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943 F.3d 988

United States Court of Appeals, Fifth Circuit.

Aleashia **CLARKSTON**; Kingdom Builders
Community Development Corporation,
Plaintiffs-Appellants,

v.

John **WHITE**, in His Individual Capacity
as Superintendent of the Louisiana
Department of Education, Defendant-Appellee.

No. 18-31099

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FILED December 4, 2019

Attorneys and Law Firms

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Before OWEN, Chief Judge, SMITH and DENNIS, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel

rehearing is DENIED. No member of the panel or judge in regular active service having requested that the court be poled [sic] on rehearing en banc (Federal Rule of Appellate Procedure 35 and Fifth Circuit Rule 35), the petition for rehearing en banc is DENIED.

The opinion issued October 25, 2019, is VACATED, and the following opinion is substituted, the only change being to add language to footnote 5:

** * * *

Opinion

JERRY E. SMITH, Circuit Judge:

Kingdom Builders Community Development Corporation (“Kingdom Builders”) and its CEO, Aleashia Clarkston, sued John White, the Superintendent of the Louisiana Department of Education (“LDOE”), alleging that White caused the denial of Kingdom Builders’s charter school application in retaliation for Clarkston’s expressing her views on disciplinary practices—including corporal punishment—on the nationally televised show *America’s Supernanny*. Plaintiffs sought damages via a 42 U.S.C. § 1983 claim for First Amendment retaliation and a state retaliation claim per article I, section 7 of the Louisiana Constitution. The district court held that Clarkston had “failed to state a valid claim for retaliation.” We affirm on a different ground.

I.

In June 2015, Kingdom Builders submitted a charter school application to the Lafayette Parish School Board, which the board denied. Plaintiffs appealed to the Louisiana Board of Elementary and Secondary Education (“BESE”).¹ In connection with that appeal, the LDOE and SchoolWorks, a third-party evaluator contracted by the LDOE, evaluated plaintiffs’ application. SchoolWorks recommended that the BESE approve the application, but the LDOE—through White—recommended that the BESE deny it.²

Following the conflicting reports, the BESE deferred ruling on the appeal and directed White to hire a third party to review his concerns with Clarkston’s application. White contracted with Transcendent Legal to conduct that review. Transcendent Legal’s report focused on “concerns specifically pertain[ing] to whether or not the proposed school leader [(Clarkston)] possess[e]d the professional judgment necessary to open and lead a high-performing charter school.” Among those concerns was Clarkston’s appearance on the television show *America’s Supernanny*, which “caused the [LDOE] to question her professional judgment in

¹ Under Louisiana law, a charter school must first submit its application to the local school board. LA. STAT. ANN. § 17:3983(A)(2)(a)(i). If the application is denied, the chartering group may appeal to the BESE. *See id.*

² As Superintendent, White is responsible for “[m]ak[ing] recommendations on contracts and agreements to be entered into by the board.” *Id.* § 17:22(2)(b). The BESE—not the LDOE—has the authority under state law to approve or deny a charter school application. *Id.* § 17:3983(A)(3)(c).

choosing to air her family’s disciplinary practices,” including the use of corporal punishment, “on national television while representing herself as an educator.”

Applying six norms used by the National Policy Board for Educational Administration,³ Transcendent Legal examined Clarkston’s professionalism. It concluded that she exceeded expectations for one of the professional norms, met expectations for two, and failed to meet expectations for three. Transcendent Legal recognized that “[w]ithout question, Mrs. Clarkston’s deficiencies in any given norm resulted solely from Mrs. Clarkston’s decision to participate in the reality show *Supernanny* and/or the related publicizing of her participation in that television show just three (3) short years ago.”

In March 2016, after reviewing the evaluations of the School Board, SchoolWorks, and Transcendent Legal, the LDOE—through White—again recommended that the BESE deny plaintiffs’ application. Highlighting

³ The standards asked whether Clarkston: (1) “act[ed] professionally in personal conduct, relationships with others, decision-making, stewardship of the school’s resources, and all aspects of school leadership”; (2) “act[ed] according to and promote[d] the professional norms of integrity, fairness, transparency, trust, collaboration, perseverance, learning, and continuous improvement”; (3) “place[d] children at the center of education and accept[ed] responsibility for each student’s academic success and well-being”; (4) “safeguard[ed] and promote[d] the values of democracy, individual freedom and responsibility, equity, social justice, community, and diversity”; (5) “le[d] with interpersonal and communication skill, social-emotional insight, and understanding of all students’ and staff members’ backgrounds and cultures”; and (6) “promote[d] professional behavior among faculty and staff.”

that Transcendent Legal’s “report provide[d] mixed conclusions regarding the professional judgment of the proposed school leader that neither disqualifies nor validates the Department’s concerns,” the LDOE emphasized that its “concerns serve not as definitive character statements, but rather as potential evidence of issues that should give BESE pause before authorizing the charter under the proposed leadership.”

After hearing from the LDOE, the BESE denied plaintiffs’ application. Both sides now agree that the BESE was the ultimate decisionmaker.

Plaintiffs brought claims for retaliation, alleging violations of the First and Fourteenth Amendments and article I, section 7 of the Louisiana Constitution.⁴ Plaintiffs contended that White took “action against the Plaintiffs because he disagreed with opinions expressed by Mrs. Clarkston on a national television show, ‘America’s Supernanny,’ in 2013 regarding corporal punishment of her own children.” They also

⁴ Article I, section 7 provides that “[n]o law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.” LA. CONST. art. I, § 7. “Louisiana’s constitutional protection of free speech mirrors that of the First Amendment,” *Heaney v. Roberts*, 846 F.3d 795, 801 n.2 (5th Cir. 2017), and “the Louisiana Supreme Court would recognize the same [QI] defense for claims under Article I, Section 7, that federal courts recognize for § 1983 First Amendment claims,” *id.* Therefore, if “summary judgment is proper as to Plaintiffs’ First Amendment claims, summary judgment is also proper on Plaintiffs’ Article I, § 7 state law claims.” *Cripps v. La. Dep’t of Agric. & Forestry*, 819 F.3d 221, 231 (5th Cir. 2016). Accordingly, the two claims are analyzed as a single issue.

contended that “White’s opinion and recommendation to the [BESE] was a motivating factor in the Board’s decision to deny Kingdom Builders’ charter school application.”

White moved for summary judgment, asserting, *inter alia*, the defense of qualified immunity (“QI”). The district court granted the motion and dismissed plaintiffs’ claims with prejudice, finding that they had failed to state a valid retaliation claim.

II.

We affirm on a basis different from the one relied on by the district court. White is entitled to QI because, at the time of his alleged violation, it was not clearly established that First Amendment liability could attach to a public official who did not possess final decisionmaking authority. The district court did not reach the QI inquiry, but this court may affirm for any reason supported by the record, even if not relied on by the district court. *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009).

A.

Government officials “are entitled to [QI] under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time.” *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018) (internal quotation marks

omitted). Courts are “permitted to exercise their sound discretion in deciding which of the two prongs of the [QI] analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

The plaintiff has the burden to point out the clearly established law. *Delaughter v. Woodall*, 909 F.3d 130, 139 (5th Cir. 2018). “Clearly established law is determined by controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.” *Id.* (internal quotation marks omitted). “This means the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right, although it is not necessary for controlling precedent to have held that the official’s exact act was unlawful.” *Id.* at 139-40 (internal quotation marks omitted). Ultimately, “[t]he central concern is whether the official has fair warning that his conduct violates a constitutional right.” *Id.* at 140.

B.

We conclude, at the second prong, that the right at issue was not clearly established, so White is entitled to QI. It thus is unnecessary for us to reach the more complicated issue of whether a rights violation occurred at the first prong. *See Callahan*, 555 U.S. at 236, 129 S.Ct. 808.

At the time White allegedly violated plaintiffs' rights—March 2016, at the latest—this court's jurisprudence was ambiguous regarding whether First Amendment liability could attach to a public official who did not possess final decisionmaking authority.⁵ Because White was not a final decisionmaker, it was not clearly established that he could be liable for his recommendation to the BESE. Accordingly, he is entitled to QI.

AFFIRMED.

⁵ See, e.g., *Sims v. City of Madisonville*, 894 F.3d 632, 641 (5th Cir. 2018) (per curiam) (holding that caselaw had not clearly established “whether First Amendment liability can attach to a public official who did not make the final employment decision”); *Pennypacker v. City of Pearl*, 689 F. App'x 332, 332 (5th Cir. 2017) (per curiam) (“It is not clearly established in this circuit whether [non-final decisionmakers] may be held personally liable for First Amendment retaliation under § 1983.”). To be sure, after *Sims*, the law is ‘no longer . . . ‘unsettled’ in this area,” and we know that “individual liability for a government official who violates constitutional rights, including First Amendment rights, turns on traditional tort principles of ‘but-for’ causation.” *Sims*, 894 F.3d at 639, 641. But the QI question here turns on whether the law was clearly established.

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2018 WL 4387620

United States District Court, M.D. Louisiana.

Aleashia CLARKSON, et al.

v.

John WHITE

CIVIL ACTION NO.: 17-00125-BAJ-RLB

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Signed 09/14/2018

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RULING AND ORDER

BRIAN A. JACKSON, JUDGE

Before the Court is the **Motion for Summary Judgment (Doc. 28)** filed by Defendant, John White. Plaintiffs oppose the motion. (Doc. 41). Oral argument is not necessary. For the reasons that follow, the motion is **GRANTED** and the action is **DISMISSED**.

I. BACKGROUND

Plaintiffs, Aleshia Clarkson and Kingdom Builders Community Development Corporation (“Kingdom Builders”) bring this case for First Amendment religious retaliation under the United States Constitution and Louisiana Constitution. Defendant is Louisiana State Superintendent of Education John White, in his individual capacity. (Doc. 1 at p. 1).

In June 2015, Kingdom Builders submitted an application to operate a charter school to the Lafayette Parish School Board, which was denied. (Doc. 28-2 at ¶ 4). Kingdom Builders appealed this decision to the Louisiana Board of Elementary and Secondary Education (“BESE”). (*Id.* at ¶ 5). In connection with this appeal, both the Louisiana Department of Education (“LDE”) and a third-party evaluator contracted by the LDE, SchoolWorks, L.L.C., evaluated Kingdom Builders’ application. (*Id.* at ¶ 6). SchoolWorks recommended that BESE approve the application, while LDE, through Superintended [sic] White, recommended that the application be denied. (*Id.* at ¶¶ 6-7). Superintendent White’s primary concern was that, approximately three years prior, while appearing on the reality television show *Supernanny*, Clarkson had expressed a public opinion in favor of corporal punishment.

Following the conflicting reports, BESE deferred ruling on the appeal, and requested that LDE hire an independent third party to review the application and address LDE’s concerns. (Doc. 9-3 at p. 18). LDE contracted with Transcendent Legal to conduct the review

ordered by BESE. (See Doc. 9-5 at p.2). Transcendent Legal’s report focused on whether Clarkson possessed “the professional judgment necessary to open and lead a high-performing charter school.” (*Id.* at p. 3). Transcendent Legal ultimately concluded that, based on Clarkson’s participation on the *Supernanny* program, she did not meet all the expectations of professional norms. (Doc. 9-5 p. 14). Specifically, it found, *inter alia*, that “[t]he public sharing of a very private moment indicates that, at the time, . . . Clarkston did not safeguard the individual freedom of privacy of the children.” (*Id.* at p. 13). Further, the report found that Clarkson’s participation on the show demonstrated that she “lacks an understanding of the backgrounds and cultures of all students and staff members.” (*Id.* at p. 14). Ultimately, BESE denied Plaintiffs’ application. (Doc. 28-2 at ¶ 11).

II. LEGAL STANDARD

Pursuant to the Federal Rules of Civil Procedure, “[t]he court shall grant summary judgment if 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). In determining whether the movant is entitled to summary judgment, the court views the facts in the light most favorable to the non-movant and draws all reasonable inferences in the non-movant’s favor. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

After a motion for summary judgment is filed, the non-movant “must set forth specific facts showing there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (internal citations omitted). “A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Austin v. Kroger Tex., L.P.*, 846 F.3d 326, 328 (5th Cir. 2017) (quoting *Gates*, 537 F.3d at 417). At this stage, however, the court does not evaluate the credibility of witnesses, weigh the evidence, or resolve factual disputes. *Int’l Shortstop, Inc. v. Rally’s, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991).

On the other hand, the non-movant’s burden is not satisfied by some metaphysical doubt as to the material facts, or by conclusory allegations, unsubstantiated assertions, or a mere scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (internal quotations omitted). Summary judgment is appropriate if the non-movant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, summary judgment will lie only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” *Sherman v. Hallbauer*, 455 F.2d 1236, 1241 (5th Cir. 1972).

III. DISUSSION [sic]

The state advances several arguments why Plaintiffs' claims cannot succeed, but the Court need not address each one because the Court ultimately concludes that Plaintiffs have failed to state a valid claim for retaliation.

The First Amendment prohibits the government from taking adverse "action against an individual in retaliation for the exercise of protected speech." *Cripps v. Louisiana Dep't of Agric. & Forestry*, 819 F.3d 221, 229 (5th Cir. 2016). Article I, § 7 of the Louisiana Constitution provides that "[n]o law should curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom."

When an ordinary citizen, as opposed to a government employee, alleges retaliation on the basis of her First Amendment rights, she "must show that (1) [she was] engaged in constitutionally protected activity, (2) the defendants' actions caused [her] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff[']s exercise of constitutionally protected conduct." *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

Under Louisiana law, charter school may first submit its application to the local school board with jurisdiction over the area where the school is to be located.

La. Rev. Stat. ann. § 17:3983(A)(2)(a)(i). If the charter school’s application is denied by the local board, it may then appeal to BESE. *Id.* § 17:3983(A)(2)(a)(i). As Superintendent of Education, White “[m]akes recommendations on contracts and agreements to be entered into by [BESE].” *Id.* § 17:3981. However, only BESE maintains the authority to approve or deny the application for charter schools. *Id.* § 17:3983(A)(2)(c). According to the Louisiana Supreme Court, BESE maintains “the constitutional power to determine education policy for the public schools of the state.” *Bd. Of Elementary and Secondary Ed. v. Nix.*, 347 So. 2d 147, 150 (La. 1977).

Here, Plaintiffs fail on the second prong because they have not shown that Superintendent White caused them to suffer an injury that would chill a person of ordinary firmness from engaging in a constitutionally protected activity. BESE, not Superintendent White, voted to deny Plaintiffs’ appeal. White, who is not a member of BESE, did not have a vote on whether to deny Plaintiffs’ application. *See Cripps*, 819 F.3d at 230. Pursuant to Louisiana law, White’s role was merely advisory.¹ After Superintendent White raised

¹ Plaintiffs raise the “cat’s paw theory,” whereby a person with retaliatory animus used the ultimate decision maker to bring about retaliation. *See Zamora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015). Although there is no “absolute bar on First Amendment liability for those who are not final decisionmakers. . . . N[either] [is] the imputation principles of cat’s paw liability applicable to an effort to hold a nondecisionmaker liable.” *Sims v. City of Madisonville*, 894 F.3d 632, 641 (5th Cir. 2018). Plaintiffs seeking to establish causation in a 42 U.S.C. § 1983 case must do so through traditional principles of causation. *Id.*

his concerns, BESE did not vote to deny Plaintiffs' appeal, but rather it deferred ruling until a third party could analyze the concerns of Superintendent White. Moreover, the Lafayette Parish School Board had independently denied Plaintiffs' initial application. There is no evidence in the record to show that Superintendent White was involved with that earlier decision. Under these circumstances, Plaintiffs have failed to establish a genuine issue of material fact regarding the causation element of Plaintiffs' First Amendment retaliation claim against Superintendent White.

"As summary judgment is proper as to Plaintiffs' First Amendment claims, summary judgment is also proper on Plaintiffs' Article I, § 7 state law claims." *See Cripps*, 819 F.3d at 230.

IV. CONCLUSION

Accordingly,

IT IS ORDERED that the motion for summary judgment is **GRANTED** and that the above-captioned action is **DISMISSED**.
