

# **APPENDIX A**

## **PETITION FOR REHEARING**

No.19-1399

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**IN THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT**

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**Lisa Smith V. Kelly Services and The School District of Philadelphia**

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**PETITION FOR PANEL REHEARING**

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Prepared and Submitted by

Lisa M. Smith  
6219 Palethorp Street  
Philadelphia Pa 19120  
Phone 215 457 5802

## TABLE OF CONTENTS

Page

I. INTRODUCTION.....	1...2
II. UNJUST LOSS OF EMPLOYMENT.....	3
III CONCLUSION.....	4

## INTRODUCTION

Ms. Smith respectfully seeks a rehearing only to ask the panel to address a very important issue of this case that caused her to lose her job unjustly due to a company policy no touch policy. This Panel decided **“Smith also argues in her brief that Kelly Services no-touch policy violates Pennsylvania law. Whether Kelly Services may hold its employees to a more rigorous standard than other teachers is not properly before us, as the issue does not affect whether Smith was discharged as retaliation for protected conduct.”**The Panel has overlooked this case also involved an issue of Kelly's services no touch policy there were two Attorneys that represented Miss Smith they properly raised this issue of Kelly Services no touch policy in the District Court and Miss Smith, Pro Se continued to raise this issue in this court properly on appeal it is a fact that all three elements of this claim, protected conduct, retaliation and a company policy of no touch are adjoined in this claim and was decided on by the District Court. **Also, in Miss Smiths' Informal Brief in question 6, and page 5 this court stated “Did the District Court or the agency apply the wrong law (either cases or statute)?”** Miss Smith answered yes **“If so, what law do you want applied?”** In response to this question Miss Smith applied the Pennsylvania school codes of discipline (No touch Policy) as this was an issue on appeal presented in the District Court. (See INFORMAL BRIEF p.6) See the District Courts' Memorandum“that she agreed to [n]ever ha[ve] any

physical contact with a student “(the “No Touch Policy”). With the signing of documents.” Smith argued this was illegal.

This Panel in its determination and affirmation, this court determined Miss Smith did not lose her job because of retaliation and protected activity, rather she violated a no touch policy. As a result, the District Court and this Court refused to properly address this issue legally. The District Court upheld this policy, and this Panel refuses to address its illegal statutes and laws which would have had a different impact and out come for this complaint.

I'm asking this Panel to decide if Kelly Services has a right to its own violation of laws that supersedes, state law to enforce a more “rigorous standard” of a no touch policy then it should state it legally rather than dodge, and justify, a policy that is not justified by Pennsylvania codes and statutes of school law. As Miss Smith has tried to reveal in her appeals Kelly Services illegally claims that touching a child is a total breach of their laws which is contrary to Pennsylvania state and federal laws and school codes and if this court ignores the above than this would demonstrate a terrible miscarriage of justice. It was this policy that caused the termination of Miss Smiths' employment from Kelly Services as decided by the District court, and this Panel. Miss Smith has proven to this court and the District Court that she did not harm a fifth grade student, and she did not impose any use of Corporal Punishment or abuse. She acted in compliance with the Pennsylvania federal statutes and laws when she used

reasonable force to grab her fifth grade student to get him in line with the other students.

Two Attorneys and Miss Smith, Pro Se showed through law that she had the legal right to quell the disturbance that this student was causing and maintain order and safety in the classroom she was assigned to.

### **Unjust Loss of Employment**

Since Miss Smith has lost her job she has had to take Substitute Teacher positions out of the state. She has had to work demographically in New Jersey, and counties in Pennsylvania as, Coastville, Phonixville, Malvern, Levittown, Vallyforge, Easttown Berwyn that in traveling time takes her one to two hours a day to arrive at work, and an additional two to six hours to return home due to heavy volumes of traffic and bad weather. In addition to the mental anguish and physical strain this has caused her. She has had to live with the humiliation of losing a job in her home town to which she held for twenty years because of false allegations, and slander of physical abuse of a child, and a illegal no touch policy.

## **CONCLUSION**

### **Costs Taxed Against the Appellant**

Miss Smith is requesting that this be waived . Miss Smith has also incurred costs as, legal fees, postage, and Attorney fees of \$1,115.000 for a demand letter written to opposing counsel, and copies of multiple briefs written by Miss Smith. Like the opposing council, Miss Smith spent many, many hours of research and time in preparing briefs because this court refused to appoint her council along with a previous lawyer that left her in District Court leaving her with the awesome responsibility with very, very limited knowledge of the law to write briefs to defend herself coupled with this court's refusal to appoint council to her when she desperately needed help in adequately preparing this case. It is estimated that she has spent at least \$2000.000 in her defense and quest to defend herself against damaging allegations that ultimately would have permanently damaged her career and efforts to get her job back. In addition, Miss Smith has incurred expenses as excessive car repairs that have taken mechanical tolls on her car and as a result of her having to leave the city she lives in to go to work. Her vehicle has suffered ware and tare which caused her to undertake high mechanical expenses in excess of at least \$150.00 and higher every other month. Also, higher cost in gas, and bridge tolls. Therefore for the above reasons Miss Smith ask for a rehearing on the above issues and reverse the District Courts' order upholding Kelly Services illegal no touch policy.

Respectfully Submitted, this 11<sup>th</sup> day of May, 2020

/s/Lisa M. Smith  
Lisa Smith, Pro Se Litigant  
6219 Palethorp Street  
Philadelphia, Pa 19120  
**215 457- 5802**

## Certificate of Service

I certify that on May 11, 2020 I mailed a copy of this brief via first class mail to the following parties at the address listed below.

Eric J. Janson  
Seyfarth Shaw LLP  
975 F Street N.W.  
Washington, D.C. 2004-1454

## **CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

### **Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

This petition complies with the type-volume limitation of Fed. R. App. P. 2(d)(2)(A)

because this petition contains 1,178 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App.

P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Open Office 4.1.4 Microsoft 2010 in Time New Roman type style, font size 14.

This brief complies with the formatting requirements of 3rd Circuit Rule 28A(h).

**/s/ Lisa M. Smith**

Lisa M. Smith  
6219 Palethorp Street  
Philadelphia Pa, 19120

# **APPENDIX B**

## **PUBLISHED OPINIONS**



Villanova University  
Charles Widger  
School of Law

**Digital Repository**

2020 DECISIONS (HTTPS://DIGITALCOMMONS.LAW.VILLANOVA.EDU/THIRDCIRCUIT\_2020)

**Case Name**

Lisa Smith v. Kelly Services Inc. (https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1467&context=thirdcircuit\_2020)

**Filed Date**

5-1-2020

**Docket Number**

No. 19-1399

**Lower Court**

USDC for the Eastern District of Pennsylvania

**Precedential or Non-Precedential**

Non-Precedential



COURT: UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION DATE: 14 NOV, 2016 CITED BY: 3 CORAM: 1  
**CASEMINE**(L)  
 MOTIONS (Beta)

Motion to dismiss : Granted ☒ Defendant

... 11-14-2016 SCOTT BOERGERT, individually and on behalf of all others, Plaintiffs, v. **KELLY SERVICES, INC.**, Defendant... Defendant **Kelly Services**, Inc. moves under Fed. R. Civ. P. 12(b)(1) to dismiss this Fair Credit Reporting Act case in its entirety for lack of subject matter jurisdiction, based on the United States... attack on Boergert's complaint, Doc. 1, inasmuch as no affidavits or other evidence have been submitted in connection with **Kelly Services'** motion under Rule 12(b)(1). Therefore, the Court applies the...

Smith v. Kelly Servs., Inc. (/judgement/us/5c52a7e8342cca279550d472)

9

COURT: UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATE: 24 JAN, 2019 CITED BY: 0 CORAM: 1

MOTIONS (Beta)

Motion for summary judgment : Granted ☒ Defendant

... CIVIL ACTION NO. 17-3600 01-25-2019 USA MARIE SMITH , Plaintiff, v. **KELLY SERVICES, INC.**, and THE SCHOOL DISTRICT... Defendant **Kelly Services**, Inc. ("Kelly Services") discharged Plaintiff Lisa Marie Smith from her job as a substitute teacher ostensibly on the basis that she violated **Kelly... Services'** "no touch" policy prohibiting physical contact with students. Plaintiff sued both Defendant **Kelly Services** as well as the School District of Philadelphia ("SDP"), contending (1) that she was...

McCRACKEN v. EXXON MOBIL CORPORATION INC. (/judgement/us/5914b5e1add7b04934775a43)

20

COURT: UNITED STATES DISTRICT COURT, S.D. TEXAS, HOUSTON DIVISION. DATE: 12 OCT, 2005 CITED BY: 0 CORAM: 1

MOTIONS (Beta)

Motion for summary judgment : Granted ☒



[Home](#) / [Browse Decisions](#) / [SMITH v. KELLY SERVICES, INC.](#)

## SMITH v. KELLY SERVICES, INC.

Civil Action No. 17-3600.

[Email](#) | [Print](#) | [Comments \(0\)](#)

<a href="#">View Case</a>	<a href="#">Cited Cases</a>
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LISA MARIE SMITH, Plaintiff, v. KELLY SERVICES, INC, and THE SCHOOL DISTRICT OF PHILADELPHIA, Defendants.

United States District Court, E.D. Pennsylvania.

January 25, 2019.

### Editors Note

Applicable Law: 42 U.S.C. § 2000e

Cause: 42 U.S.C. § 2000e Job Discrimination (Employment)

Nature of Suit: 442 Civil Rights: Employment

Source: PACER

*Attorney(s) appearing for the Case*

**JUSTIA**

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Circuit.**

**Lisa Smith v. Kelly Services Inc, No. 19-  
1399 (3d Cir. 2020)**

[Download PDF](#)

**NOT PRECEDENTIAL**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

\_\_\_\_\_  
No. 19-1399  
\_\_\_\_\_

LISA MARIE SMITH,  
Appellant

v.

KELLY SERVICES INC; PHILADELPHIA SCHOOL DISTRICT

---

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Action No. 2-17-cv-03600)  
District Judge: Honorable Wendy Beetlestone

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Submitted Pursuant to Third Circuit LAR 34.1(a)  
March 19, 2020  
Before: SHWARTZ, RESTREPO and NYGAARD, Circuit Judges

(Opinion filed May 1, 2020)

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OPINION\*

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PER CURIAM

Lisa Smith appeals from an order of the United States District Court for the Eastern District of Pennsylvania, which granted summary judgment to Kelly Service:

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

# APPENDIX C

## **1. CHILD ABUSE INVESTIGATION**

**Department of Human Services (DHS)**

## **2. Petitioners Declaration**

## **3. Respondent's Motion for Summary Judgment Page 10**



**pennsylvania**  
DEPARTMENT OF HUMAN SERVICES

00238068200010101

3/10/2017

Administrator/Director

Alleged Perpetrator: LISA SMITH  
Referral #: 7804140

6219 N PALETHORP STREET  
PHILADELPHIA, PA 19120

Dear Administrator/Director:

The Child Protective Services Law requires that the Department of Human Services notify child care service employers of the final status of a report where the alleged perpetrator was a child care service employee.

Based on the outcome of the investigation, please note the above report has been UNFOUNDED.

Types of Abuse where the Allegation is Unfounded:  
Causing Bodily Injury to Child Through Recent Act/Failure to Act

If you have any questions regarding the final status of this investigation, please contact Philadelphia County Dept of Human Services at (215) 683-6000.

Sincerely,

*Dori Barnard*

Dori Barnard, Director  
Division of Operations



IN THE  
**Supreme Court of the United States**

**Lisa Marie Smith                      Petitioner**

**V.**

**School District of Philadelphia   Kelly Services Inc. Respondent(s)**

**PETITIONERS' DECLARTION LISA MARIE SMITH**

On this day of September 9, 2020 Petitioner Lisa Marie Smith swear under oath that during the dates of February 2,4,7, she wrote disciplinary forms to the Lead Disciplinarian regarding student behavior of racial bantering when calling names to their guest teacher, Lisa Marie Smith as a Monkey, Black Bitch, and referring to her as a Nigger.

Dated: September 9, 2020 In accordance with **28 U.S.C. § 1746**, I declare under penalty of perjury that the foregoing is true and correct.

Executed this day of September 9, 2020

Respectfully Submitted,

Lisa M. Smith  
6219 Palethrop Street  
Philadelphia, Pa 19120  
(215) 457-5802  
Marie.1963@hotmail.com

/s/Lisa M. Smith

any corrective action and no viable claim can be made against Kelly for a hostile work environment.<sup>4</sup>

**A. Legal Standard for Hostile Work Environment**

42 U.S.C. § 1981 racial harassment claim can be analyzed using the Title VII hostile work environment framework. *CBOCS West, Inc. v. Humphries*, 553 U.S. 452 (2008) (finding that post-contractual allegations are actionable under § 1981 and intentionally overlap Title VII analysis). *See also Verdin v. Weeks Marine Inc.*, 124 Fed.Appx. 92, 96 (3d Cir. 2005) (not reported) (finding that “we use the same analysis in assessing the substantive merit of the claims” for § 1981 racial harassment and Title VII hostile work environment claims). Therefore, to establish a *prima facie* case of racial harassment under § 1981, a plaintiff must show that: (1) she or she suffered intentional discrimination because of race; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same race in that position; and (5) *respondeat superior* liability existed. *Andreoli v. Gates*, 482 F.3d 641, 643 (3d Cir. 2007).

While the undersigned was unable to find any legal authority in this jurisdiction on whether student-on-teacher harassment is even actionable under 42 U.S.C. § 1981, the few courts outside this jurisdiction that have analyzed this issue (under Title VII) have held that in order to prove harassment in such a situation, the teacher plaintiff must show that, “first that a hostile environment existed and second that the school board either provided no reasonable avenue of complaint or knew of the harassment and failed to take appropriate remedial action.” *Berger-Rothberg v. City of New York*, 803 F. Supp. 2d 155, 164–65 (E.D.N.Y. 2011) (citing *Peries v. N.Y.C. Bd. of Educ.*, 97–CV–7109 (ARR), 2001 WL 1328921, at \*6).

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<sup>4</sup> Moreover, Kelly could not have taken any corrective action against the students involved, as they do not have any responsibility for student discipline. That is the province of SDOP.

# **APPENDIX E**

## **Opinions and Orders from District and Appellate Court**

Civil Action No. 17-3600. No 19-1399 Appellate Court

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

C.A. No. 19-1399

LISA MARIE SMITH,  
Appellant

v.

KELLY SERVICES INC; PHILADELPHIA SCHOOL DISTRICT

(D.C. No.: 2-17-cv-03600)

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**SUR PETITION FOR PANEL REHEARING**

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Present: SHWARTZ, RESTREPO and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby ORDERED that the petition for rehearing by the panel is denied.

BY THE COURT,

s/ L. Felipe Restrepo  
Circuit Judge

Dated: May 28, 2020  
Sb/cc: Lisa Marie Smith  
Eric J. Janson, Esq.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 19-1399

---

LISA MARIE SMITH,  
Appellant

v.

KELLY SERVICES INC; PHILADELPHIA SCHOOL DISTRICT

---

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Action No. 2-17-cv-03600)  
District Judge: Honorable Wendy Beetlestone

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Submitted Pursuant to Third Circuit LAR 34.1(a)  
March 19, 2020

Before: SHWARTZ, RESTREPO and NYGAARD, Circuit Judges

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**JUDGMENT**

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This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on March 19, 2020. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered January 28, 2019, be and the same is hereby affirmed. Costs taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit  
Clerk

Dated: May 1, 2020

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

No. 19-1399

---

LISA MARIE SMITH,  
Appellant

v.

KELLY SERVICES INC; PHILADELPHIA SCHOOL DISTRICT

---

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Action No. 2-17-cv-03600)  
District Judge: Honorable Wendy Beetlestone

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Submitted Pursuant to Third Circuit LAR 34.1(a)  
March 19, 2020

Before: SHWARTZ, RESTREPO and NYGAARD, Circuit Judges

(Opinion filed May 1, 2020)

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OPINION\*

---

PER CURIAM

Lisa Smith appeals from an order of the United States District Court for the Eastern District of Pennsylvania, which granted summary judgment to Kelly Services,

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Inc., and the School District of Philadelphia, the defendants in her employment discrimination case. We will affirm the District Court's judgment.

Smith was a substitute teacher in a Philadelphia elementary school, but she was employed by Kelly Services and not by the School District. Smith filed a second amended complaint, raising claims against Kelly Services under 42 U.S.C. § 1981, and claims against the School District under 42 U.S.C. § 1983,<sup>1</sup> Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq., the Pennsylvania Human Relations Act, 43 P.S. § 951, et seq., and the Philadelphia Fair Practices Ordinance, Phila. Code § 9-1101, et seq. She alleged that she was fired from her substitute teacher position in retaliation for having reported students' racially abusive language, and that the students' use of such language created a hostile work environment.<sup>2</sup> Kelly Services stated that it fired Smith for violating its "no-touch" policy when she touched a fifth-grade student.<sup>3</sup>

The District Court granted Kelly Services summary judgment on the retaliation claim because Smith never informed Kelly Services that she had reported students for

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<sup>1</sup> The District Court dismissed the § 1983 claims against the School District because Smith failed to plausibly allege that the School District had a policy or custom of tolerating racial harassment by students. Dkt. #52 (citing Monell v. N.Y. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)). Smith does not challenge that decision in her brief here and we discern no error in the District Court's decision.

<sup>2</sup> The Second Amended Complaint was filed by appointed counsel. Counsel was later granted leave to withdraw and Smith then proceeded pro se. Dkt. #59.

<sup>3</sup> Smith was accused of "busting the lip" of a student, but an investigator with the Department of Human Services determined that the report of child abuse was "unfounded." But Smith did admit that she grabbed the student's shirt to get him to get back in line.

using racially abusive language (she reported students' behavior only to certain School District staff). The Court also agreed with the defendants that Smith had not established a genuine issue of material fact regarding whether she experienced a hostile environment, as she had submitted no evidence showing that "she suffered 'intentional discrimination due to . . . her race,'" or that any "abuse was 'severe or pervasive.'"<sup>4</sup> Dkt. #83 at 4. As to the claims against the School District, the District Court determined that the School District was not liable for her claims as it was not Smith's employer. Smith timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review the District Court's grant of summary judgment de novo." Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 288 (3d Cir. 2018). Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, there is no genuine dispute about any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Kaucher v. County of Bucks, 455 F.3d 418, 422-23 (3d Cir. 2006).

To succeed on her retaliation claim, Smith would have to show: (1) protected employee activity; (2) "adverse action by the employer either after or contemporaneous

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<sup>4</sup> The Court noted that although her second amended complaint stated that she experienced almost "daily" racial abuse from the students and that she "repeatedly" reported the harassment to the school, at her deposition, she recalled just four specific incidents, only one of which was documented by a complaint to school officials. And that report did not mention any racial abuse; instead, it simply mentioned that the student used "profanity." Dkt. #83 at 4. The Defendants also noted in their summary judgment motion that of the incidents Smith recalled, only the one that was reported involved a racist comment directed at her. Dkt. #72-1 at 12.

with the employee's protected activity"; and (3) a causal connection between the protected activity and the adverse action. Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 193 (3d Cir. 2015). We agree with the District Court that Smith did not proffer any evidence suggesting a causal connection. Smith argues that she was fired for reporting racial harassment by students. Such reporting would be "protected activity," see id., but as the District Court noted, Kelly Services could not have fired Smith *because* she reported student behavior if it did not know that she had *made* such reports.<sup>5</sup>

As to her hostile work environment claim, even if we assume for the sake of argument that Smith established a genuine issue of material fact regarding what she experienced at work, Smith has not explained why Kelly Services should be liable, since she did not establish that it was aware of the situation. See Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293-94 (3d Cir. 1999) (holding that an employer can be liable for a hostile environment only if it "knew or should have known of the harassment and failed to take prompt remedial action"). As for the School District, Smith concedes that the School District was not her employer, which is a requirement for liability under Title

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<sup>5</sup> Smith also argues in her brief that Kelly Services' "no-touch" policy violates Pennsylvania law. Whether Kelly Services may hold its employees to a more rigorous standard than other teachers is not properly before us, as the issue does not affect whether Smith was discharged as retaliation for protected conduct.

VII,<sup>6</sup> the Pennsylvania Human Relations Act,<sup>7</sup> and the Philadelphia Fair Practices Ordinance,<sup>8</sup> and she has explained no other basis for liability.

For all of these reasons, we will affirm the District Court's judgment.

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<sup>6</sup> 42 U.S.C. § 2000e-2(a).

<sup>7</sup> 43 Pa. Stat. Ann. § 955.

<sup>8</sup> Phila. Code § 9-1103.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**LISA MARIE SMITH,**  
Plaintiff,

**CIVIL ACTION**

**v.**

**KELLY SERVICES, INC, and THE  
SCHOOL DISTRICT OF  
PHILADELPHIA,**

**NO. 17-3600**

Defendants.

**ORDER**

**AND NOW**, this 25th day of January, 2019, upon consideration of Defendants' motion for summary judgment (ECF No. 72), Plaintiff's response (ECF No. 77), and Defendants' reply thereto (ECF No. 79), **IT IS ORDERED** that:

- (1) The motion is **GRANTED**;
- (2) **JUDGMENT IS ENTERED IN FAVOR** of Defendants and **AGAINST** Plaintiff;
- (3) The Clerk of Court is directed to close this case.

**BY THE COURT:**

/s/ Wendy Beetlestone

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**WENDY BEETLESTONE, J.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**LISA MARIE SMITH ,  
Plaintiff,**

**CIVIL ACTION**

**v.**

**KELLY SERVICES, INC, and THE  
SCHOOL DISTRICT OF  
PHILADELPHIA,  
Defendants.**

**NO. 17-3600**

**MEMORANDUM OPINION**

Defendant Kelly Services, Inc. (“Kelly Services”) discharged Plaintiff Lisa Marie Smith from her job as a substitute teacher ostensibly on the basis that she violated Kelly Services’ “no touch” policy prohibiting physical contact with students. Plaintiff sued both Defendant Kelly Services as well as the School District of Philadelphia (“SDP”), contending (1) that she was fired in retaliation for having reported several students’ use of racially abusive language and (2) that the students’ use of this language created a hostile work environment. Defendants have each filed a motion for summary judgment which, for the reasons set forth below, shall be granted.

**I. Facts**

In February 2017, Kelly Services employed Plaintiff as a substitute teacher assigning her to work at a school in the SDP, which was one of its clients. When she took the job with Kelly Services, Plaintiff signed documents acknowledging that she was “not an employee of any customer to which Kelly assigns me,” that she agreed to “[n]ever ha[ve] any physical contact with a student,” (the “No Touch Policy”), and that she would “[r]eport all incidents . . . to the Kelly office” including “any type of harassment.”

On February 14, 2017, Kelly Services fired Plaintiff because she had violated the No

Touch Policy. Plaintiff does not dispute that she violated the policy but explains that she made physical contact with a fifth-grade student to “pull him back in line with . . . other children.” However, she disputes the rationale for her termination, contending that the real reason she was fired was because she had reported several students’ use of racially abusive language to SDP employees. She contends further that the students’ use of such language subjected her to a hostile work environment.

## **II. Legal Standard**

Summary judgment must be granted if “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); *see also Radich v. Goode*, 886 F.2d 1391, 1395 (3d Cir. 1989). Materiality of facts is determined by reference to the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute “exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *U.S. ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89, 93 (3d Cir. 2018) (internal quotation marks omitted). “[A]ll reasonable inferences” must be drawn in the non-moving party’s favor. *Burton v. Teleflex Inc.*, 707 F.3d 417, 425 (3d Cir. 2013). However, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007).

## **III. Analysis**

Plaintiff brings two claims against Kelly Services, both under 42 U.S.C. § 1981: retaliatory discharge and hostile work environment. The claims will be addressed in sequence.

To establish a *prima facie* claim for retaliation under Section 1981, a plaintiff must show “(1) that [s]he engaged in a protected activity; (2) that [s]he suffered an adverse employment action; and (3) that there was a causal connection between the protected activity and the adverse employment action.” *Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001). Kelly Services argues that because Plaintiff never reported to it any of the alleged incidents—as Plaintiff admitted in her deposition testimony, she only reported them to staff employed by Defendant SDP—Plaintiff cannot establish the third element: a causal connection. According to Kelly Services, if it was never aware of the abuse or of the fact that abuse had been reported, then it could not have fired Plaintiff for reporting the abuse.

Plaintiff acknowledges this argument, stating that she “believes that reporting student harassment to her employer, Kelly Services would have been inappropriate since Kelly does not handle student discipline[.]” Whether or not her belief was accurate, it would be impossible for Kelly Services to have fired Plaintiff for retaliatory purposes if Kelly Services was unaware of the event for which it was purportedly retaliating. *See Ambrose v. Twp. of Robinson, Pa.*, 303 F.3d 488, 493 (3d Cir. 2002) (noting that to retaliate against an individual engaging in protected conduct, “the decisionmaker[] must be aware of the protected conduct”). Therefore, summary judgment must be granted to Kelly Services as to the retaliatory discharge count.<sup>1</sup>

To establish a *prima facie* claim for hostile work environment under Section 1981, a plaintiff must show “(1) the employee suffered intentional discrimination because of his/her race; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person in like

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<sup>1</sup> Plaintiff also purports to rely on a cat’s paw theory of liability whereby an employer (Kelly Services) is held responsible “for the animus of a nondecisionmaker” (SDP), *McKenna v. City of Philadelphia*, 649 F.3d 171, 177 (3d Cir. 2011), but offers neither legal argument nor record evidence to show why the theory should apply.

circumstances; and (5) the existence of *respondeat superior* liability[.]” *Castleberry v. STI Grp.*, 863 F.3d 259, 263 (3d Cir. 2017). Where the harassment is by an someone other than a plaintiff’s supervisor then the plaintiff must also provide sufficient evidence that “the employer failed to provide a reasonable avenue for complaint, or, alternatively, [that] the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.” *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009).<sup>2</sup>

Plaintiff’s Complaint alleges “routine[.]” almost “daily” racial abuse perpetrated by students at Cayuga Elementary, and that she “repeatedly” reported the harassment. However, in her deposition testimony she recalled only four incidents in which she heard children use racially abusive language. Only one incident is documented and there is no mention of racial abuse in the disciplinary report (rather, it mentions “profanity” in general terms). Plaintiff maintains that she submitted discipline forms for each of the incidents and asserts her belief that “Defendants have withheld the disciplinary forms of a racially hostile environment, or the staff at Cayuga Elementary School in all probability has destroyed them,” but cites to no evidence in-support of that belief.

At summary judgment, “the nonmoving party [must] go beyond the pleadings,” to show that “there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Plaintiff fails to do so, relying only on the assertions made in her Complaint and a repetition of those assertions made during her deposition. As such, she has not established a genuine dispute of material fact as to whether she suffered “intentional discrimination due to . . . her race” or whether any abuse was “severe or pervasive.” *Castleberry*, 863 F.3d at 263; *see also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 232 n.9 (3d Cir. 2007) (affirming a grant of

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<sup>2</sup> This requirement is typically applied to “co-worker harassment,” but courts within this District have also applied it to hostile work environment claims made by instructors that are based on the actions of students. *See Dykes v. Marco Grp.*, 222 F. Supp.3d 418, 430 n.6 (E.D. Pa. 2016).

summary judgment where there was “no support for [a claim] in the record beyond [the plaintiff’s] own testimony”). Therefore, summary judgment must be granted in favor of Kelly Services on this count as well.

With respect to the SDP, Plaintiff alleges that it violated Title VII, the Pennsylvania Human Relations Act (“PHRA”), and the Philadelphia Fair Practices Ordinance (“PFPO”), on the basis of both retaliatory discharge and hostile work environment. Liability under each of these laws is premised on Plaintiff establishing that she was an employee of the SDP. 42 U.S.C. § 2000e-2(a) (Title VII); 43 Pa. C.S.A. § 955; Philadelphia Code § 9-1103. The undisputed evidence of record is that the SDP was not Plaintiff’s employer – Kelly Services was. Indeed, Plaintiff admits as much. Accordingly, summary judgment must be granted to the SDP on these counts.

An appropriate order follows.

**January 25, 2019**

**BY THE COURT:**

**/s/ Wendy Beetlestone**

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**WENDY BEETLESTONE, J.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**LISA MARIE SMITH ,  
Plaintiff,**

**CIVIL ACTION**

**v.**

**KELLY SERVICES, INC, and THE  
SCHOOL DISTRICT OF  
PHILADELPHIA,  
Defendants.**

**NO. 17-3600**

**ORDER**

**AND NOW**, this 25th day of January, 2019, upon consideration of Defendants' motion for summary judgment (ECF No. 72), Plaintiff's response (ECF No. 77), and Defendants' reply thereto (ECF No. 79), **IT IS ORDERED** that:

- (1) The motion is **GRANTED**;
- (2) **JUDGMENT IS ENTERED IN FAVOR** of Defendants and **AGAINST** Plaintiff;
- (3) The Clerk of Court is directed to close this case.

**BY THE COURT:**

/s/ Wendy Beetlestone

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**WENDY BEETLESTONE, J.**

summary judgment where there was “no support for [a claim] in the record beyond [the plaintiff’s] own testimony”). Therefore, summary judgment must be granted in favor of Kelly Services on this count as well.

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An appropriate order follows.

**January 25, 2019**

**BY THE COURT:**

**/s/ Wendy Beetlestone**

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**WENDY BEETLESTONE, J.**

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK



UNITED STATES COURT OF APPEALS

21400 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106-1790

Website: [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov)

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May 1, 2020

Eric J. Janson, Esq.  
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975 F Street, N.W.  
Washington, DC 20004

Lisa Marie Smith  
6219 Palethorp Street  
Philadelphia, PA 19120

RE: Lisa Smith v. Kelly Services Inc, et al

Case Number: 19-1399

District Court Case Number: 2-17-cv-03600

ENTRY OF JUDGMENT

Today, **May 01, 2020** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment.

45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:

3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).

15 pages if hand or type written.

# **APPENDIX D**

## **SCHOOL DISTRICT OF PHILADELPHIA Harassment and Discrimination Policy**



# SCHOOL DISTRICT OF PHILADELPHIA EMPLOYEE HANDBOOK

**December 2009**

## PROCEDURES FOR INVESTIGATIONS AND RESOLVING COMPLAINTS

### A. EQUAL EMPLOYMENT OPPORTUNITY OFFICER

The principal of each school shall be designated as the EEO Officer capable of conducting a thorough and complete investigation. In non-school offices the administrator in charge of such office shall be the EEO officer. The principal or administrator shall seek advice and assistance from the Cluster Leader (in the case of the principal) or the next higher administrator (in the case of an administrator in charge of a non-school office) if the principal or administrator believes that he/she lacks the capacity to conduct a thorough and complete investigation or the alleged misconduct. If the principal or the administrator in charge is the alleged harasser or is alleged to have been responsible for the harassment, such person's direct line supervisor will conduct the investigation.

### B. CONDUCTING INVESTIGATIONS

Any Supervisor or EEO Officer receiving a complaint of sexual harassment shall take the details of the complaint in writing and have the complainant sign it. Copies of this document will be forwarded to the Law Department of the School District of Philadelphia and the Director of Human Resources. All complaints of sexual harassment against a District employee shall be received, investigated, and disposed of in accordance with the procedures set forth in this Policy, and complainants shall be notified of the final disposition/action taken by the District.

If the complaint involves sexual assault, rape, or conduct of a criminal nature, the Philadelphia Police Department shall be contacted and a report of the incident made. If there is any question whether the conduct complained of constituted criminal activity, the Law Department of the School District of Philadelphia should be contacted and consulted.

The assigned investigator shall attempt to secure statements from all participants in, and witnesses to the alleged incident. The accused shall have the right of representation during his/her interview as required by the applicable collective bargaining agreement or practice.

All investigations shall be completed by the assigned investigator within 60 days from the filing date of the complaint. Extenuating circumstances for not being able to comply with the deadline must be approved by the Director of Human Resources. The extension must be a specified period of time not exceeding 25 days, and must be communicated to the complainant.

If the charge is substantiated, the EEO Officer shall determine the appropriate level of discipline consistent with the School District's strong policy against sexual harassment. Such discipline as is deemed appropriate will be initiated in accordance with District disciplinary procedures and applicable collective bargaining agreements. Documents regarding substantiated charges of sexual harassment shall be placed in the accused employee's personnel file. Documents regarding unsubstantiated charges shall not be placed in personnel files, but shall be maintained by the Law Department of the School District of Philadelphia in a confidential EEO file established expressly for retaining complaints of sexual harassment against employees of the District.

## SYSTEM SECURITY OBLIGATIONS

Users are responsible for the use of their individual access account(s) and should take all reasonable precautions to prevent others from being able to use their account(s), including coworkers, friends, or family. Under no conditions should a user provide his/her password to another person.

Attempts to log on to the District's private network or any other network as a system administrator are prohibited.

Any user identified as a security risk or having a history of violating this or any other Acceptable Use Policy may be denied access to the District's private network.

Users will avoid the inadvertent spread of computer viruses by following the School District virus protection procedures if they download software or share common file directory. Users should immediately notify a teacher or system administrator of any possible security problem. Students will promptly disclose to their teacher or other appropriate school employee any message received that is inappropriate.

## FILTERING

As required by law and in recognition of the need to establish a safe and appropriate computing environment, the District will use filtering technology to prohibit access, to the degree possible, to objectionable or unsuitable content that might otherwise be accessible via the Internet.

## DUE PROCESS

The School District will cooperate fully with local, state, or federal officials in any investigation concerning or relating to any illegal activities conducted through The District's private network.

In the event there is an allegation that a student has violated the District Acceptable Use Policy, the student will be provided with a written notice of the alleged violation and will be provided with notice and opportunity to be heard in the manner set forth in the Student Hearing Process Policy. Disciplinary actions may be taken.

Employee violations of the District Acceptable Use Policy will be handled in accordance with law, School Board Policy, or collective bargaining agreement(s), as applicable.

## ADMINISTRATION

The Chief Information Officer has the responsibility and authority for the development, publication, implementation, and ongoing administration and enforcement of the processes and techniques required to protect the SDP's technology systems and services from unauthorized access, loss, or misuse.

School principals have the responsibility to establish a plan to ensure adequate supervision of students. They are also responsible for interpreting and enforcing this policy at the local level. Local management has the responsibility to interpret and enforce this policy.

# SCHOOL DISTRICT OF PHILADELPHIA

SECTION: PUPILS  
TITLE: HARASSMENT  
ADOPTED: September 22, 2010  
REVISED: August 22, 2013

## 248. HARASSMENT

### 1. Purpose

The School Reform Commission strives to provide a healthy, safe, positive learning climate for students in the schools. Therefore, it shall be the policy of the District to maintain an educational environment in which harassment in any form is not tolerated. It shall also be the policy of the District that each staff member shall be responsible for maintaining an educational environment free from all forms of harassment, and that each student shall be responsible to respect the rights of his/her fellow students and employees and to ensure an atmosphere free from all forms of harassment.

### 2. Authority

43 P.S.  
Sec. 931 et seq  
Title IX  
20 U.S.C.  
Sec. 1681 et seq  
29 CFR  
Sec. 1606.8(a)

The SRC prohibits all forms of harassment of students and third parties by all District students and staff members, contracted individuals, vendors, volunteers, and third parties in the schools. The SRC encourages students or their parents/guardians and third parties who have been harassed to promptly report such incidents to the school principal or designee, or to any other member of the school staff, including teachers, guidance counselors, bilingual counseling assistants (BCAs), coaches, and administrators. Any staff member who receives such a report shall immediately notify the principal or designee of same. If the behavior continues or if the school does not take action, students or parents/guardians should report the incident to the District's hotline at 215-400-SAFE.

This policy applies to students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, in transit to and from school, at a class or training program sponsored by the school at another location, or elsewhere. The policy also applies to any off-campus conduct that has a continuing effect on campus.

The SRC directs that all complaints of harassment shall be investigated promptly and thoroughly, and corrective action taken when allegations are substantiated. Confidentiality of all parties shall be maintained, consistent with the District's legal and investigative obligations. All parties will be treated with dignity and shall be afforded legally-required due process.

No reprisals or retaliation shall occur as a result of good faith reports of harassment.