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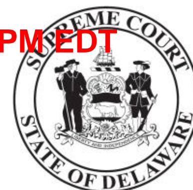

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORINE TERMONIA,	)	
	)	
Plaintiff Below, Appellant,	)	
	)	C.A. No. 322, 2014
v.	)	
	)	On Appeal from the Superior Court of the State of Delaware in and for New Castle County, C. A. No. 10C-12-174 ALR
BRANDYWINE SCHOOL DISTRICT,	)	
	)	
Defendant Below, Appellee.	)	

APPELLEE'S ANSWERING BRIEF

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Dated: August 28, 2014

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NATURE OF PROCEEDINGS

This case and its related predecessor have spanned nearly a decade of litigation. Plaintiff Corine Termonia ("Plaintiff") filed suit in 2006 alleging discrimination, in a case that settled in October 2009. (Plaintiff's Opening Brief on appeal (hereinafter "OB") at 5.) Plaintiff filed the lawsuit giving rise to this appeal on December 10, 2010. (B4.)[1] She thereafter filed an amended complaint alleging discrimination and retaliation. Plaintiff contends that she suffered "20 years" of discrimination (B171 at 5), and is convinced someone- who she cannot identify- is out to get her. For example, she believes some sort of invisible hand of the District directed a principal not to hire her for a position (B92 at 107-08; B93 at 113), thinks HR is out to get her because she felt animosity during a deposition (B93-94 at 113-14), and while she has never met any of the board members, she thinks they may be out to get her because they settled her previous lawsuit. (B94 at 116.)

Plaintiff filed three charges of discrimination after her first lawsuit was settled. Plaintiff filed her first charge of discrimination (the "First Charge") with the Delaware Department of Labor on February 1, 2010. (B1.) Her second charge ("Second Charge") was filed on August 23, 2011. (B51.) Her third charge ("Third Charge") was filed on October 18, 2011. (B53.)

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[1] References to "A__" refer to the Appendix filed with Appellant's Opening Brief. References to "B__" refer to the Answering Brief Appendix filed contemporaneously herewith.

The allegations of unlawful conduct in the present lawsuit were legion. She alleged that the Board of Education of the Brandywine School District (the "District") discriminated and/or retaliated against her by (i) passing her over in 2009 for a position as the department head in a World Languages Department, (ii) allowing her to be bullied by a coworker in 2009 and 2010, (iii) not posting a dean of students position (at a school where she did not work), (iv) denying her promotions to three assistant principal positions, (v) reprimanding her for failing to control her class, (vi) giving her a small classroom, (vii) discontinuing the French program at her school due to dwindling enrollment, (viii) forcing her to accept back into her class a student who had left voluntarily, (ix) suspending her with pay while the District investigated allegations that she engaged in inappropriate conduct with a student, (x) issuing her a notice of intent to terminate her employment, (xi) breach of contract with regard to the settlement of her prior lawsuit, and (xii) violation of the covenant of good faith and fair dealing. Via a series of stipulations and waived claims, most of the claims were dismissed. Of the claims not dismissed voluntarily, only claims that the District retaliated when it suspended her and issued a notice of intent to terminate her services are presented on appeal.[2]

[2] No discrimination claims are before the Supreme Court on appeal. The appealed issues (her suspension and receipt of a notice of intent to terminate) were advanced only from the perspective of retaliation. (B158-159.)

The District filed two motions for summary judgment, the first on February 14, 2013, (B98) and the second on February 26, 2014. (B161.) The Superior Court heard multiple sessions of oral argument and gave Plaintiff an opportunity to attempt to clarify her claims and identify record citations in support of her positions. On April 16, 2014, the Superior Court granted the District's motion for summary judgment. (OB, Ex. A.) Plaintiff moved for reconsideration and the Superior Court again heard oral argument on the merits. In a May 22, 2014 bench ruling, the Superior Court confirmed its grant of the District's motion for summary judgment. (OB, Ex. B.) Relevant to this appeal, the Superior Court found that Plaintiff did not present evidence that she was suspended without pay, and if she was, that there was no causal relationship between the suspension and her protected activity. With regard to the notice of intent to terminate, the Superior Court found the notice was not adverse employment action under the retaliation standard, and that there was no possibility of a "but for" causal connection between her protected activity and the issuance of the notice. This appeal followed.

SUMMARY OF ARGUMENT

1. Denied. Summary judgment was appropriately granted on the suspension claim for a lack of adverse action and causation. Specifically, Plaintiff contends there are facts in dispute (OB at 3) but does not identify a single fact in dispute. Her claim with regard to a proposed suspension without pay fails for a lack of adverse employment action. If the Court should find adverse employment action in the suspension (as the Superior Court assumed), the claim still fails because no reasonable jury can conclude that the "but-for" cause of her suspension was her prior protected activity, which occurred months before with no intervening acts of hostility, particularly since she concedes she was due some discipline for her misconduct.

2. Denied. Summary judgment was correctly granted on the notice of intent to terminate claim because of lack of adverse employment action. It also fails because no reasonable jury can conclude that the "but-for" reason for her notice of intent to terminate was her prior protected activity, when she admits she is subject to discipline for her conduct, the protected activity occurred months before with no intervening acts of hostility, and she was accused of a serious act of misconduct (which is not alleged to have been fabricated or exaggerated by the District).

STATEMENT OF FACTS

Plaintiff was a French teacher in the District. The District is a public school district. On December 10, 2010, there was an incident between Plaintiff and a student named J.S.[3] Plaintiff either kicked J.S. out of class or J.S. left. Plaintiff testified Principal Al Thompson ("Thompson") arrived at the classroom with J.S. and said "'This scholar needs to be in the classroom to learn, and you have to let her in because she has to be in.'" (A0062.) Plaintiff contended her authority as a teacher was usurped when she was "forced" to accept J.S. into class. Plaintiff admits she told Thompson that she did not kick J.S. out of class, but that J.S. left on her own volition. (*Id.*)[4]

Following the J.S. incident, Plaintiff filed a grievance under the collective bargaining agreement ("CBA"), alleging Thompson violated the CBA by returning J.S. to class and reprimanding her in front of the class. (A0243-47.)[5]

On April 7, 2011, plaintiff pulled J.S. out of math class to prepare a written statement to be used against the school in this litigation and possibly in appealing her grievance. (B45.) She was kept from class for an hour. (B85.) She was 16 at

[3]Initials are used to protect the anonymity of a non-party minor.

[4] Plaintiff contends Thompson "knew" Plaintiff sent the student out of class. This is contradicted by her testimony that she told Thompson that J.S. left on her own volition.

[5] The grievance alleged Thompson lied about the chain of events. Plaintiff contends Doherty "was aware" Thompson lied (without factual citation) and there was no investigation into whether he lied. (OB at 15.) Whether he lied in December 2010 is not relevant to Plaintiff's misconduct in April 2011.

the time. (B86.) J.S.'s mother called the superintendent's office irate on April 13, 2011. (A0248.)

On April 15, 2011, the parent, student, head of HR and superintendent met to investigate. There, J.S. informed administration of numerous incidents of misconduct by Plaintiff besides removing J.S. from a core curriculum class for an hour in furtherance of Plaintiff's personal interests. J.S. informed administration that while she was pulled from math:

- Plaintiff made inappropriate comments about the size of the principal's genitals,
- Plaintiff made inappropriate comments about discipline against the principal,
- Plaintiff directed the 16 year old student to lie in her statement, and
- Plaintiff told J.S. to say in her statement that "JS was being an ass in class."

(A0270.)[6]

There is no allegation or evidence that J.S.'s allegations of Plaintiff's misconduct are exaggerated or falsified. Thus, there is no dispute of fact that

[6] Plaintiff downplays her misconduct, characterizing it as simply asking a student to write a statement during class time about an incident. (OB at 1.) It is undisputed, however, that J.S. accused Plaintiff of much more serious conduct.

administration received a detailed and documented (via photographs taken by J.S.) report of serious teacher misconduct.

Plaintiff contends without citation that J.S. "volunteered" the statement. (OB at 9.) However, the student testified (and told HR and the Superintendent) that Plaintiff "called me in." (B88.) Plaintiff came to J.S. for "help" by way of preparing a statement for the Plaintiff (B89), J.S. did not understand why she was there (B90), and it made J.S. uncomfortable. (*Id.*) J.S. felt pressured and took a photograph on her phone as evidence of what Plaintiff gave her. (A0270.)

Given the serious allegations, the District placed Plaintiff on leave to investigate. HR Director Kim Doherty ("Doherty") and her assistant went to the school where Plaintiff worked to inform her she was on leave, but she was nowhere to be found. (A0081.) Plaintiff had left the building without signing out while she was supposed to be on duty. (A0271.) They found Plaintiff at home during the workday while she was supposed to be at school. (A0271-72.)

Pursuant to Title 14 Chapter 14, school employees cannot be terminated without certain procedures, and can only be terminated for certain enumerated reasons. Among these are disloyalty, immorality, misconduct and neglect of duty. The District followed its investigation into the J.S. matter with a letter dated April 21, 2011, recommending Plaintiff be terminated for the above reasons, and also for violating the CBA and the policy against conflicts of interest. (A0268-79.)

Before the recommendation could be acted upon, Plaintiff went out on voluntary leave. Plaintiff submitted medical leave papers on May 5, 2011. (B48.) She applied for a disability pension on June 20, 2011. (A0088; B49.) On August 17, 2011[7], she wrote to HR informing the District she could return to work. (B50.) On August 26, 2011, Plaintiff returned to work for the first time since April, met with HR and the Superintendent, received the recommendation and report regarding the investigation from April, and was informed the District would move to terminate her and that in the future she would be suspended without pay. (A0091-95.) The next workday, she presented a doctor's note continuing her medical leave. (A0089.) The District never presented her case for termination because she went out on permanent disability (A0096-97), and because only the Board of Education can terminate. See 14 *Del. C.* § 1413(b).

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[7] The letter was sent on August 17th, but is dated 10 days later in error (it was stamped as "received" before the 27th).

ARGUMENT

I. PLAINTIFF'S CLAIM CONCERNING NOTICE OF AN UNPAID SUSPENSION FAILS FOR A LACK OF ADVERSE EMPLOYMENT ACTION AND BECAUSE NO REASONABLE JURY CAN CONCLUDE THE "BUT-FOR" CAUSE OF THE ONE DAY SUSPENSION WAS CAUSALLY CONNECTED TO PROTECTED ACTIVITY.

(a) QUESTION PRESENTED

Should the Supreme Court affirm the Superior Court's grant of the District's motion for summary judgment when, construing all inferences in favor of Plaintiff, there are no material facts in dispute and the District is entitled to judgment as a matter of law? This was addressed on pages 15-22 of the District's Opening Brief and pages 9-11 of the District's Reply Brief below.

(b) SCOPE OF REVIEW

This Court reviews a trial court's decision to grant summary judgment *de novo*. *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997). There are many instances where Plaintiff has no evidence to support her claim. Plaintiff claims testimony of District witnesses should be disregarded when they are the only testimony on relevant topics, even though they are unrebutted. She still must present evidence in support of her claims. Rule 56 does not "permit plaintiffs to get to [the] jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations." *First Nat'l Bank of Ariz. v. Cities Servs.*

Co., 391 U.S. 253, 289-90 (1968). The non-movant may not prevail by relying on mere speculation, but instead must identify specific material facts in the record creating a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This requires the opposing party to "'make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Seldomridge v. Uni-Marts, Inc.*, 2001 WL 771011, at *4 (D. Del. July 10, 2001) (quoting *Knabe v. Bourty*, 114 F.3d 407, 410 n.4 (3d Cir. 1997)).

(c) MERITS OF ARGUMENT

To establish a *prima facie* case of retaliation, Plaintiff must show: "(1) he or she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action." *Weston v. Pa.*, 251 F.3d 420, 430 (3d Cir. 2001).

"[A] plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a "but-for" cause of the alleged adverse action by the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)(internal quotations added.).

On January 27, 2014, the United States Supreme Court cited *Nassar* outside the context of Title VII and further analyzed the meaning "but-for causality," and

held that it means more than "contributing" and more than "substantial". *Burrage v. U.S.*, 134 S. Ct. 881 (2014). The Court stated that where retaliatory animus is the "straw that broke the camel's back", but-for causation exists. *Id.* at 888. By analogy, the Court stated the but-for causation standard this way:

> Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run.

Id.

Underscoring that the causation issue is no small point, the Supreme Court expressed concern that a "lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage," which would be "inconsistent with the structure and operation of Title VII." *Nassar*, 133 S. Ct. at 2532. Whether a plaintiff has established a prima facie case is a question of law. *Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003).

Assuming a plaintiff establishes a prima facie case, the employer may rebut the prima facie case by simply offering a legitimate, non-discriminatory reason for its action. *Ward v. MBNA Am.*, 2014 WL 2925257, at *3 (3d Cir. June 30, 2014). This is a burden of production only. *McDonnell Douglas v. Green*, 411 U.S. 792, 800-02 (1973). Once it does, the burden returns to the Plaintiff to prove the legitimate, non-discriminatory reason is pretextual, and that the real motivation was retaliation. *Id.* at 800-02.

1. There Was No Adverse Action.

As mentioned previously, Plaintiff submitted medical leave papers on May 5, 2011. (B48.) She applied for a disability pension on June 20, 2011. (A0088; B49.) In her disability application, she represented that she understood she would be "permanently separated" from her employment. (B49.) On August 17, 2011, she wrote to HR informing the District she wished to return to work (B50), despite her existing suspension. On August 26, 2011, Plaintiff met with Doherty and Superintendent Mark Holodick ("Holodick"). In that meeting (a Friday), she was informed she would be placed on unpaid leave the following Monday, August 29, 2011. (A0091-95.) She promptly presented a doctor's note dated August 29, 2011, continuing her medical leave (A0089) stemming from the allegation of misconduct the prior Spring, which had not yet been addressed due to her leave.

As a preliminary matter, this litigation concerned her suspension *with pay* that started on April 19, 2011 following her inappropriate conduct with J.S. (A0248.) The parties litigated whether a suspension with pay is or is not an adverse employment action under retaliation or discrimination standards. Suddenly, in her motion for reconsideration, after the issue was briefed and argued at length (more than once), Plaintiff put her *unpaid suspension* at issue.

This took the Court by surprise. Indeed, the Amended Complaint filed in this case did not refer to the August 2011 *unpaid* suspension. Rather, her Amended Complaint refers specifically to the May and June 2011 *paid* suspensions. (See B54 ¶¶ 88, 93, 94, 131.) Given that the issue of the unpaid suspension came as a surprise to the Court, Judge Rocanelli noted that "This issue was briefed, not once, not twice, three times, and the Answer to the Motion for Summary Judgment, then there was oral argument, then there was a re-briefing of the Motion for Summary Judgment, the Court issued its Opinion, and then I have a Reargument paper." (OB, Ex. B at 21.) Judge Rocanelli also noted "At the oral argument the parties were given the opportunity to clarify the issues, specifically the plaintiff was given the opportunity to clarify the issues, by filing another set of briefs." (Id. at 33.)

Had this issue been part of the case, it is conceded that an *actually served* unpaid suspension would amount to adverse employment action. However,

Plaintiff presented no evidence that she actually incurred the one day unpaid suspension.[8] Indeed, it was conceded by Plaintiff's counsel that: "There may be no workday that she was unpaid." (Id. at 31.) Plaintiff bears the burden of establishing an adverse employment action. *McDonnell Douglas*, 411 U.S. at 802. This she cannot do.

There is no adverse employment action under the post-*Burlington* standard.[9] Employees are only protected from action that is material and produces harm. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). The Third Circuit emphasizes that in evaluating whether an action is materially adverse, "'it is important to separate significant from trivial harms' because '[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.'" *Moore v. City of Phila.*, 461 F.3d 331, 346 (3d Cir. 2006)(quoting *Burlington Northern,* 548 U.S. at 68). Here, Plaintiff suffered no harm because she represented that she was medically unable to work effective as of

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[8] It is observed the issue of a suspension that was never served is consuming significant judicial resources and public funds.

[9] Plaintiff alleges the Superior Court applied the discrimination standard, rather than the standard for retaliation. (OB at 2 n.2.) Judge Rocanelli noted that this argument lifts "one sentence from the Opinion to the exclusion of the rest of the Court's analysis." (OB, Ex. B at 37.) Separately, the term "post-*Burlington*" is used because the Supreme Court modified therein the adverse employment action standard in retaliation cases.

the date that her unpaid suspension was to begin.[10] (B52.) Indeed, she previously acknowledged she would be permanently separated from work when she submitted her disability pension application. (B49.)

Plaintiff may claim that the mere proposal to put her on unpaid leave was adverse employment action. This argument fails. In *Lanza v. Donahoe*, 2013 WL 5477160 (D.N.J. Sept. 30, 2013), the District Court granted summary judgment on a retaliation claim for a lack of adverse employment action when an employee was given a 14 day suspension that was later rescinded. The Court noted: "While it appears that the Third Circuit has not directly opined on the issue of whether rescinded discipline constitutes an adverse employment action under Title VII, district courts in this Circuit have held that a rescinded or unenforced employment decision does not constitute an adverse employment action." *Id.* at *6. Furthermore, in the retaliation context where proposed terminations – which are patently more consequential than a suspension- were never acted upon, there is not adverse action. *See* Section III, *infra.*

Because the unpaid suspension never went into effect, Plaintiff did not suffer adverse employment action.[11]

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[10] Plaintiff is in a corner on this issue. If she was medically fit to work, she misrepresented her inability to work. If she was not fit to work, she suffered no adverse employment action.

[11] Judge Rocanelli assumed for point of discussion the notice of unpaid suspension was adverse employment action (OB, Ex. B at 40), but found that it was never served (*Id.* at 41) and no reasonable jury could have found it to be retaliatory. (*Id.* at 39.)

2. Plaintiff Cannot Establish Causation.

Plaintiff cannot establish a causal connection between her protected activity and the notice of suspension she received on August 26, 2011. Her prior protected activity included the First Charge on February 1, 2010, (B1) and this lawsuit filed December 10, 2010. (B4.)[12]

It should be noted that Plaintiff contends she also engaged in protected activity on April 7, 2011 when she pulled J.S. from class. (B185.) It cannot be so. Protected activities fall into two distinct categories: participation or opposition. *See* 42 U.S.C. § 2000e-3(a). Engaging in wrongful conduct to further one's litigation is neither "opposition" nor "participation." *See, e.g., Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253 (4th Cir. 1998) (surreptitiously copying documents to aid a discrimination suit is not protected activity); *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008) (employee did not engage in protected activity when she knowingly provided to her attorney innocently obtained, but confidential, documents to further her ability to testify later in a discrimination case). By Plaintiff's reasoning, if she stole from her employer to get money for court costs, it would be protected activity.

[12] Her Second Charge was filed on August 23, 2011. There is no contention (because there is no reasonable probability) that the District received the Second Charge by the time it issued its notice on August 26, 2011.

As an initial matter, Plaintiff concedes she was subject to discipline for her conduct by suggesting she should have been suspended for pulling the student from class. (B192.) This admission ends the inquiry as to what was the but-for cause of her suspension. She implicitly admits the but-for cause was not a retaliatory motive.

Plaintiff cannot prove the "but-for" cause of the issuance of an unpaid suspension was her prior protected activity. As noted previously, on April 7, 2011, Plaintiff pulled J.S. out of math class. (B45.) J.S. was kept from class for an hour. (B85.) J.S. was 16 at the time. (B86.) On April 15, 2011, J.S. informed administration of numerous incidents of misconduct by Plaintiff besides removing J.S. from a core curriculum class. While J.S. was pulled from math, Plaintiff also made inappropriate comments about the size of the principal's genitals and about discipline against the principal, directed the 16 year old student to lie in her statement, and engaged in other inappropriate behavior. (A0270.) Immediately after these incidents Plaintiff was suspended. She then went out on leave and represented that she understood that she would become "permanently separated" from the District. (B49.) The suspension process (albeit with pay) had been in motion since April 19, 2011, and was only reinitiated when she wrote to HR on August 17, 2011 that she was ready to come back to work.

The retaliation claim also lacks any semblance of temporal proximity. The First Charge was filed nineteen months previously and her lawsuit was filed nine months previously. Even a six month time between alleged protected activity and alleged adverse action is not "unusually suggestive" of retaliation with nothing more. *Ward*, 2014 WL 2925257, at *2. Of course, she will claim there is "more," and that every intervening interaction with any supervisor was retaliatory, but all claims pertaining to each interaction (addressed below pertaining to her so called "animus" argument) were dismissed. And, she has no other way of establishing causation via any evidence suggesting, for example, that the District contrived or exaggerated the J.S. incident or treated her less favorably than others who had engaged in similar misconduct.

II. PLAINTIFF'S CLAIM CONCERNING THE ISSUANCE OF A NOTICE OF INTENT TO TERMINATE FAILS FOR A LACK OF ADVERSE EMPLOYMENT ACTION AND BECAUSE NO REASONABLE JURY CAN CONCLUDE THE "BUT-FOR" CAUSE OF THE ISSUANCE OF THE NOTICE WAS PROTECTED ACTIVITY.

(a) QUESTION PRESENTED

Should the Supreme Court affirm the Superior Court's grant of the District's motion for summary judgment when, construing all inferences in favor of Plaintiff, there are no material facts in dispute and the District is entitled to judgment as a matter of law? This was addressed on pages 15-22 of the District's Opening Brief, pages 12-17 of the District's Reply Brief, and pages 3-4 of the District's opposition to Plaintiff's motion for reconsideration below.

(b) SCOPE OF REVIEW

This Court reviews a trial court's decision to grant summary judgment *de novo*. *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997). This Court also reviews questions of law, such as statutory interpretation, *de novo*. *Levan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

(c) MERITS OF ARGUMENT

As mentioned previously, the District followed its investigation into the J.S. matter with a letter dated April 21, 2011, recommending Plaintiff be terminated. (A0268-79.) The District never presented her case for termination because she went out on permanent disability. (A0096-97.)

1. There Was No Adverse Action.

Proposed or rescinded terminations do not constitute adverse employment action under the post-*Burlington* analysis. *See, e.g., Gonzalez v. Potter,* 2010 WL 2196287 (W.D. Pa. June 1, 2010) (granting motion to dismiss where plaintiff alleged adverse employment action as a result of receiving a notice of termination); *Lanza*, 2013 WL 5477160, at *3 (finding no adverse action where the plaintiff received a letter stating "'[t]his is advanced written notice that it is proposed to remove you from the Postal Service no sooner than 30 calendar days from the date of your receipt of this letter.'"); *Hellman v. Weisberg*, 2009 WL 5033643, at *2 (9th Cir. Dec. 23, 2009) (holding in a retaliation case that, even though plaintiff found out that her boss wanted to have her fired and prosecuted, the mere threat of termination does not constitute adverse action); *Ilori v. Carnegie Mellon Univ.*, 742 F. Supp. 2d 734 (W.D. Pa. 2010) (finding in a retaliation case a lack of adverse employment action when a boss asked the plaintiff when would be his last day, told him that if he did not resign, a date would be picked for his resignation, and that his dates at the defendant employer were numbered).

Not only was the termination process never acted upon, but the administration could not have terminated Plaintiff. That was a decision which, as a matter of law, had to be made by the Board of Education, which never received the termination case due to Plaintiff's voluntary leave. See 14 *Del. C.* § 1413(b).

Plaintiff contends that threats of termination amount to adverse action. (OB at 22.) She cites *Abramson v. William Patterson College of N.J.*, 260 F.3d 265 (3d Cir. 2001). In *Abramson*, the plaintiff was actually terminated. *Id.* at 288. It is noted that the Third Circuit in dicta found adverse action in Abramson's dean's refusal to recommend to the provost the plaintiff's retention, despite a review committee's approval of her retention. Under the *Abramson* facts, the dean's recommendation for retention was an element of the retention process, *Id.* at 268, and ultimately led to her non-retention. Also, *Abramson* has been distinguished due to the idiosyncratic nature of tenure recommendations in academia. *See, e.g., Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 880 (8th Cir. 2005).

Plaintiff also relies on *Slater v. Town of Exeter*, 2009 WL 737112, at *10 (D.N.H. Mar. 20, 2009). However, in *Slater*, the Court found that there was *no retaliatory conduct* and granted a motion for summary judgment. Importantly, the court stated in footnote 14 that a threat to terminate "if she persists with the protected activity" could be adverse employment action. *Id.* There was no such threat in this case, and indeed, there was no threat at all. Rather, Plaintiff's termination was proposed as a consequence for her incredibly inappropriate behavior. At no time did anyone act in a manner such as would implicate *Slater* by, for example, telling her that she would be terminated if she did not drop this

lawsuit. In other words, there was no threat, much less a threat to act if Plaintiff was not coerced.

In *E.E.O.C. v. Creative Networks, LLC*, 2009 WL 597214 (D. Ariz. Mar. 9, 2009), there was a threat coupled with hostile conduct directed at dissuading an employee from helping another employee who had filed a charge of discrimination. There was *no holding that this was adverse employment action.* The instant matter is distinguished because, again, there was no threat in the instant matter and no effort to try to dissuade the Plaintiff from continuing her litigation of this matter.

Harris v. City of Chicago, 1998 WL 59873 (N.D. Ill. Feb. 9, 1998) was presented on a scant motion to dismiss record. It survived a motion to dismiss because there was more than a threat in that case. One plaintiff was reprimanded and threatened, and another was arrested and threatened.

Martin v. Gates, 2008 WL 4657807 (D. Haw. Oct. 20, 2008) involved a case where an employee was threatened with termination if he did not withdraw a sexual harassment claim. There were no conditions or demands placed upon Plaintiff in the instant matter.

Finally, the court in *Thomas v. IStar Financial, Inc.*, 438 F. Supp. 2d 348 (S.D.N.Y 2006) held that threats to "'get rid of'" an employee *were not* adverse employment action. (*Id.* at 366.)

2. Plaintiff Cannot Establish Causation.

Plaintiff cannot possibly establish that the "but for" cause of her receipt of a notice of intent to terminate was either the First Charge filed fourteen months previously or her lawsuit filed five months previously. There is no contention that the District fabricated the "but for" cause, which was an irate parent complaining Plaintiff had pulled her sixteen year old daughter out of class for an hour, made comments about the size of the principal's genitals, and engaged in a multitude of inappropriate behaviors, including directing the student to lie. Then, when HR went to inform Plaintiff of the investigation, Plaintiff was gone while she was supposed to be on duty. If this conduct does not justify a recommendation for termination, one must wonder what power to control its staff a school has? Again, Plaintiff concedes she was subject to discipline for her conduct by suggesting she should have been suspended. (B192.)

Plaintiff's contention that a responsible person would be dissuaded from filing a charge if they faced potential termination is unavailing. By Plaintiff's reasoning, protected activity is a shield against any and all consequences, regardless of severity or temporal proximity. Again, the District is not accused of fabricating or exaggerated J.S.'s complaint, which begs the question whether the District should have stood down and not acted on the complaints, solely because

Plaintiff had previously engaged in protected activity? Of course, this is not a logical way to run a school, but it is the logical extension of Plaintiff's argument.

A. Plaintiff's Allegations Of Pretext Lack Support In The Record.

While ignoring the but-for impetus of her termination notice was her misconduct, Plaintiff attempts to show pretext in the decision to issue the notice of intent to terminate. Notably, however, she concedes she was subject to discipline for her conduct by suggesting she should have been suspended. (B192.) Logically, if she was subject to discipline for what she was accused of, a retaliatory motive did not exist.

Plaintiff misses the point when she contends that other people pull students from class, and that there was no rule against this. First, other staff members pull students from class for school purposes (*e.g.*, school discipline investigations). She did it for her own purposes. Second, she did much more than pull a student from class. She also made inappropriate comments about the size of the principal's genitals and about discipline against the principal, directed the 16 year old student to lie in her statement, and engaged in other inappropriate behavior. (A0270.) She presents no evidence of anyone who was not disciplined for doing what she did.

Plaintiff also contends there is pretext because the District should have questioned J.S.'s motives, because J.S. received poor grades in Plaintiff's class and Plaintiff had complained to J.S.'s mother about her school performance. (OB at

12.) There is no record evidence the decisionmakers (HR and the Superintendent) knew of these issues. What they did know is that they had an irate parent accusing Plaintiff of serious misconduct. Plaintiff would get to raise her side of the story and question the student's motives had she availed herself of the teacher termination procedures set forth in Title 14, Chapter 14, but she did not.

Plaintiff contends J.S. volunteered the statement and was only out of class for 15 minutes, and denies making comments about Thompson's genitals to the student. (*Id.* at 9.) However, the student testified that she told HR and the Superintendent that Plaintiff "called me in" (B88), Plaintiff came to J.S. for "help" by way of preparing a statement for the Plaintiff (B89), J.S. did not understand why she was there (B90), and it made J.S. uncomfortable. (*Id.*) Moreover, Plaintiff's version of what happened is irrelevant. What matters is what the decision-makers were told. Managers are entitled to rely upon information presented in an investigation. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998).

B. Plaintiff Claims Without Factual Support That Only Persons Who Commit Crimes Are Terminated.

Plaintiff claims only people who commit crimes are terminated. This is unsubstantiated by the record. First, she references the Rachel Holt case, to suggest the District permits staff to engage in sexually inappropriate conduct without consequences. In the *Holt* case, the plaintiffs alleged the District knew or

should have known of misconduct, but did nothing. There were different decision-makers in the *Holt* case at both the building level (Holt was a middle school case) and District level. Moreover, Doherty and Holodick were not the respective Director of HR and Superintendent at the time Holt came to light. (Doherty became director in 2008 (B81) and Holodick became Superintendent in 2009. (B83)). The abuse occurred in the *Holt* case between March 31 and April 3, 2006. *Thomas v. Bd. of Ed. of Brandywine Sch. Dist.*, 759 F. Supp. 2d 477, 486 (D. Del. 2010). Second, the other teachers who had committed crimes are but a few examples of people who were recommended for termination to the memory of Doherty. Plaintiff presents Doherty's list as exhaustive, but Doherty testified she did not recall all the terminations over the years (A0220), she would have to go through termination records to identify all the terminations (A0222), and there were "*lots of people*" other than Plaintiff recommended for termination for violating the Board Policy with regard to employee conduct. (A0224.) There is no contrary record evidence. Finally, Plaintiff can cite to no other person who engaged in similar conduct (pulling a student from class for personal, not school, reasons, speaking about the size of an administrator's genitals, directing a student to lie, etc.) who was not disciplined.

C. Plaintiff Contends Without Support That The District Has Retaliated In The Past.

Plaintiff contends the District has retaliated in the past. (OB at 4, 34.) The citations merely provide other allegations of retaliation. In the *Bullock* case she references, there were allegations, but not findings, of retaliation, by completely different decisionmakers, and it was before Doherty and Holodick held their positions.

D. Plaintiff Contends Without Support That She Suffered Antagonism After Her First Lawsuit.

Plaintiff contends there was a pattern of antagonism after her first lawsuit. (OB at 4-5, 25-26.) Her first example concerns her application for a World Languages Department ("World Languages") Head position, a position she previously put at issue in her amended complaint. She learned of this during late summer 2009. (A0042.) An HR clerk erred by failing to forward Plaintiff's application to Thompson. (A0041 at 99.) As a consequence, Principal Thompson only had one candidate to whom the position could be awarded. Plaintiff admitted the clerk has no animus against her. (*Id.*) Thompson had no knowledge of the existence of the first lawsuit at that time. There is no evidence in the record that he had knowledge of the first suit before July 27, 2010, which post-dates the World Languages position by some ten months. (B3.) Without knowledge of the previous protected activity, there is simply no way that he retaliated against

Plaintiff. *See Red v. Potter*, 211 F. App'x 82, 85 (3d Cir. 2006) (affirming summary judgment on retaliation claim where plaintiff "ha[d] not shown that there [was] a material issue of fact that the officials responsible for her demotion and ultimate termination ... were aware of her EEO filings at the time of their actions"). Despite her repeated contentions that Thompson knew of her former suit, and her factually unsupported contention that someone "forced" Thompson to award her the position in the Fall of 2009 as a consequence of her first lawsuit, it is simply not in the record and none of her previous citations support the conclusion that he knew of it.[13]

Her second example of antagonism also fails, concerning alleged bullying. Plaintiff alleged she was bullied by a co-worker at the District High School during the 2009-2010 school year. The alleged bully is the teacher who initially received the World Languages position. Plaintiff contends Thompson permitted the bullying.

There is no evidence others were bullied and received help, while Plaintiff was not assisted by administration. There is no evidence that the District encouraged the bully.

[13] If, as in the past briefings, in her reply brief Plaintiff submits factual citations to purportedly show Thompson knew of the first suit before July 2010, the Court is encouraged to review the cited evidence, which will not establish knowledge by Thompson earlier than July 2010.

Plaintiff admits the District stopped the bullying once she brought it to the District's attention. She contends she complained to Thompson on May 19, 2010 and June 2, 2010. (B106.) Although Thompson does not recall addressing the issue, Plaintiff admits Thompson directed an assistant principal at the end of the school year (i.e., contemporaneously with the May and June complaints) to meet with Plaintiff and the bully, and stop the "nonsense." (A0051.) She admits this stopped the bullying. (A0051-52.) All of this occurred before there is any evidence Thompson knew of the first lawsuit.[14]

Her third example of alleged antagonism concerns three assistant principal vacancies she applied for in the Fall of 2009. There is no evidence in the record that the decisionmaker (Thompson) had knowledge of the first suit before July 27, 2010. (B3.) Moreover, as Judge Rocanelli found, no reasonable juror can find that Plaintiff was qualified to be an assistant principal.

Finally, there is no harassment, condescension, inappropriate remarks or the typical "antagonism" that would support her claim.

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[14] Lopez (the fellow teacher with whom Plaintiff was in combat during the 2009-2010 school year) called Plaintiff an "elder" in the context of apologizing for speaking rudely to an elder. (A0090.) It is farcical to contend that this was discrimination, pretext or harassment. Moreover, Lopez was not a decisionmaker.

E. Plaintiff's Tortured Reading Of The Deposition Testimony Of Holodick And Doherty Does Not Establish This Is A Direct Evidence Case.

Plaintiff contends there is direct evidence of a retaliatory motivation based solely upon the deposition testimony of Holodick and Doherty. (OB at 32-34.) Plaintiff contends Holodick and Doherty expressed animus towards Plaintiff's pursuit of litigation. (*Id.*) This is a distortion of their testimony. Direct evidence of discrimination is evidence that demonstrates that "'decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision.'" *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 248 (3d Cir. 2002).

Each testified that what Plaintiff did by pulling the student from class was wrongful, not because she pursued litigation to her own benefit, but to distinguish what she did (pulling a kid out of class to her own benefit)[15] from what administrators (not teachers) do (remove students from class for school-related purposes). In other words, their testimony concerns not animosity towards filing a lawsuit, but animosity towards the wrongful behavior of pulling a student from a core class (math) to pursue her suit. It is also important to carefully read the cited testimony Plaintiff offers. Doherty's testimony does not suggest animosity that Plaintiff used the litigation to her own benefit, but that she used her employment

[15] Plaintiff claims there is no rule against this. Her conduct is so beyond the pale, there need not be. One must wonder, if an employer cannot terminate a teacher for pulling a student from a core curriculum class to pursue her own ends, what can an employer terminate an employee for?

with the District inappropriately. (See OB at 33.) Holodick's testimony does not express any animus towards the litigation, but merely criticizes Plaintiff for "using JS to her personal advantage when she pulled her out of class." (A0261.) (internal quotations omitted).

These comments and observations do not make this a direct evidence case. Courts have made clear that only the most blatant remarks, whose intent could be nothing other than to discriminate, are considered sufficient to constitute direct evidence of discrimination. *See Taylor v. Procter & Gamble Dover Wipes,* 184 F. Supp. 2d 402, 413 (D. Del. 2002) (the statement must reveal nothing other than an overt intent to discriminate); *Walden v. Georgia-Pacific Corp.,* 126 F.3d 506, 513 (3d Cir. 1997)(it is a plaintiff's high burden to pursue a direct evidence analysis). Plaintiff relies upon *Fakete v. Aetna, Inc.,* 308 F.3d 335, 339 (3d Cir. 2002), which is distinguishable because in that case, the supervisor made statements that he was "'looking for younger . . . people.'" The instant matter's deposition statements are not such "blatant remarks."

CONCLUSION

For the foregoing reasons, the District respectfully requests the Supreme Court affirm the Superior Court's grant of the District's motion for summary judgment.

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