, 1985, where the state officers' or employees' immunity set forth in § 9-8-307(h) is not sustained. Notwithstanding the foregoing, the board of claims may, in its sole discretion, reduce the reimbursement provided in this subsection (h) if the board finds a circumstance to exist which makes such a reduction proper and just. Such a circumstance may include, but is not limited to, the failure of the officer or employee to fully cooperate in the investigation and defense of the litigation. In cases where the judgment or settlement is in excess of the limits found in § 9-8-307(e), the board of claims may pay any of the amounts in excess of those limits where such reimbursement is found to bear a reasonable relationship to the officer's or employee's liability or the injury or damage caused.

(2) For purposes of this subsection (h), actions deemed to be within the scope of official duties include, but are not limited to, actions taken pursuant to the statutes, policies or procedures of the state of Tennessee, or when the officer or employee had reason to believe that the officer or employee acted pursuant to the statutes, policies or procedures of the state.

(3) Payments may be denied pursuant to this subsection (h) if the officer or employee or the officer's or employee's counsel have not made reasonable efforts to defend or if the officer's or employee's actions were grossly negligent, willful, malicious, criminal or done for personal gain. All other applicable provisions of this section shall apply to this subsection (h). The board may promulgate rules and regulations implementing this subsection (h).

Acts 1982, ch. 717, § 1; 1983, ch. 68, § 1; T.C.A., § 9-8-220; Acts 1984, ch. 972, § 19; 1985, ch. 105, § 13; 1985, ch. 322, §§ 1, 2; 1995, ch. 260, § 2.

Compiler's Notes. This section may be affected by § 9-1-116, concerning entitlement to funds,

absent appropriation.

Cross-References. Claims against the state, title 9, ch. 8, parts 3 and 4.

Defense counsel for state employees, § 8-42-103.

Employment of private counsel, § 8-42-104.

Section to Section References. This section is referred to in §§ 4-51-135, 8-42-101, 8-42-103, 8-42-104, 8-50-116, 9-8-108, 58-2-811.

Cited: Adkins v. McCartt, 723 S.W.2d 627, 1986 Tenn. App. LEXIS 3218 (Tenn. Ct. App. 1986); Jain v. University of Tennessee, 670 F. Supp. 1388, 1987 U.S. Dist. LEXIS 8708 (W.D. Tenn. 1987).

Collateral References.

Payment of attorneys' services in defending action brought against officials individually as within power or obligation of public body. 47 A.L.R.5th 553.

THE BLACKBURN FIRM, PLLC

213 FIFTH AVENUE NORTH, SUITE 300 • NASHVILLE, TN 37219
P (615) 254-7770 • F (866) 895-7272

W. GARY BLACKBURN
RULE 31 MEDIATOR

BRYANT KROLL

January 5, 2016

Mr. Fred Carr
Chief Operating Officer
Metropolitan Nashville Public School
2601 Bransford Avenue
Nashville, TN 37204

RE: Mrs. Kelly Brown, Mr. Robert C. Brown, Shana Claud-West

Dear Mr. Carr,

This letter is in response to your three essentially identical letters to Mr. and Mrs. Brown and Ms. Claud-West, each of whom I represent. You state that interim director Chris Henson has, "tasked" (sic) you with the responsibility of conducting a review of "all data, background and information regarding recent allegations made in the media and in front of the Tennessee state legislature regarding course placement decisions and end of course testing in Metro Schools." Your letters demonstrate no such intention.

In the event you are seriously concerned with an objective investigation of the deplorable conduct which has been reported in the media, I presume you will, without fail, interview each principal and assistant principal involved as well as any person, present or past, employed at the central office who may have given direction to any subordinate to engage in this appalling behavior.

I have copied the Director of Law on this letter because I also represent one of the

EXHIBIT C

victims, Ms. Toni Jones, whose class action lawsuit is pending in the Chancery Court for Davidson County, and as yet unanswered. Your investigation will not only be requested under the applicable Tennessee Open Records statutes, but also will be the subject of specific discovery requests in that case. Each of my clients is anticipated to be a material witness in Ms. Jones' lawsuit.

You have made a broad accusation that certain "confidential student records" were given to "members of the state legislature." I presume you understand that a committee of the General Assembly conducted a hearing regarding the irresponsible behavior of MNPS and the possible violations of State law this conduct entailed. Representative Womick has stated that no retaliation of any kind should be undertaken against these brave public servants in spite of the statute he thought might apply. I can assure you, Mr. Carr, that no retaliation of any kind, directly or indirectly, whether by MNPS as an institution or by you or any other person individually will be tolerated. My clients are public employees who spoke out publicly about a matter of public concern. Their speech is therefore protected by the First Amendment to the Constitution of the United States. This principal is clearly established, such that neither you nor MNPS may successfully argue qualified immunity in response to any lawsuit based on retaliation.

With regard to your motivated accusations of FERPA violations, you must first advise me of what specific records you claim were inappropriately disclosed to a committee of the General Assembly charged with overseeing various aspects of public education in our state. I am confident, for example, that the records of Ms. Jones were disclosed with the knowledge and participation of this young lady and her mother, although any records furnished did not, at the time provided, disclose her name or

other information.

Your letters failed to mention that what may not be disclosed is "personally identifiable information" from an educational record of a student. If you are going to accuse these persons of violating this law, then it is necessary that you identify which specific records disclose personally identifiable information, and about whom. No such information has been intentionally disclosed, and the only name of any student which has been reported in the press is that of my client, Ms. Jones, who is of age and authorized the filing of the lawsuit.

The deplorable behavior of your subordinates has inflicted serious harm on numerous children. One of your subordinates testified before the legislative committee in a deceptive manner intended to suggest that none of what has been alleged is true. This person has been intentionally untruthful, and it is your duty to understand that fact and to act accordingly.

Your letter is but another indication of the systemic failures of our public schools. Matters of serious concern have been raised and the response has been denial and deception. I noticed for example, that certain witnesses were directed not to answer questions before the legislative committee because of the pending Jones lawsuit. One is forced to wonder precisely what "privilege" was asserted. In the course of Ms. Jones' case, those issues will be explored.

Our rules provide that sanctions may be imposed against a party that alters or destroys evidence in a civil case. Your attorney can explain the doctrine of spoliation to you.

In this regard, I specifically request that you preserve any and all emails from or to you, all memorandum, notes and records of any kind related to my clients or to the

lawsuit brought by Ms. Jones. I also request that you specifically preserve, in a manner suitable for production all documents, records, or things, including emails and notes of conversations, regarding your efforts to make accusations of any kind against my clients.

Because your conduct may result in probable further litigation involving MNPS and you personally, I will attend any meeting which you may purport to conduct. I've already spoken to the fact that Ms. Claud-West is unavailable due to her FMLA leave. You are surely aware that Mr. and Mrs. Brown are husband and wife. It seems intentionally inefficient and harassing to schedule their conferences three hours apart, with the attempt to question Ms. Claud-West in the intervening time. I ask that this be a single meeting at which Mr. and Mrs. Brown appear.

Finally, I note in your letter that although you have been "tasked" with the responsibility to review the accusations your letter states transparently that the only purpose of the meeting is to gather information regarding "apparent access and release of protected student data," none of which is identified, rather than to seek the truth of what occurred.

Please respond in writing as to whether this meeting is confined to that one subject rather than the basis for the disclosures made by my clients in their attempts to provide more protection for these pupils than that of which you and your subordinates appear capable.

Very truly yours,
THE BLACKBURN FIRM, PLLC

W. Gary Blackburn

WGB/kd

cc: Chris Henson
Jon Cooper, Esquire

RICK WOMICK
STATE REPRESENTATIVE
34TH LEGISLATIVE DISTRICT

TELEPHONE: (615) 741-2804
FAX: (615) 253-0322

House of Representatives
State of Tennessee

Nashville

LEGISLATIVE OFFICE:
G29 WAR MEMORIAL BUILDING
NASHVILLE, TENNESSEE 37243-0134

COMMITTEES:
EDUCATION ADMINSTRATION
EDUCATION ADMINISTRATION - SUB
CONSUMER AND HUMAN RESOURCES

January 8, 2016

Metropolitan Nashville Public Schools
2601 Bransford Avenue
Nashville, Tennessee 37204

To Whom It May Concern:

This letter is to inform all individuals and interested parties on the handling of redacted and unredacted evidence given to the Tennessee House of Representatives by Kelly Brown, Robert Brown, and Shana West, employees of Metro Nashville Public Schools (MNPS). The evidence given by these three individuals, who are protected under the Tennessee "Whistle Blower" statute, proves that MNPS removed students just prior to end of course exams during the students second semester, and did not allow these students to take the end of course exams as is required by state law.

All redacted and unredacted copies of evidence provided to Representative Harry Brooks, Chairman of the House Education Committee, by Mr. and Mrs. Brown and Mrs. West, were turned over to House of Representative lawyers for review in accordance with all privacy laws, in particular the Family Educational Rights and Privacy Act (FERPA). No other state legislators had access to the redacted or unredacted copies and Chairman Brooks opted to turn his redacted copy over the House Education Committee Attorney for her preliminary review and analysis. All redacted and unredacted copies are being used by investigators of the Tennessee General Assembly and the Tennessee Department of Education in accordance to the FERPA to verify the presented evidence and the students involved.

In this investigative process, MNPS Central Office has been given copies of this evidence, redacted and/or unredacted, by state investigators for the sole purpose to assists investigators in verifying its authenticity and determining the students involved in the removal from classes prior to the end of course exams.

rep.rick.womick@capitol.tn.gov

Any use of the evidence provided to the MNPS Central Office by the State of Tennessee for purposes outside of the investigation, such as attempted retribution against protected witnesses under the "Whistle Blower" statute, may in and of itself be a violation of the FERPA by MNPS. Additionally, any such retribution attempts by MNPS may necessitate the involvement of the State's Attorney's General in the enforcement of the "Whistle Blower" statute.

Sincerely,

Rick Womick

Rick Womick
State Representative
34th Legislative District

RW:scs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

KELLY BROWN, ROBERT BROWN, and SHANA CLAUD-WEST	)	
	)	**Case No. 3:16-cv-02737**
Plaintiffs,	)	
	)	**Judge Crenshaw**
v.	)	**Magistrate Judge Frensley**
	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
	)	
Defendants.	)	

THE METROPOLITAN GOVERNMENT'S MOTION TO DISMISS

The Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") moves to dismiss all claims brought against it on two grounds. First, because the complaint only contains conclusory allegations regarding municipal liability and fails to identify any custom, policy, or practice of the Metropolitan Government that was the "moving force" behind Plaintiffs' injuries. Second, the Education Truth in Reporting and Employee Protection Act ("ETREPA") does not apply to reports concerning the removal of students from courses prior to an end of course ("EOC") exam being given. ETREPA only applies to reports on falsification of records or the waste/mismanagement of public education funds. ETREP does not apply to an area of education that is devoid of any state laws, rules or regulations, such as removal of students from class and placement in another.

In support of its Motion to Dismiss the Metropolitan Government relies on its contemporaneously filed Memorandum of Law.

Respectfully submitted,

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #23571
DIRECTOR OF LAW

/s/ Melissa Roberge
Keli J. Oliver (#21023)
Melissa Roberge (#26230)
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341
Counsel for the Metropolitan Government

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing has been served via the court's electronic filing system to:

W. Gary Blackburn
The Blackburn Law Firm, PLLC
213 Fifth Avenue North
Suite 300
Nashville, TN 37219
(615) 254-7770
gblackburn@wgaryblackburn.com

on this 9th day of December 2016.

/s/Melissa Roberge
Melissa Roberge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

KELLY BROWN, ROBERT BROWN, and SHANA CLAUD-WEST	)	
	)	**Case No. 3:16-cv-02737**
Plaintiff,	)	
	)	**Judge Crenshaw**
v.	)	**Magistrate Judge Frensley**
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF THE METROPOLITAN GOVERNMENT'S MOTION TO DISMISS

The Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") moves to dismiss all claims brought against it on two grounds. First, because the complaint only contains conclusory allegations regarding municipal liability and fails to identify any custom, policy, or practice of the Metropolitan Government that was the "moving force" behind Plaintiffs' injuries. Second, the Education Truth in Reporting and Employee Protection Act ("ETREPA") does not apply to reports concerning the removal of students from courses prior to an end of course ("EOC") exam being given. ETREPA only applies to reports on falsification of records or the waste/mismanagement of public education funds. ETREP does not apply to an area of education that is devoid of any state laws, rules or regulations, such as removal of students from class and placement in another.

FACTS[1]

Kelly Brown, Robert Brown, and Shana Claud-West are all employees of Metropolitan Nashville Public Schools ("MNPS"). Ms. Brown and Ms. West are guidance counselors, while Mr. Brown is a licensed teacher. Through their employment, Plaintiffs became aware that principals at Hunters Lane High School and Pearl Cohn High School directed subordinates to remove students who had failed predictive tests from classes with an EOC exam.[2] Students were placed in a credit recovery program known as A+. Because of their placement in an A+ class, those students did not take the EOC exam, and there were no scores to report for them.

After bringing their concerns to MNPS personnel and News Channel 5 reporter Phil Williams, the Plaintiffs informed Rep. Womick, a legislative member of the Joint Education Committee for the Tennessee General Assembly, that MNPS had reassigned a number of students prior to EOC exams. Thereafter, Rep. Womick issued a public notice soliciting testimony and offering protection under the Tennessee Whistle Blower Law, Tenn. Code Ann. § 8-50-116. The Plaintiffs continued to feed Rep. Womick information about students being removed from classes and ultimately testified before the General Assembly in December 2015. The information provided included student records that MNPS believed to be protected by the Federal Education Rights and Privacy Act ('FERPA").

Ultimately, Plaintiffs testified before the Joint Education Committee on December 10, 2015 concerning the removal of students from classes prior to the EOC exam. Plaintiffs have never reported to Rep. Womick, or to any other member of the General Assembly, that MNPS, or any employee had falsely reported the EOC results.

[1] All facts are drawn from the Complaint.
[2] End of class exams are mandated in a number of high school courses. Tenn. Comp. R. & Regs. 0520-01-03-.06.

Fred Carr, MNPS's Chief Operating Officer, ultimately issued a written reprimand to all the Plaintiffs for the disclosure of information protected by FERPA on January 15, 2016.

LEGAL ANALYSIS

I. Motion to Dismiss Standard

The standard for testing the sufficiency of the allegations in a complaint in a motion to dismiss under Fed. R. Civ. P. 12(b)(6) was articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). A plaintiff must allege in a complaint "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570.

As the Supreme Court reiterated in *Iqbal*, "'where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 557). Further, the tenet that a court must accept as true all of the well-pleaded *factual* allegations contained in a complaint is inapplicable to legal conclusions: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." *Id*. (citations omitted). Determining whether a complaint states a claim for relief that is plausible on its face is a context-specific exercise that requires a court to "draw in its judicial experience and common sense." *Id.* at 679.

II. Plaintiffs have not identified any policy or custom connected to the Metropolitan Government that resulted in infringement on their civil rights.

The only allegations against the Metropolitan Government are:

> The Defendant engaged in wrongful disciplinary action prompted by the Plaintiffs' exercise of their First Amendment rights to speak out on matters of

> public concern, which right was exercised by exposing the unethical and improper testing practices occurring within the Defendant's district.
>
> The Defendant Metro and the Defendant Carr acted under color of law to deprive the Plaintiffs of the rights, privileges, and immunities of citizenship by acts of retaliation with the intention of intimidating the Plaintiffs and others from the exercise of their rights under the First Amendment as alleged herein.
>
> Metro, and the Defendant Carr, having been duly warned, adopted and participated in a practice, policy, and custom in violation of the constitutional rights of the Plaintiffs and are therefore liable.

(Doc. No. 1, Count I, at ¶ 73, 75-2, 76)

None of these conclusory statements, however, are supported by any well-pleaded factual allegations. These contentions are in fact, legal conclusions masquerading as "facts." Therefore, they are not sufficient to state a claim against the Metropolitan Government.

Municipalities can only be liable for individual constitutional violations that are part of a policy, custom, or practice. *See Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978).

Plaintiffs premise their Section 1983 municipal liability claims on this singular instance of Fred Carr issuing a written reprimand after Plaintiffs spoke to news reporter Phil Williams and testified at the House Committee concerning removal of MNPS students from certain classes. (Doc. No. 1, ¶ 3)(Defendant Fred Carr…previously served as chief operating officer of Metropolitan Nashville Public Schools and acted in this capacity at all times material to this Complaint.) Section 1983 will not support a claim against a municipality based upon a *respondeat superior* theory of liability. *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 690-91 (1978). Rather, a municipality may be held liable "only for the adoption of a 'policy or custom' that violates federally protected rights." *Schroder v. City of Fort Thomas*, 412 F.3d 724, 727 (6th Cir. 2005); *see also Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 819 (6th Cir. 2007).

Here, Plaintiffs have failed to identify a particular custom, policy, or practice, much less provide *any* well-pleaded factual support for the notion that any deprivation of Plaintiffs' First Amendment rights occurred as the result of an unconstitutional custom, policy, or practice of the Metropolitan Government; therefore, the municipal liability claim should be dismissed. *Ehrlich v. Kovack*, 135 F. Supp. 3d 638, 671 (N.D. Ohio 2015)(complaint's general allegations regarding the County in connection with the First Amendment Retaliation claim do not sufficiently identify a relevant policy or suggest that Plaintiff's injury was the result of such a policy).

III. Plaintiffs did not make a report under ETREPA and are therefore not covered under its whistleblower protections.[3]

The complaint is devoid of any facts establishing that Plaintiffs made any report regarding the falsification of records or the mismanagement of public education funds. Plaintiffs only reported the inappropriate removal of students from classes with an EOC exam. Accordingly, their claim under ETREPA must be dismissed.

ETREPA provides a cause of action for persons who have reported under its provisions and have suffered disciplinary action as a result. Tenn. Code Ann. § 49-50-1409(a). To succeed on their claim Plaintiffs must prove that they are 1) a "person" as defined by ETREPA; 2) who has reported under ETREPA's provisions; and 3) who has suffered a disciplinary action as a result. *Blair v. Rutherford County Bd. Of Educ.*, 2013 WL 3833516, *4 (Tenn. Ct. App. 2013).

ETREPA only protects school employees who report on falsification of records or the waste/mismanagement of public education funds and are disciplined as a result. *Mosley v. Kelly,* 65 F. Supp.2d 725, 731 (E.D. Tenn. 1999). Specifically:

[3] Should the Court disagree with the Metropolitan Government's position regarding ETREPA the Metropolitan Government would ask that, as an alternative, the Court decline to exercise supplemental jurisdiction over the state law claim and allow Tennessee courts to answer any issues sounding particularly in state law.

> No person or persons required by state law, or rules or regulations promulgated pursuant to those laws to collect, manage, review and maintain accurate records pertaining to the operation of an LEA shall knowingly and willfully make or cause to be made any false statement in any detail of statistical or financial data, reports or other information requested or required by a state official, employee, agency, department, board, commission or other body in the executive branch of state government, or any board, commission, committee, member or employee of the legislative branch of state government.

Tenn. Code Ann. § 49-50-1404. And

> No person or persons required by state law, or rules or regulations promulgated pursuant to those laws, to collect, manage, review and maintain accurate records pertaining to the operation of an LEA shall knowingly and willfully make or cause to be made any false statement in any detail of statistical or financial data, reports, board minutes or other information requested or required by law enforcement agencies, the judiciary or any member or employee of a law enforcement agency or the judiciary.

Tenn. Code Ann. § 49-50-1405 (West).

For Plaintiffs to prevail on their claim, the legislature must have had the intent to discourage persons who are required to make reports on removing students from classes with EOC exams from knowingly and willfully making or causing to be made any false or inaccurate report related to the operation of a local education agency. [4] *Mosley*, 65 F.Supp.2d at 731. No reports are required with regarding removing student from classes with EOC exams, however. Accordingly, ETREPA does not cover such a scenario.

[4] At the time Plaintiffs were testifying, the legislature did not consider this a report under ETREPA involving the falsifications of records required to be reported or the waste/mismanagement of employee funds. During Plaintiffs testimony to the General Assembly the Chair referenced the Tennessee Whistleblower law and legal counsel advised him that the statute only applied to state employees. Rep. Womick then asked if teachers were state employees. Counsel indicated that they were not. Rep. Womick asked the Plaintiffs if they would still like to testify. They then went on testify about end of course exams and removal of students from classes, not false reporting. http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=11210. This Court can consider Plaintiffs' testimony at the motion to dismiss stage because Plaintiffs' public testimony is a public record, is referred to in the complaint, and is central to the ETREPA claim. *See Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)(when a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein.)

As characterized by the Plaintiffs, Ms. Brown gathered "evidence demonstrating that students were improperly removed from EOC courses" and presented it to Rep. Womick (Doc. No. 1, ¶ 48). Plaintiffs' testimony before members of the House Education Committee of the General Assembly concerned MNPS's testing practices and not the falsification of records or the mismanagement of MNPS funds. There is no law that requires a report identifying students removed from a class prior to an EOC exam. In fact, there are no applicable state laws, rules or policies regarding removing students from one class and reassigning them to another. Plaintiffs do not allege that MNPS misrepresented the number of students who actually took the EOC or falsified the scores of the students who took the exam. Plaintiffs' reporting does not fall within the scope of coverage of ETREPA and the claim must be dismissed.

CONCLUSION

For the foregoing reasons, the Metropolitan Government is entitled to dismissal of all claims brought against it in this action.

Respectfully submitted,

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #23571
DIRECTOR OF LAW

/s/ Melissa Roberge
Keli J. Oliver (#21023)
Melissa Roberge (#26230)
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341
Counsel for the Metropolitan Government

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing has been served via the court's electronic filing system to:

W. Gary Blackburn
The Blackburn Law Firm, PLLC
213 Fifth Avenue North
Suite 300
Nashville, TN 37219
(615) 254-7770
gblackburn@wgaryblackburn.com

on this 9th day of December 2016.

/s/Melissa Roberge
Melissa Roberge

2013 WL 3833516
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Fonda BLAIR
v.
RUTHERFORD COUNTY
BOARD OF EDUCATION, et al.

No. M2012–00968–COA–R3–CV.
|
May 9, 2013 Session.
|
July 19, 2013.
|
Application for Permission to Appeal
Denied by Supreme Court Nov. 13, 2013.

Appeal from the Chancery Court for Rutherford County, No. 10CV698; Timothy L. Easter, Chancellor.

Attorneys and Law Firms

Fonda Blair, Murfreesboro, Tennessee, Pro Se.

Josh A. McCreary, Murfreesboro, Tennessee, for the Appellees, Rutherford County Board of Education, Rutherford County Tennessee, Ken Nolan and Martha Millsaps.

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S., and ANDY D. BENNETT, J., joined.

OPINION

RICHARD H. DINKINS, J.

***1** Teacher who brought action against Rutherford County, the Rutherford County Board of Education, and two employees of the Board appeals the grant of defendants' motion for summary judgment and dismissal of her claim that defendants violated the Education Truth in Reporting and Employee Protection Act of 1989, as well as her claims for invasion of privacy, abuse of process, misrepresentation, and harassment. We affirm the trial court's holding that there is no general cause of action under the Education Truth in Reporting and Employee Act of 1989. Finding that there are genuine issues of material fact with respect to Plaintiff's claim for retaliation which preclude summary judgment, we reverse and remand for further proceedings. We affirm the trial court's dismissal of the remaining claims.

I. FACTS AND PROCEDURAL HISTORY

Fonda Blair ("Plaintiff") was employed as a teacher with the Rutherford County school system for thirty-two years, and began working as a history teacher at Siegel High School in 2005. On May 3, 2010, Plaintiff sued the Rutherford County Board of Education; Rutherford County; Ken Nolan, the principal of Siegel High School; and Martha Millsaps, an administrative worker at the school ("Defendants"). Plaintiff asserted that Defendants had violated the Education Truth in Reporting and Employee Protection Act of 1989 ("ETREPA"), Tenn.Code Ann. § 49–50–1401, et seq., by "willfully and intentionally inaccurately communicat[ing] Plaintiff's [Tennessee Value–Added Assessment System ("TVAAS")][1] scores to the state."[2] Plaintiff amended her complaint to allege that she met with a representative of the Tennessee Department of Education and that an investigation into her allegations of misconduct against Defendants had resulted in a recommendation that she "needed to report this [inaccuracies] to the Local School Superintendent." Defendants answered, denying any misconduct and asserting affirmative defenses.[3]

Plaintiff amended her complaint a second time to include additional factual allegations and to assert claims for invasion of privacy and harassment; the second amended complaint sought $250,000 in damages from each defendant as well as discretionary and court costs.

Defendants thereafter moved for summary judgment, asserting that ETREPA did not provide a general cause of action in favor of an individual plaintiff, that Plaintiff's claims were barred by the Tennessee Governmental Tort Liability Act ("GTLA"), that the individual Defendants had immunity under the "public duty doctrine," and that Plaintiff had suffered no damages. The motion was supported by various depositions and an affidavit. Plaintiff sought to amend her complaint again; this request was denied by the court.

The trial court entered an order granting Defendants' motion for summary judgment. The court held that there was no private cause of action under ETREPA, other than a cause of action for retaliation. With respect to the alleged retaliation, the court concluded that Plaintiff suffered no disciplinary action as a result of her complaints to the Department of Education and that she could not demonstrate any damages in light of the lack of disciplinary action and the lack of evidence that her TVAAS scores had been lowered. The court held that Plaintiff's claims for invasion of privacy, abuse of process, misrepresentation, and harassment were barred under the GTLA. [4]

***2** Plaintiff appeals, asserting that the trial court erred in granting Defendants' motion for summary judgment and in failing to properly supervise discovery.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Draper v. Westerfield,* 181 S.W.3d 283, 288 (Tenn.2005). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.,* 970 S.W.2d 435, 437 (Tenn.1998). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.,* 142 S.W.3d 288, 291 (Tenn.2004); *Blair v. West Town Mall,* 130 S.W.3d 761, 763 (Tenn.2004). In our review, we consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Draper,* 181 S.W.3d at 288; *Doe v. HCA Health Servs., Inc.,* 46 S.W.3d 191, 196 (Tenn.2001); *Memphis Hous. Auth. v. Thompson,* 38 S.W.3d 504, 507 (Tenn.2001). We determine first whether factual disputes exist and, if so, whether the disputed fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd,* 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.,* 978 S.W.2d 102, 104 (Tenn.Ct.App.1998). "If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd,* 847 S.W.2d at 211.

III. ANALYSIS

A. Violation of ETREPA

1. Private Cause of Action

Before reaching the issue of whether summary judgment was proper with respect to Plaintiff's claims under ETREPA, we must determine as a matter of law what, if any, cause of action is available to Plaintiff under the act. Plaintiff contends that ETREPA "provides for a private cause of action for damages or at least a mechanism, administrative or judicial or both, for correction of manifest errors."

The purpose of the Act is set forth at Tenn.Code Ann. § 49–50–1402:

> (a) The purpose of this part is to discourage persons, whether employed, elected or appointed, who are required to furnish statistical data, reports or other information to local or state departments, agencies or legislative bodies, from knowingly and willfully making or causing to be made any false or inaccurate compilation of statistical data, reports or information related to the operation of [a Local Education Agency ("LEA")] as defined in § 49–1–103. It is the intent of the general assembly to reduce the waste and mismanagement of public education funds, to reduce abuses in governmental authority and to prevent illegal and unethical practices.
>
> (b) To help achieve these objectives, the general assembly declares that public education employees should be encouraged to disclose information on actions of LEAs that are not in the public interest and that legislation is needed to ensure that any employee making those disclosures shall not be subject to disciplinary measures, discrimination or harassment by any public official.

***3** ETREPA prohibits the following:

> No person or persons required by state law, or rules or regulations promulgated pursuant to those laws to collect, manage, review and maintain accurate records pertaining to the operation of an LEA shall knowingly and willfully make or cause to be made any false statement in any detail of statistical or financial data, reports or other

> information requested or required by a state official, employee, agency, department, board, commission or other body in the executive branch of state government, or any board, commission, committee, member or employee of the legislative branch of state government.

Tenn.Code Ann. § 49–50–1404; *see also* Tenn.Code Ann. § 49–50–1405 (prohibiting the same conduct with respect to information provided to law enforcement or the judiciary). As penalty for violating Tenn.Code Ann. §§ 49–50–1404 and –1405, the violator must "forfeit all pay and compensation for the position held for a period not to exceed one (1) year, be subject to dismissal, removal or ouster from the office or position and be ineligible for election or appointment for the same or a similar position for five (5) years ." Tenn.Code Ann. § 49–50–1406. Further, ETREPA provides that any person found to have "personally profited" from violations of Tenn.Code Ann. §§ 49–50–1404 and –1405 "shall be liable to the affected LEA or state department or agency." Tenn.Code Ann. § 49–50–1407.

As detailed above, the penalties for violating ETREPA are found at Tenn.Code Ann. §§ 49–50–1406 and –1407. There is no provision in ETREPA's statutory scheme that allows for an individual like Plaintiff, who alleges that she has been harmed by violations of Tenn.Code Ann. § 49–50–1404, to bring suit to correct perceived errors or to recover damages arising out of the violation of ETREPA. Thus, the trial correctly held that ETREPA does not provide the cause of action asserted by Plaintiff.

2. Cause of Action under Tenn.Code Ann. § 49–50–1409(a) for Retaliation

When a motion for summary judgment is made, the moving party has the burden of showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The moving party may accomplish this by either: (1) affirmatively negating an essential element of the non-moving party's claim; or (2) showing that the non-moving party will not be able to prove an essential element at trial. *Hannan v. Alltel Publ'g Co.,* 270 S.W.3d 1, 8–9 (Tenn.2008). If the moving party's motion is properly supported, "[t]he burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Id.* at 5 (citing *Byrd v. Hall,* 847 S.W.2d 208, 215(Tenn.1993)). The non-moving party may accomplish this by:

> (1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for the trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P. Rule 56.06.

***4** *Martin v. Norfolk S. Ry. Co.,* 271 S.W.3d 76, 84 (Tenn.2008) (citations omitted).

ETREPA includes a cause of action for persons who have reported under its provisions and have suffered disciplinary action as a result. Tenn.Code Ann. § 49–50–1409(a) provides:

> Any person reporting under this part shall have a civil cause of action against any person or employer who causes a disciplinary action or threat of disciplinary action against the reporting person. An action commenced pursuant to this part may seek appropriate injunctive relief or damages for each violation of this section.

Thus, to succeed under Tenn.Code Ann. § 49–50–1409(a), Plaintiff must prove that she is (1) a "person" as defined by ETREPA [5]; (2) who has reported under ETREPA's provisions [6]; and (3) who has suffered disciplinary action or threat of disciplinary action as a result. [7]

In their motion for summary judgment, Defendants sought to negate the second and third elements of Plaintiff's claim under Tenn.Code Ann. § 49–50–1409—i.e. that Plaintiff made a report under ETREPA and that she suffered disciplinary action or threat thereof as a result. In support of their motion, Defendants filed the depositions of Vicky Smith and Plaintiff, the affidavit of

Ken Nolan, the principal of Siegal High School, and a statement of undisputed material facts.

With respect to the second element, Defendants concede that Plaintiff made numerous complaints to Vicky Smith, an employee with the Tennessee Department of Education, regarding perceived irregularities in the calculation of her TVAAS score. Defendants contend, supported by Ms. Smith's deposition, that Plaintiff failed to make the report required by Tenn.Code Ann. § 49–50–1409(a) because, at the close of her investigation, Ms. Smith concluded that there were no irregularities or violations of state statute.

The cause of action set forth at Tenn.Code Ann. § 49–50–1409(a) does not require that Plaintiff prove that the allegations made in the report ultimately resulted in a finding of wrongdoing. One of the purposes of ETREPA, as set forth in Tenn.Code Ann. § 49–50–1402, is to encourage the disclosure of information and to protect those who make such disclosures from disciplinary action. ETREPA further provides that a person reporting under its provisions "shall be presumed to be acting in good faith." Tenn.Code Ann. § 49–50–1408(c). Thus, the second element of Plaintiff's claim requires only that she show that she made a report. Defendants' evidence that Plaintiff's report did not result in a finding of irregularity does not negate the second element of Plaintiff's claim and consequently does not serve as a basis for summary judgment.

With respect to the third element, Defendants sought to show that Plaintiff suffered no disciplinary action or threat thereof as a result of her report to the Department of Education. In his affidavit, Mr. Nolan attested that "[Plaintiff] has never been demoted, fired, reassigned, or in any way suffered a disciplinary action as a result of any allegations made in the Complaint, as amended." By presenting evidence that Plaintiff did not suffer disciplinary action, Defendants shifted the burden of production to Plaintiff to show that a genuine issue of material fact existed in this regard.

***5** Plaintiff submitted a document styled, "Statement of Facts in Opposition to Defendants' Motion for Summary Judgment" which disputed facts in Defendants' statement of undisputed material facts and Defendants' motion for summary judgment. In this document, Plaintiff responded to Defendants' statement that "[Plaintiff] admitted that she had never lost pay," as follows: "After I filed the lawsuit, I was denied the right to teach summer school for½ semester in 2009 (2,700) and entire summer in 2010 (5,400)." In her deposition, Plaintiff stated that she taught one session of summer school in 2010, but did not teach summer school in 2009, and that she was kept from teaching summer school due to the report she made to the Board of Education. [8]

The trial court granted Defendants' motion for summary judgment, stating:

> The Plaintiff claims at section VI of her Amended Complaint that she was "retaliated against for whistle blowing" which affected her summer school employment.
>
> ... According to the Plaintiff and Ken Nolan, Ms. Blair has received no disciplinary action. The Plaintiff was not terminated, demoted or transferred. She has not been reassigned or suspended or admonished. Furthermore, in her deposition she was unable to establish that she actually lost summer school teaching opportunities.

"Withholding of work" is included in the definition of "disciplinary action" at Tenn.Code Ann. § 49–50–1403(1); Plaintiff's allegation that she was not hired to teach summer school as she had been in the past meets the definition of "withholding of work." The materials put forth by Plaintiff relative to her loss of summer school employment satisfied her responsibility to produce evidence establishing a genuine issue of material fact regarding whether she was retaliated against as a result of her report to the Board of Education; consequently, Defendants failed to negate the third element of the Plaintiff's Tenn.Code Ann. § 49–50–1409(a) claim.

Because the Defendants failed to negate the second and third elements of Plaintiff's retaliation claim, summary judgment was inappropriate.

B. Summary Judgment with Respect to Other Claims

Plaintiff contends that the trial court erred in granting Defendants' motion for summary judgment with respect to her claims of invasion of privacy, abuse of process, misrepresentation, and harassment. [9]

1. Claims against Rutherford County and the Rutherford County Board of Education

The court granted Defendants' motion for summary judgment with respect to Plaintiff's remaining claims against Rutherford County and the Rutherford County Board of Education holding that these defendants were immune from suit pursuant to the GTLA.

Under the GTLA, governmental entities [10] are immune from suit for injuries that occur due to discharge of their functions. Tenn.Code Ann. § 29–20–201; *Hill v. City of Germantown,* 31 S.W.3d 234, 236 (Tenn.2000) (citing *Hawks v. City of Westmoreland,* 960 S.W.2d 10, 14 (Tenn.1997)). Tenn.Code Ann. § 29–20–205 removes governmental immunity for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment," but then reinstates immunity for enumerated causes of action. The following are among the causes of action for which immunity is reinstated:

> ***6** (2) False imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;
> * * *
> (6) Misrepresentation by an employee whether or not such is negligent or intentional;

Tenn.Code Ann. § 29–20–205.

In accordance with the plain language of Tenn.Code Ann. § 29–20–205, the trial court correctly held that Rutherford County and the Rutherford County Board of Education are immune from liability and suit with respect to the claims of abuse of process, invasion of privacy, and misrepresentation.

The remaining cause of action against Rutherford County and the Rutherford County Board of Education is harassment. In her brief on appeal, Plaintiff states that she "asserted a cause of action for malicious harassment under Tennessee Code Annotated § 4–21–701." [11] This Court has held that a malicious harassment claim under Tenn.Code Ann. § 4–21–701 "must be premised upon the specific categories set forth in the criminal statute, i.e. 'race, color, ancestry, religion or national origin.' " *Oates v. Chattanooga Pub. Co.,* 205 S.W.3d 418, 427–28 (Tenn.Ct.App.2006). We have reviewed the amended complaint and note that Plaintiff made no allegation that she was harassed due to her race, color, ancestry, religion or national origin; thus, Defendants were entitled to judgment as a matter of law with respect to this claim. [12]

2. Claims against the Individual Defendants

The trial court held that the Amended Complaint failed to state any cause of action against the individual defendants and that, "[t]o the extent the Plaintiff is attempting to make claims against Mr. Nolan and Ms. Millsaps individually, such claims are not support[ed] by the record for Summary Judgment purposes." Further, the court held that "no specific personal allegations against Mr. Nolan or Ms. Millsaps are made outside the scope of their employment with the Rutherford County School Board."

We have reviewed the complaint, and note as the trial court did below, that we must construe the narrative contained therein in order to determine that Plaintiff intended to set forth causes of action for invasion of privacy, abuse of process, misrepresentation, and harassment. Although the complaint describes conduct on the part of Mr. Nolan and Ms. Millsaps, much of this conduct relates to alleged violations of ETREPA, which does not create a private cause of action. The complaint does not allege facts that would hold Mr. Nolan or Ms. Millsaps individually liable for invasion of privacy, abuse of process, misrepresentation, or harassment; the trial court correctly held that these claims should be dismissed with respect to the individual defendants.

C. Discovery Matters

Plaintiff contends that the trial court erred in failing to properly supervise discovery. In her brief, Plaintiff does not cite efforts she made to secure discovery or specific orders of the court in this regard. Defendants contend that any such issues were not raised in the trial court and are not properly before this court. Because these matters were not raised at the trial court, we will not consider them on appeal.

III. CONCLUSION

***7** For the foregoing reasons, we reverse the trial court's judgment with respect to Plaintiff's claim of retaliation

under Tenn.Code Ann. § 49–50–1409(a) and remand for further proceedings. We affirm the trial court's judgment in all other respects.

Plaintiff has requested that the case be reassigned to a different judge on remand. In light of the adoption of Tenn. Sup.Ct. R. 10 regarding motions to recuse, Plaintiff should address her concerns to the trial court.

All Citations

Slip Copy, 2013 WL 3833516

Footnotes

1 The TVAAS model operates to measure the effectiveness of individual educators. In her brief, Plaintiff explained the scoring system, basing her explanation on an article from the Journal of Personnel Evaluation in Education:

> [T]he test scores utilized by TVAAS statistical model that measure growth are based on test score statistical models to measure growth utilizing the Tennessee Course Assessment Program (TCAP) and End of Course (EOC) assessment tests taken at the end of the school year by high school students in selected subjects.... The TVAAS model uses the scale scores of the students' previous test scores to predict, based on what the students did in the past in subjects, what they should do on the EOC ... predicted score, and thereupon compares it statistically to the observed [score] on the EOC. The TVAAS statistical system saves the achievement scores of every student over several years to form a continuous record (a longitudinal record). Every student's record is also linked to the school district and school that the student attended, and to the individual student's teachers. Conclusions are based not only upon each student's growth over the previous year, but also on averages of the student's growth over a three-year period.

2 Plaintiff's original complaint sought "injunctive relief, payment of lost wages resulting from lost work and opportunities for advancement, actual damages, attorney's fees, court costs, expert witness fees, other expenses."

3 Defendants asserted the following affirmative defenses: that Rutherford County and the Rutherford County Board of Education are not persons as defined at Tenn.Code Ann. § 49–50–1401; that the complaint failed to state a claim upon which relief can be granted; that Plaintiff's claim was barred as there was no disciplinary action or threat thereof; that the claim was barred under the applicable statute of limitations; the defense of comparative default; that Plaintiff failed to make an allegation of waste or mismanagement of public funds as required by the Act; and that Plaintiff failed to make a report in compliance with Tenn.Code Ann. § 49–50–1408.

4 The court stated that, although invasion of privacy, abuse of process, misrepresentation, and harassment were not specifically pled in Plaintiff's Amended Complaint, it was construing the complaint as raising these claims.

5 Tenn.Code Ann. § 49–50–1403(3) defines "person" for the purposes of ETREPA as including "members of the local board of education, the director of the school system, supervisors, principals and other individual school system employees."

6 Tenn.Code Ann. § 49–50–1408 provides a procedure for reporting violations of ETREPA:

> (a) Any person having knowledge of a knowing or willful falsification within the meaning of §§ 49–50–1404 and 49–50–1405 or the waste or mismanagement of public education funds may report or disclose the falsification, waste or mismanagement to the department of education or committee of the general assembly or individual official, member or employee of the department or committee.
>
> (b) The department shall make a thorough investigation of any written report of falsification, waste or mismanagement. No investigation of anonymous reports shall be required by this part. Reports of alleged falsification, waste or mismanagement shall be confidential only to the extent the person reporting requests that the person's name not be revealed.
>
> (c) No penalty shall attach to the failure to report and a person reporting shall be presumed to be acting in good faith and shall thereby be immune from any liability, civil or criminal, that might otherwise be incurred or imposed for the reporting

7 ETREPA defines disciplinary action as "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, reprimand, admonishment, reduction in force, withholding of work, unsatisfactory or below standard performance evaluation or the threat of such discipline or penalty." Tenn.Code Ann. § 49–50–1403(1).

8 Plaintiff testified in her deposition as follows:

> Q: ... So when we get to damages, you asked for lost wages. From what?
>
> A: Summer school.

Q: Okay. So you this you—that's the wages, what you think you should have gotten because you should have been able to work summer school in #09.

A: Right. It was a very hostile environment. After the investigation when I didn't call the investigation off, it was a change. It was a fury like I've never seen before.

9 In her brief, Plaintiff also contends that she set forth a prima facie case for retaliatory discharge under Tenn.Code Ann. § 50–1–304 and that Defendants engaged in discriminatory practices as defined by Tenn.Code Ann. § 4–21–301. Plaintiff did not raise these issues at trial, and it is well-settled that issues not raised at trial may not be raised for the first time on appeal. *Simpson v. Frontier Cmty. Credit Union,* 810 S.W.2d 147, 153 (Tenn.1991). We will not consider Plaintiff's contentions with respect to Tenn.Code Ann. §§ 50–1–304 and 4–21–301.

10 Governmental entities are defined to mean political subdivisions of the state. Tenn.Code Ann. § 29–20–102.

11 Tenn.Code Ann. § 4–21–701 states:

(a) There is hereby created a civil cause of action for malicious harassment.

(b) A person may be liable to the victim of malicious harassment for both special and general damages, including, but not limited to, damages for emotional distress, reasonable attorney's fees and costs, and punitive damages.

12 The trial court concluded that Plaintiff's harassment claims were barred by the GTLA; because Plaintiff did not make a claim of sexual harassment in the amended complaint, we do not address the court's holding.