

72 IDELR 144

118 LRP 29496

**H.C.; R.D.C., by and through his next friends, his parents, H.C. and R.D., Plaintiffs-Appellants, v. FLEMING COUNTY KENTUCKY BOARD OF EDUCATION, et al., Defendants-Appellees**

**U.S. Court of Appeals, Sixth Circuit**

17-6269

**July 11, 2018**

**Related Index Numbers**

**405.050 Harassment/Retaliation**

**405.055 In General**

**Judge / Administrative Officer**

**DANNY J. BOGGS**

**Judge / Administrative Officer**

**RAYMOND M. KETHLEDGE**

**Judge / Administrative Officer**

**ERIC L. CLAY**

On Appeal from the U.S. District Court, Eastern District of Kentucky

UNPUBLISHED

AFFIRMING a decision reported at 70 IDELR 224

**Ruling**

A Kentucky district did not violate Section 504 when it banned a grade schooler's parent from entering school grounds without prior approval after she advocated on the student's behalf. The 6th U.S. Circuit Court of Appeals affirmed the District Court's dismissal of the parent's retaliation claim at 70 IDELR 224.

**Meaning**

Educators should document every incident of a parent's inappropriate behavior on school grounds. This documentation may be critical to the district's defense if the parent later alleges the district excluded her as punishment for her advocacy. Here, the district's evidence that the parent threatened school

staff and spoke to employees in an abusive or intimidating manner convinced the 6th Circuit that the district excluded her because of her behavior as opposed to her advocacy. *Editor's note: Per court order, this decision has not been released for publication in official or permanent law reports.*

**Case Summary**

Noting that a Kentucky district kept a detailed record of a parent's "contentious and unpleasant interactions" with school staff, the 6th Circuit rejected the parent's claim that the district banned her from school grounds because she advocated on her son's behalf. The 6th Circuit affirmed the District Court's dismissal of the parent's Section 504 retaliation claim. The three-judge panel assumed without deciding that the mother's request for a Section 504 hearing and her complaints about disciplinary measures qualified as a protected activity. It also noted that the district banned the parent from school grounds shortly thereafter, which could suggest the district was responding to the parent's advocacy. However, the panel pointed out that the district offered a legitimate, nondiscriminatory reason for banning the parent from school grounds. Not only did the district have detailed records showing that the parent harassed, intimidated, and threatened its employees, but it also explained that it filed a criminal trespass complaint against the parent because she disregarded a letter banning her from entering school property without prior approval. "The burden then shifted back to [the parent] to show pretext, but she failed to present any evidence demonstrating that the proffered reasons [for her exclusion] were pretextual," the panel wrote in an unpublished decision. The 6th Circuit affirmed a decision in the district's favor reported at 70 IDELR 224.

**Full Text**

**Opinion**

**Order**

H.C. and R.D.C., pro se Kentucky residents, appeal the district court's order granting summary

judgment in favor of the defendants and dismissing their complaint. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a).

In 2016, H.C. and R.D.C., through counsel, brought this civil-rights action against the Fleming County Kentucky Board of Education ("Board") and employees Carol Thompson, Brian Creasman, and Michelle Hawkins. H.C. is the mother of R.D.C. They alleged that the defendants failed to provide R.D.C. with a free appropriate public education; discriminated against R.D.C., in violation of section 504 of the Rehabilitation Act<sup>1</sup> ("§ 504"), the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and 42 U.S.C. § 1983; violated R.D.C.'s procedural due process rights; retaliated against H.C. and R.D.C.; acted negligently; negligently trained and supervised staff; and intentionally inflicted emotional distress on H.C. and R.D.C.<sup>2</sup> The complaint concerned various incidents surrounding R.D.C.'s time as a fourth and fifth grader at Hillsboro Elementary School ("Hillsboro"), including his two suspensions for striking a student with an oversized pencil and for threatening to shoot another student, H.C.'s interactions with the defendants regarding R.D.C., and the educational services provided by the defendants.

After a period of discovery, the defendants moved for summary judgment. The district court granted the motion and dismissed the complaint in its entirety, reasoning that: (1) the defendants could not be sued in their individual capacities under § 504, the ADA, and Kentucky Revised Statutes § 344.280; (2) R.D.C. failed to exhaust his administrative remedies for his claims of violations of § 504, the ADA, and 42 U.S.C. § 1983; (3) the plaintiffs failed to support their claims of retaliation with any evidence demonstrating that the defendants' legitimate, nondiscriminatory reasons for the adverse actions were pretextual; (4) the plaintiffs failed to support their due process claim with evidence that they appealed the suspension or were denied the opportunity to appeal the suspension;

and (5) the defendants were entitled to immunity.

Attorney Edward E. Dove represented the plaintiffs in the district court and appeared on their behalf on appeal. However, citing "irreconcilable differences," Dove moved to withdraw.

We granted the motion and allowed plaintiffs thirty days to obtain new counsel or else proceed pro se. H.C. opted to continue pro se and filed a pro se appellant's brief on behalf of herself and R.D.C. The defendants now move to strike the parts of H.C.'s pro se brief that make arguments or seek relief on behalf of anyone other than H.C. The defendants also seek the dismissal of R.D.C.'s appeal for failing to file a timely brief through legal counsel.

Pursuant to 28 U.S.C. § 1654, a party may proceed pro se or be represented by counsel. A party may not proceed pro se, however, where the interests of others are at issue. *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002). Moreover, "parents cannot appear pro se on behalf of their minor children because a minor's personal cause of action is her own and does not belong to her parent or representative." *Id.* A parent may represent herself pro se to vindicate rights that may be intertwined with her child's granted under a statutory scheme such as Individuals with Disabilities Education Act ("IDEA"). See *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007). *Winkelman*, however, was predicated on rights granted directly to the parent by the statute. Here, the plaintiffs sought to vindicate R.D.C.'s rights under § 504, the ADA, and the Fifth and Fourteenth Amendments, but they did not raise a claim pursuant to the IDEA. H.C. has not responded to the defendants' motion to strike, and she thus has not indicated that any other statute authorizes her to represent R.D.C. pro se. Accordingly, H.C.'s brief applies solely to her own claims for retaliation and intentional infliction of emotional distress. Because R.D.C. failed to obtain counsel to file a brief on his behalf, his appeal is dismissed for failure to prosecute. See *Shepherd*, 313 F.3d at 970.

Insofar as H.C. appeals the denial of her claims for retaliation and intentional infliction of emotional

distress, her brief does not address the district court's legal reasoning for dismissing her claims. Instead, she argues that the district court failed to examine adequately the evidence of the physical, mental, and emotional abuse allegedly perpetrated by the defendants, including the stress placed upon her entire family and her resulting medical issues. H.C. also reiterates the mistreatment that she believes R.D.C. received at Hillsboro, specifically that Thompson called R.D.C. a liar, trouble-maker, and bully, grabbed his arm forcefully enough to cause a bruise, and made falsified calls to social services, the police, and R.D.C.'s doctor; that bullying is pervasive at Hillsboro; that other students struck R.D.C. in the head; and that the defendants banned H.C. from school property and brought false criminal charges against her. To the extent that H.C. raises new allegations on appeal, such as that the defendants' actions damaged other members of her family or that Hillsboro suffers from bullying issues generally, we will not consider them. *See Jolivette v. Husted*, 694 F.3d 760, 770 (6th Cir. 2012).

We review a grant of summary judgment de novo. *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing a motion for summary judgment, we view the evidence and all inferences drawn from the underlying facts "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Summary judgment is appropriate against a party that "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party must show that sufficient evidence exists to create a genuine issue of material fact, with a mere "scintilla" of evidence being

insufficient. *Bell v. Ohio State Univ.*, 351 F.3d 240, 247 (6th Cir. 2003).

The district court properly dismissed H.C.'s retaliation claims. H.C. alleged that the Board responded to her complaints and her request for a § 504 hearing by suspending R.D.C. twice, banning H.C. from school property, and bringing charges against H.C. for criminal trespass and truancy. See 29 C.F.R. § 33.13 (2017); Ky. Rev. Stat. § 344.280. To establish a prima facie case of retaliation, a plaintiff must show that (1) she was engaged in a protected activity, (2) the defendant knew of the protected activity, (3) the defendant took an adverse action against the plaintiff, and (4) there was a causal connection between the protected activity and the adverse action. *See A.C. ex rel. J.C. v. Shelby Cty. Bd. of Educ.*, 711 F.3d 687, 697-98 (6th Cir. 2013).

Assuming that H.C.'s request for a § 504 hearing and her complaints to the Board were protected activities known to the Board and that the Board took adverse actions against H.C. and R.D.C., she still needed to present evidence establishing a causal connection between the two. H.C. asserted that the temporal proximity between the complaints and § 504 hearing request and the adverse actions was sufficient to demonstrate a causal connection. Even if she did, however, the Board carried its burden of presenting evidence of legitimate, nondiscriminatory reasons for the adverse actions. *See DiCarlo v. Potter*, 358 F.3d 408, 414-15 (6th Cir. 2004), *overruled on other grounds, Gross v. FBL Fin. Servs.*, 557 U.S. 167, 180 (2009). The Board presented evidence that R.D.C. was suspended for hitting another student with an oversized pencil and for threatening to shoot another student; that H.C. was banned from school property due to her contentious and unpleasant interactions with Hillsboro personnel; that the criminal trespass complaint filed against H.C. resulted from her decision to disregard a letter banning her from entering school property without permission; and that the truancy charge against H.C. was brought due to her daughter's twenty-two unexcused absences (which correlated with the time R.D.C. stayed home). The

burden then shifted back to H.C. to show pretext, but she failed to present any evidence demonstrating that the proffered reasons were pretextual. *See Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 526 (6th Cir. 2008).

The district court correctly determined that the Board was entitled to governmental immunity under Kentucky law because the plaintiffs failed to respond in their summary judgment response to the Board's argument that it was shielded from tort liability under Kentucky law. *See Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001).

As for the individual defendants, public officers in Kentucky enjoy qualified immunity if their actions are discretionary, made in good faith, and are within the scope of their employment. *Id.* at 522. The plaintiffs asserted in their summary judgment response that the individual defendants were not entitled to this immunity because their actions violated the plaintiff's clearly established rights and thus were made in bad faith. *See id.* at 523 (explaining that once an employee has shown that an act was performed within the scope of her discretionary authority -- which the plaintiffs did not challenge -- "the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith"). As evidence of such a rights violation in their summary-judgment response, the plaintiffs pointed only to their allegation that R.D.C. was denied adequate due process for his suspension. Because this due-process claim was properly dismissed because R.D.C. did not present any evidence that he was denied the opportunity for a hearing or to appeal the suspension, along with the plaintiffs' other claims of rights violations, the district court did not err in determining that the individual defendants were entitled to qualified immunity on the plaintiffs' state-law claims.

For the reasons discussed above, we AFFIRM the district court's judgment regarding the claims brought by H.C. We DISMISS R.D.C.'s appeal for failure to prosecute.

ENTERED BY ORDER OF THE COURT

<sup>1</sup>Codified at 29 U.S.C. § 794.

<sup>2</sup>The Plaintiffs claimed a violation of the Family Educational Rights and Privacy Act in the complaint but conceded in their summary-judgment response that the Act does not create a private right of action.

**Cases Cited**

550 U.S. 51647 IDELR 281  
711 F.3d 68760 IDELR 271