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App. 1

United States Court of Appeals
for the Eighth Circuit

No. 22-2067

Janice Hargrove Warren

Plaintiff - Appellee

v.

Mike Kemp, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity; Linda Remele, in her official capacity as a Member of the Pulaski County Special School District and in her individual capacity; Shelby Thomas, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Alicia Gillen, in her official capacity as a Member of the Pulaski County Special School District and in her individual capacity; Eli Keller, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Brian Maune, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Pulaski County Special School District

Defendants - Appellants

No. 22-2169

Janice Hargrove Warren

Plaintiff - Appellant

v.

Mike Kemp, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity; Linda Remele, in her official capacity as a Member of the Pulaski County Special School District and in her individual capacity; Shelby Thomas, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Alicia Gillen, in her official capacity as a Member of the Pulaski County Special School District and in her individual capacity; Eli Keller, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Brian Maune, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Pulaski County Special School District

Defendants - Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: June 15, 2023
Filed: August 22, 2023

Before GRUENDER, KELLY, and GRASZ, Circuit Judges.

GRUENDER, Circuit Judge.

After being passed over for a superintendent role, Dr. Janice Warren sued her employer, Pulaski County Special School District ("PCSSD"), and its board members, for discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. A jury found in her favor on her Title VII and § 1981 retaliation claims and awarded damages, including punitive damages. The defendants appeal the district court's denial of their motion for judgment as a matter of law and the punitive damages award. Dr. Warren cross-appeals the district court's denial of her request for front pay, additional back pay, and equitable relief. We vacate the judgment for Dr. Warren.

I.

Dr. Warren works for PCSSD. PCSSD has been under federal court supervision since 1982 when the predominately black Little Rock School District sued the predominately white PCSSD, North Little Rock School District, as well as the state of Arkansas. We ordered

the schools to develop desegregation plans to establish unitary, racially integrated districts. *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, 778 F.2d 404, 434-36 (8th Cir. 1985). In 2000, the parties in that case reached an agreement (the "Plan 2000") whereby PCSSD promised it would "prepare . . . a plan so that existing school facilities are clean, safe, attractive, and equal."

In 2011, the district court found that PCSSD was not in compliance as to facilities because it had "devoted a disproportionate share of its facilities spending to predominantly white areas." *Little Rock Sch. Dist. v. Arkansas*, 664 F.3d 738, 753 (8th Cir. 2011). PCSSD then decided to build a new Mills High School in a predominantly black area and to convert Robinson High School to a middle school in a predominantly white area.

In 2012, Dr. Warren was hired to be the director of PCSSD's elementary education program. A year later, she also became the interim assistant superintendent for equity and pupil services. Then, in 2017, the PCSSD board (consisting of Alicia Gillen, Eli Keller, Mike Kemp, Brian Maune, Dr. Linda Remele, Shelby Thomas, and Tina Ward), hired Dr. Warren to be the interim superintendent for one year. Her contract stated that afterward, she would return to her previous position as assistant superintendent for equity and pupil services.

At the end of August 2017, Dr. Warren was notified of significant differences between the construction of

the Robinson Middle School and the Mills High School. For example, Robinson's weight room was 2,700 square feet larger than the one at Mills. And Robinson had theater-style padded seats in its basketball arena while Mills had "glorified folding chairs" in its gymnasium.

After investigating, Dr. Warren called the board members and PCSSD's attorney in the desegregation case to notify them of the differences. An upcoming status hearing in the ongoing desegregation case had already been scheduled for early September, so PCSSD's attorney updated PCSSD's status report to include information about the differences in the facilities. After the report was filed, tension developed between Dr. Warren and some of the board members. For example, some board members alleged Dr. Warren revised and submitted the status report without them seeing it, and Dr. Remele was upset about the status report being published in the newspaper.

Before Dr. Warren's interim superintendent contract expired, the board began to search for a permanent superintendent. There is conflicting evidence about whether the search began before or after the September status update. In any event, it was after the status update that the board hired Ray & Associates, a national school-executive-search organization, to help find a permanent superintendent.

Dr. Warren applied for the permanent superintendent position. Nine top candidates, including Dr. Warren, were selected for the board to review. After

reviewing each candidate's video presentation and application package, each board member completed a "consensus-building matrix." Ray & Associates then ranked the candidates using the collective matrix scores, and the board chose three finalists to interview. Dr. Warren was not a finalist, though no one disputes that she was qualified for the position. Dr. Warren believes she was not a finalist because Gillen and Dr. Remele scored her very low when completing the matrix to bring her overall score down. Ultimately, the board hired someone else to be the superintendent, and Dr. Warren returned to her prior position.

After being passed over for the superintendent position, Dr. Warren sued PCSSD and the board members in their individual capacities for discrimination and retaliation under Title VII and § 1981 and for breach of contract. As to retaliation, she alleged that the defendants declined to interview or hire her because she reported the disparity in the facilities. She requested back pay, front pay, compensatory damages, punitive damages, pre- and post-judgment interest, and other equitable relief. The defendants moved for summary judgment, arguing that Dr. Warren did not engage in protected conduct for her retaliation claims. Their motion was denied.

At trial, the defendants moved for judgment as a matter of law, raising the same purely legal questions as at summary judgment. Their motion again was denied. The jury found in Dr. Warren's favor only on her Title VII and § 1981 retaliation claims for not being hired as superintendent. For those claims, the jury

instructions contained a single retaliation instruction that did not distinguish between Title VII and § 1981. The jury awarded her back pay and other compensatory damages and also punitive damages against PCSSD, Dr. Remele, and Gillen. The district court then granted the defendants' earlier motion for judgment as a matter of law as to punitive damages against PCSSD, agreeing that they are not available against political subdivisions like school districts.

Dr. Warren asked to be reinstated, for front pay, for an order to increase her salary, for pre- and post-judgment interest, and for other equitable and declaratory relief. The defendants then renewed their motion for judgment as a matter of law on the protected-conduct issue. They also moved, in the alternative, to alter or amend the judgment, arguing that punitive damages cannot be awarded against Dr. Remele and Gillen. As to Dr. Warren's motion, the district court denied her request for front pay, additional back pay, and other equitable relief, but it awarded her pre- and post-judgment interest on her lost wages and benefits. As to the defendants' motion, the district court upheld the jury's verdict and affirmed the award of punitive damages. The defendants appeal the denial of their motion for judgment as a matter of law. Dr. Warren cross-appeals, renewing her requests for increased back pay, front pay, and reinstatement.

II.

We begin with the defendants' motion for judgment as a matter of law. We review the district court's denial *de novo*, viewing the evidence in the light most favorable to the jury's verdict. *Wedow v. City of Kansas City*, 442 F.3d 661, 666 (8th Cir. 2006). Judgment as a matter of law is appropriate if there is no "legally sufficient evidentiary basis" for a reasonable jury to find for the non-moving party. Fed. R. Civ. P. 50(a)(1).

The jury found in Dr. Warren's favor for retaliation. Because the jury instructions did not distinguish between the Title VII and § 1981 claims, we assume that the jury found for Dr. Warren as to both.

Title VII bans discrimination with respect to "compensation, terms, conditions, or privileges of employment, because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In addition, Title VII "prevents employers from retaliating against employees who have acted to vindicate their statutorily protected rights by reporting harassment or discrimination in the workplace." *Brannum v. Mo. Dep't of Corrs.*, 518 F.3d 542, 547 (8th Cir. 2008); *see* 42 U.S.C. § 2000e-3(a).

Section 1981 provides that all persons shall have the same right to "make and enforce contracts . . . as is enjoyed by white citizens," which includes the right to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a)-(b). Section 1981 protects private employees who are discriminated against on the basis of race.

Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459-60 (1975). To prove a § 1981 discrimination claim, a plaintiff must establish membership in a protected class, discriminatory intent by the defendant, engagement in a protected activity (e.g., attempting to make a contract or having an existing contractual relationship), and interference with that activity. *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 468-69, 473 (8th Cir. 2009) (en banc); *Withers v. Dick's Sporting Goods, Inc.*, 636 F.3d 958, 964 (8th Cir. 2011) (noting that the plaintiffs did not attempt to make a contract or have an existing contractual relationship that constituted protected activity). It also encompasses claims of retaliation for an individual "attempting to vindicate the rights of minorities protected by § 1981." *Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025, 1031 (8th Cir. 2013); *see CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (holding that a plaintiff may bring a retaliation claim under § 1981 to vindicate the § 1981 rights of another).

To establish retaliation under either Title VII or § 1981, a plaintiff must prove (1) he engaged in statutorily protected activity, (2) suffered an adverse employment action, and (3) that the engagement in a protected activity is the but-for cause of the adverse employment action. *See Blackwell v. Alliant Techsystems, Inc.*, 822 F.3d 431, 436 (8th Cir. 2016) (listing the elements of a Title VII retaliation claim); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1063 (8th Cir. 1997) (explaining that the elements of retaliation for Title VII and § 1981 are the same).

The defendants argue that judgment as a matter of law is appropriate because Dr. Warren's reporting of the disparity in the facilities does not qualify as a protected activity, she did not suffer an adverse employment action, and there is insufficient evidence to find that she was not hired as superintendent because she reported the disparity in the facilities. We conclude that Dr. Warren did not engage in a protected activity, so we need not reach the defendants' other arguments.

We and other courts have held that an employee engages in a protected activity under § 1981 when the employee has opposed any practice made unlawful by Title VII involving race-based discrimination. *See*, *e.g.*, *Sayger*, 735 F.3d at 1030-31; *Scott v. U.S. Bank Nat'l Assoc.*, 16 F.4th 1204, 1209 (5th Cir. 2021). Thus, cases interpreting opposition under Title VII are "instructive" in determining whether conduct "vindicated the rights of minorities" and is therefore protected under § 1981. *Sayger*, 735 F.3d at 1031 (brackets omitted). To be sure, protected activities under § 1981 might include conduct not also covered by Title VII because § 1981 prohibits discrimination in all contractual relationships. But the parties present this case as having a single protected-activity theory based on Title VII. There was a single jury instruction for both retaliation claims, and on appeal the defendants argue that Dr. Warren did not engage in protected conduct because she did not report a discriminatory employment practice, again treating the claims as if they are one. Dr. Warren responds without arguing that she has separate protected-activity theories for each claim. We

therefore accept the parties' invitation to treat the claims as one. So we focus on whether her conduct is protected under Title VII. If it is not, we vacate the jury's verdict in her favor on both retaliation claims.

Under Title VII, "protected activity" includes opposition to discriminatory employment practices prohibited under Title VII. *Bakhtiari v. Lutz*, 507 F.3d 1132, 1137 (8th Cir. 2007). Such practices are those that discriminate with respect to "compensation, terms, conditions, or privileges of employment, because of [an] individual's race, color, religion, sex, or national origin." § 2000e-2(a)(1). We have rejected Title VII retaliation claims where the plaintiff opposed conduct other than a discriminatory employment practice. *See*, *e.g.*, *Bonn v. City of Omaha*, 623 F.3d 587, 591-92 (8th Cir. 2010) (holding that the plaintiff did not engage in a protected activity under Title VII by publishing a report exposing a police department's policing tactics that were potentially discriminatory because the report did not implicate employment practices); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 101 (8th Cir. 1995) (rejecting a Title VII retaliation claim based on "an allegation that [the principal's] efforts to comply with a desegregation directive disregarded the needs of the black student population" because it "lies not with any allegation of a discriminatory employment practice").[1] A plaintiff need not establish that the

[1] In *Evans*, the plaintiff also brought a § 1981 retaliation claim that we analyzed separately. The ground for rejecting that claim—that the plaintiff could not bring a § 1981 retaliation claim alleging that a third party's rights were violated, *Evans*, 65 F.3d

conduct he opposed was in fact prohibited under Title VII; rather, he need only demonstrate that he had a "good faith, reasonable belief that the underlying challenged conduct violated Title VII." *Bakhtiari*, 507 F.3d at 1137 (brackets omitted).

We conclude that Dr. Warren did not engage in a protected activity because she did not report an underlying discriminatory employment practice. Dr. Warren does not argue that her report itself was about an employment practice. Rather, she argues that *making* the report was a required employment practice, so she engaged in a protected activity.

But simply performing one's job duties is not itself a protected activity under Title VII; a plaintiff must oppose a discriminatory employment practice. Her case is indistinguishable from *Bonn* and *Evans*, where we held that a plaintiff did not engage in a protected activity when opposing conduct that was not itself a discriminatory employment practice. *Bonn*, 623 F.3d at 591-92; *Evans*, 65 F.3d at 101. Even if Warren was required as interim superintendent to report the disparity in the facilities, this conduct did not constitute opposition to a discriminatory employment practice because the disparity in the facilities had nothing to do with "compensation, terms, conditions, conditions, or privileges of employment." *See* § 2000e-2(a)(1). Indeed,

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at 101—has since been rejected by the Supreme Court, *see Humphries*, 553 U.S. at 445, 457. Thus, contrary to the defendants' arguments, *Evans* does not necessarily bar Dr. Warren's § 1981 claim. But, as mentioned, Dr. Warren does not advance a theory for § 1981 retaliation independent from her Title VII theory.

she agrees that her report was about a violation of the students' rights, not employees' rights. Thus, Dr. Warren did not engage in a protected activity by reporting the disparity in the facilities.[2]

Nor can we affirm on the ground that Dr. Warren had a good faith, reasonable belief that she was opposing an unlawful employment practice. *See Bakhtiari*, 507 F.3d at 1137. The jury was never instructed to determine this issue, and Dr. Warren never testified that she believed she was reporting discrimination against employees. Further, there is no other evidence from which a jury could infer that she had a good-faith belief that she believed she reported discrimination against employees. At most, Dr. Warren testified that her concern for employees being treated fairly motivated her to file the EEOC complaint. As a whole, the evidence demonstrates that she believed she reported the disparity in the facilities as part of her duty to oversee compliance with the Plan 2000, which sought to rectify discrimination against students in public education. Though we do not rule out that the disparity in the

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[2] At oral argument, Dr. Warren seemed to raise a new argument that, at least for § 1981, her report was about discrimination against employees too and the affected contractual relationship was her own and others' employment contract. Whatever the merits of this theory, she never raised it in her complaint, to the district court, or in her appellate briefs, so we will not affirm on this basis. *See Adamscheck v. Am. Fam. Mut. Ins.*, 818 F.3d 576, 588 (10th Cir. 2016) (rejecting appellee's proposed alternative basis for affirmance because it was unbriefed and raised for the first time at oral argument). Unlike the dissent, we do not address whether the evidence could have been sufficient to support Warren's belated theory of the case.

facilities could affect employees too, there is simply no evidence here that Dr. Warren believed she was complaining about a discriminatory employment practice. Thus, a jury could not conclude that Dr. Warren had a good faith belief that she was reporting a discriminatory employment practice.

III.

For the foregoing reasons, we vacate the judgment and remand the case to the district court to enter judgment as a matter of law for the defendants. We therefore need not address the remaining arguments the defendants raise or Dr. Warren's cross-appeal.

KELLY, Circuit Judge, dissenting.

PCSSD appeals the district court's denial of its post-verdict motion for judgment as a matter of law. See Fed. R. Civ. P. 50(b). Under the applicable standard of review, we cannot set aside the jury verdict finding in favor of Warren on her Title VII retaliation claim[3] unless we conclude that, in light of the evidence presented, "no reasonable jury" could have made factual determinations sufficient to render Warren's conduct statutorily protected. Hopman v. Union Pac. R.R., 68

[3] In light of the district court proceedings and the parties' arguments on appeal, I agree with the court that our analysis of Warren's Title VII and § 1981 retaliation claims "is the same." Sayger v. Riceland Foods, Inc., 735 F.3d 1025, 1030 (8th Cir. 2013).

F.4th 394, 399 (8th Cir. 2023); see Bayes v. Biomet, Inc., 55 F.4th 643, 648 (8th Cir. 2022) ("When reviewing a [Rule 50(b)] motion . . . , our analysis reflects our hesitancy to interfere with a jury verdict." (cleaned up)). Because the evidence at trial was "legally sufficient . . . to support" the jury's verdict here, Bavlsik v. Gen. Motors, LLC, 870 F.3d 800, 805 (8th Cir. 2017), I would affirm the judgment.

To prove her retaliation claim, Warren had to establish, among other things, that she "engaged in a protected activity." Bonn v. City of Omaha, 623 F.3d 587, 590-91 (8th Cir. 2010). Title VII "shields" employees from retaliation for having "opposed a practice made unlawful by" the statute, Barker v. Mo. Dep't of Corr., 513 F.3d 831, 834 (8th Cir. 2008), which includes making statements in opposition to discriminatory "conditions . . . of employment," 42 U.S.C. § 2000e-2(a)(1). See id. § 2000e-3(a). Accordingly, the question presented by this appeal is whether there was a "legally sufficient evidentiary basis," Fed. R. Civ. P. 50(a)(1), for the conclusion that Warren's complaints about disparate school facilities within PCSSD concerned, at least in part, an unlawful employment practice. And a review of the trial record here shows sufficient evidence from which a reasonable jury could have determined that Warren's complaints did, in fact, implicate certain "conditions . . . of employment," 42 U.S.C. § 2000e-2(a)(1)—namely, those faced by a predominantly Black staff[4] working at a school in a

[4] In her brief in opposition to PCSSD's Rule 50(b) motion, Warren explained that in 2017, 67 percent of the administrators

predominantly Black community that had facilities that were undisputedly inferior to those enjoyed by the staff at a school in a predominantly white community.

At trial, Warren testified about the "[v]ery, very disturbing phone call" she received from a parent in August 2017 regarding the obvious disparities between the athletic facilities at Mills High School and those at Robinson Middle School. Warren explained that after that call, she requested video footage of the two schools' facilities, which confirmed that Mills's sport complex, while "nice," was "nothing compared to" Robinson's. And after viewing the footage, Warren reported the disparities to PCSSD's board.

By that point in the trial, those disparities had already been presented to the jury in detail. For instance, jurors heard testimony from Margie Powell, a federal court expert who was directed in September 2017 to "report on whether the sports complex at Mills High School [was] equal to the one located on the site of the Robinson Middle School campus." Powell testified that during her investigation, she "found inequities" between the two schools, "some of" which "were rather gross." According to Powell, the staff members working at Mills's sports complex did not have "nearly the space to work with that Robinson had." Mill's complex also had a "smaller" equipment room than the one at Robinson, the "furniture was different," and the complex

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at Mills High School were Black, "including the principal and athletic director," and that 58 percent of the school's staff was Black. Nothing in the trial record contradicts this assertion.

was "difficult to get to." Powell's report, which was admitted into evidence, stated that Mills's athletic director, who was Black, "d[id] not have an office" in the new sports complex, while his counterpart at Robinson "ha[d] a separate office" that "include[d] a restroom." And the report further noted that while Robinson's athletic director "was invited (at least twice) to provide input on what he felt was important with respect to [the] design and specific attributes of his school's complex," Mills's athletic director "was not allowed the same privilege."

The jury also heard from Curtis Johnson, PCSSD's director of operations, who testified that "Mills High School was inferior in scope of work and design to that of the Robinson Middle School project." Johnson explained that due to budget shortfalls, the classrooms at Mills—that is, the spaces in which staff members were expected to teach—were the smallest size permitted under state standards. He noted that Robinson had "masonry walls," while Mills "had gypsum board or regular sheetrock walls," which could be more easily punctured and were less safe "in times of storms." And Johnson further noted that the sports complex at Robinson was likewise "made of masonry brick walls," while the complex in which Mills's athletic staff was expected to work was "almost like a metal tin building." A project manager for the architectural firm that was hired to design Mills's new buildings testified about how PCSSD asked the firm to "scale back th[e] project" to cut costs, which resulted in Mills having "gypsum board walls," narrower hallways, less natural

lighting, and ceilings that were two feet shorter than originally planned. And, crucially, jurors viewed the video footage comparing the athletic facilities at Mills and Robinson, which allowed them to see firsthand the extent of the disparities about which Warren complained, and to draw their own inferences about how the inferior facilities at Mills would affect that school's community—including the employees who worked there.

As Warren expressly argued to the district court in opposing PCSSD's Rule 50(b) motion, this evidence "provided the jury with" a legally sufficient basis "for inferring" that PCSSD's "discriminatory construction" of facilities at a school in a predominantly Black community "adversely affect[ed] the employment conditions of" that school's "predominantly black administrators, teachers, and staff." And the district court agreed, explaining in its order denying the Rule 50(b) motion that PCSSD had failed to meet its burden of showing "a complete absence of probative facts to support the conclusion reached by the jury." See Browning v. President Riverboat Casino-Mo., Inc., 139 F.3d 631, 634 (8th Cir. 1998) ("Judgment as a matter of law is proper only when the evidence is such that . . . there is a complete absence of probative facts to support the verdict.").

On appeal, PCSSD attempts to portray its argument in support of reversal as one that raises a "narrow" question of law—namely, whether Warren "engage[d]" in activity that was protected "under the relevant statutes." And it contends that "Warren's reporting

about discriminatory conditions" at Mills was not so protected because such "opposition to racial discrimination on behalf of students . . . did not relate to an *employment practice.*" But PCSSD's framing of the relevant facts fails to account for the trial record as a whole. In other words, PCSSD's argument presumes that Warren's complaints about inferior school facilities were, as a factual matter, limited exclusively to concerns about the impact that those facilities would have on Black students. Or, at the very least, its argument presumes that Warren's complaints in no way implicated the effect that those same facilities would also have on the predominantly Black staff members who would work in them. See 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination on the basis of race with regard to the "terms, *conditions*, or privileges of employment" (emphasis added)); see also Wedow v. City of Kansas City, 442 F.3d 661, 671-72 (8th Cir. 2006) (explaining that the provision of discriminatory workplace "facilities" can be unlawful under Title VII if it creates "conditions" of employment that "jeopardize" an employee's "ability to perform the core functions of her job in a safe and efficient manner").

But a court reviewing a Rule 50(b) motion must (1) "consider the evidence in the light most favorable to" the party that prevailed at trial, (2) "assume that all conflicts in the evidence were resolved in favor of" that prevailing party, (3) "assume as proved all facts that the prevailing party's evidence tended to prove," and (4) "give the prevailing party the benefit of all favorable inferences that may reasonably be drawn from

the facts proved." Ryan Data Exch., Ltd. v. Graco, Inc., 913 F.3d 726, 732-33 (8th Cir. 2019) (quoting Washington v. Denney, 900 F.3d 549, 558-59 (8th Cir. 2018)). Once the trial record is so construed, the court must then "determine whether there was legally sufficient evidence to support the jury's liability finding." Bavlsik, 870 F.3d at 805. And as just explained, the evidence in the trial record here was legally sufficient to support the conclusion that Warren's reporting of disparate school facilities implicated in part the "conditions . . . of employment" faced by Mill's predominantly Black staff. 42 U.S.C. § 2000e-2(a)(1).

Framing the question presented here as a purely legal one also overlooks what took place in the district court. At summary judgment, PCSSD treated the material facts regarding Warren's conduct as settled and then argued that those facts did not, as a legal matter, amount to "protected conduct" under Title VII's anti-retaliation provision. The district court denied PCSSD's motion, concluding that "genuine issues of fact" regarding Warren's retaliation claim remained "in dispute." At the close of Warren's evidence at trial, PCCSD filed a motion for judgment as a matter of law, see Fed. R. Civ. P. 50(a), arguing that Warren's report about substandard school facilities in a predominantly Black community was "not protected activity under Title VII" because such complaints concerned "student-based issues and the District's compliance with" federal desegregation orders rather than an unlawful employment practice. The district court summarily denied that motion too, explaining that "there [was]

sufficient evidence in the [trial] record" for Warren's retaliation claim "to go to the jury."

These decisions indicate that the question of whether Warren's complaints addressed only "student-based" issues or instead an "unlawful employment practice" that affected the conditions or privileges of employment was a *factual* one for the jury to decide. PCSSD, however, did not raise this as a disputed factual issue to the jury in closing argument. Moreover, the jury instructions for Warren's retaliation claim simply asked jurors to find whether Warren "reported a disparity between the construction of Mills High School and Robinson Middle School to PCSSD, its lawyer, or the court"—an instruction that presupposed such conduct qualified as protected activity under Title VII. Yet PCSSD did not object.[5] See Riggs v. Gibbs, 66 F.4th 716, 719 (8th Cir. 2023) (noting that "objections to jury instructions are waived, absent a showing of plain error" if a party does not object to the instructions at trial). Nor did it seek a special verdict asking the jury to specifically find whether Warren's complaints about

[5] To the contrary, the instructions proffered by PCSSD would have asked the jury to find that Warren "complained about facility inequalities at Mills High School and that the facilities were being constructed in a discriminatory manner based on race," and that she "reasonably believed that Mills High School students were being discriminated against on the basis of race." These proposed instructions not only presuppose that complaints about disparate school facilities qualify as protected activity under Title VII, but also that complaints about racial discrimination *towards students* do as well, which directly contradicts the argument that PCSSD now advances on appeal.

the inferior facilities at Mills related to an unlawful employment practice.

The evidence in this case was sufficient for a jury to make a reasonable inference that PCSSD's discriminatory approach to the construction of facilities at a school in a predominantly Black community affected the conditions and privileges of employment for that school's predominantly Black staff. "Judgment as a matter of law is appropriate only when the record contains no proof beyond speculation to support the verdict." Am. Bank of St. Paul v. TD Bank, N.A., 713 F.3d 455, 462 (8th Cir. 2013) (cleaned up) (quoting Wilson v. Brinker Int'l, Inc., 382 F.3d 765, 770 (8th Cir. 2004)). Because that is not the case here, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2067

Janice Hargrove Warren

Plaintiff - Appellee

v.

Mike Kemp, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity; Linda Remele, in her official capacity as a Member of the Pulaski County Special School District and in her individual capacity; Shelby Thomas, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Alicia Gillen, in her official capacity as a Member of the Pulaski County Special School District and in her individual capacity; Eli Keller, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Brian Maune, in his official capacity as a Member of the Pulaski County Special School District and in his individual capacity; Pulaski County Special School District

Defendants - Appellants

No: 22-2169

Janice Hargrove Warren

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Defendants - Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:19-cv-00655-BSM)
(4:19-cv-00655-BSM)

JUDGMENT

Before GRUENDER, KELLY, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

August 22, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JANICE HARGROVE WARREN PLAINTIFF

v. Case No. 4:19-CV-00655-BSM

MIKE KEMP, *et al.* DEFENDANTS

ORDER

(Filed Apr. 21, 2022)

Defendants' motion for judgment as a matter of law, or to alter or amend the judgment [Doc. No. 181], is denied. Warren's motion for equitable and injunctive relief [Doc. Nos. 177 & 179] is granted in part and denied in part. Warren is awarded pre-judgment and post-judgment interest as specified below, and her remaining requests for relief are denied.

1. Defendants' Motion

In their motion, defendants argue that punitive damages cannot be assessed against Linda Remele and Alicia Gillen because section 1981 does not permit retaliation claims against state actors, except those brought pursuant to section 1983. *See Onyiah v. St. Cloud State Univ.*, 5 F.4th 926, 929 (8th Cir. 2021). They contend Warren did not bring her section 1981 retaliation claim under section 1983, and that her claim would fail regardless because section 1983 retaliation claims must be based on First Amendment activity. *See* Doc. No. 182 at 3-4. Defendants' argument

fails because Warren unambiguously brought her section 1981 retaliation claim under section 1983. *See* Second Am. Compl. 167-70, Doc. No. 65. Moreover, section 1981 provides an independent basis for retaliation claims related to racial discrimination. *See CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008). In this context, section 1983 merely provides the "damages remedy for the violation of rights guaranteed by § 1981." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989).

Defendants also argue that the entire verdict must be set aside because Warren did not prove a retaliation claim under either Title VII or section 1981. They contend that Warren's reporting of a disparity between the construction of two schools is not a protected activity that supports a retaliation claim under either statute. *See* Doc. No. 182 at 4-8. Title VII protects opposition to "any practice made an unlawful employment practice [by Title VII]." 42 U.S.C. § 2000e-3(a). The employee must have a reasonable, good faith belief that the practice violates Title VII, even if it is not actually unlawful. *Bonn v. City of Omaha*, 623 F.3d 587, 591 (8th Cir. 2010). The elements of Title VII and section 1981 retaliation claims are identical and analyzed the same. *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 737 (8th Cir. 2013).

Defendants' request to set aside the verdict is denied because a reasonable juror could have found that Warren's report of the construction disparity was a protected activity. Judgment as matter of law is appropriate "[o]nly when there is a complete absence of probative facts to support the conclusion reached" by

the jury. *Ryther v. KARE 11*, 108 F.3d 832, 845 (8th Cir. 1997) (quoting *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)). Defendants have not met this burden, nor have they shown it is necessary to alter or amend the judgment to correct "manifest errors of law." *Ryan v. Ryan*, 889 F.3d 499, 507 (8th Cir. 2018) (internal quotation omitted).

2. Warren's motion

Warren argues that she should be awarded additional back pay, pre and post-judgment interest, front pay, and other injunctive and declaratory relief.

a. Back pay

Warren's back pay award will not be increased because the jury heard evidence that Warren failed to fully mitigate her damages by seeking comparable employment. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809 (8th Cir. 1982). Based on the evidence, the jury found that Warren was not entitled to lost wages and benefits for the entire time period she was seeking, and this finding cannot be freely disregarded. *See Mathieu v. Gopher News Co.*, 273 F.3d 769, 778 (8th Cir. 2001) ("the district court is not free to reject or contradict findings by the jury that were properly submitted to the jury")

b. Pre-judgment interest

Warren is awarded $17,281.36 in pre-judgment interest. Pre-judgment interest may be awarded against state defendants under Title VII. *Wimbush v. State of Iowa By Glenwood State Hosp.*, 66 F.3d 1471, 1483 (8th Cir. 1995). The Pulaski County Special School District (PCSSD) has provided no reason why such an award would be inequitable given Title VII' s purpose to make plaintiff's whole. *See Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1194 (8th Cir. 2000) ("Generally, prejudgment interest should be awarded 'unless exceptional or unusual circumstances exist making the award of interest inequitable.' ") (internal quotation omitted). Warren's pre-judgment interest, however, will only be awarded on her lost wages and benefits. An award of prejudgment interest on Warren's other damages is not appropriate. *See Smith v. World Ins. Co.*, 38 F.3d 1456, 1467 (8th Cir. 1994) (prejudgment interest is committed to the district court's discretion). Prejudgment interest is also not appropriate on Warren's punitive damages award. *See Flockhart v. Iowa Beef Processors, Inc.*, 192 F.Supp.2d 947, 978 (N.D. Iowa 2001) (denying pre-judgment interest on punitive damages in a Title VII case).

Warren's pre-judgment interest rate will be calculated according to Arkansas law. *See* Ark. Code Ann. § 16-65-114. This rate is the Federal Reserve primary credit rate in effect on the date of the judgment, plus two percentage points. *See* 12 C.F.R. § 201.51(a); Ark Code Ann. § 16-62-114(a)(1)(B). Accordingly, the pre-judgment interest rate will be 2.25%. Warren's back

pay award ($208,025.40) multiplied by the applicable rate (.0225) yields $4,680.57 in interest per year, which is a daily interest rate of $12.82. The amount of pre-judgment interest from July 1, 2018, to March 10, 2022 (date of judgment) is therefore $17,281.36.

c. Post-judgment interest

Warren's motion for post-judgment interest is granted. Post-judgment interest is allowed on any money judgment in a federal civil case. 28 U.S.C. § 1961(a). The applicable post-judgment interest rate is "a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." *Id.* According to the St. Louis Federal Reserve Banks' FRED database, Warren's post-judgment interest rate is 1.02 percent. *See* Federal Reserve Statistical Release, *available at* http://www.https:/https://fred.stlouisfed.org/release/tables?eid=290&rid=18, at March 10, 2022 (last visited Apr. 12, 2022). Post-judgment interest will accrue on Warren's entire jury award, including punitive damages.

d. Front pay

Warren's request for front pay is denied. Front pay may be granted in lieu of reinstatement in situations where reinstatement would be impracticable or impossible. *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997). Reinstatement is presumably

impossible here because the PCSSD superintendent position is occupied, but front pay is still not appropriate because the jury found that Warren failed to mitigate her damages when it only awarded her half of the back pay she was seeking. *See Miller v. Bd. of Regents of Univ. of Minn.*, No. 15-CV-3740 (PJS/LIB), 2019 WL 586674, at *3 (D. Minn. Feb. 13, 2019) (holding jury must necessarily have found plaintiff met duty to mitigate when it awarded full damages through date of verdict). The jury concluded that Warren was not entitled to lost wages and benefits through the date of verdict, which is when front pay begins to be calculated. A front pay award would contradict this finding by the jury. *See Mathieu*, 273 F.3d at 778; *see also Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) (denying front pay based on plaintiff's failure to mitigate by finding comparable employment).

e. Other relief

Warren's request for other equitable relief is denied. For the same reasons it is not appropriate to award Warren front pay, it is also not appropriate to order PCSSD to place her in the next available superintendent position or adjust her pay to match that of the current superintendent. *See supra* Section 2.d; *see also Briscoe v. Fred's Dollar Store, Inc.*, 24 F.3d 1026, 1028 (8th Cir. 1994) ("District courts have broad discretion to issue an injunction once discrimination has been established in a Title VII action"). Warren's request for declaratory relief is also denied because such a declaration would essentially restate the jury's

verdict, which did not represent a significant development in Title VII law. *See Pitrolo v. Cty. of Buncombe, N.C.*, 589 F. App'x 619, 627-30 (4th Cir. 2014) (affirming district court's denial of declaratory relief).

3. Conclusion

For the foregoing reasons, defendants' motion for judgment as a matter of law, or to alter or amend the judgment [Doc. No. 181], is denied. Warren's motion for equitable and injunctive relief [Doc. Nos. 177 & 179] is granted in part and denied in part. Warren is awarded pre-judgment interest in the amount of $17,281.36. Warren is also awarded post-judgment interest to be calculated at the rate of 1.02 percent on the total award of $383,025.40, pursuant to 28 U.S.C. section 1961(a), for the period beginning on March 10, 2022, through the date that the judgment is paid in full. Warren's other requests for relief are denied.

IT IS SO ORDERED this 21st day of April, 2022.

/s/ Brian S. Miller
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JANICE HARGROVE WARREN PLAINTIFF

v. Case No. 4:19-CV-00655-BSM

MIKE KEMP, *et al.* DEFENDANTS

JUDGMENT

(Filed Mar. 10, 2022)

Pursuant to the verdict returned by the jury on February 25, 2022, following seven days of trial, and my March 4, 2022 order granting in part defendants' motion for judgment as a matter of law [Doc. No. 175], judgment is entered in favor of plaintiff Janice Warren. Warren is awarded damages against defendants jointly and severally in the amount of $208,025.40 in lost wages and benefits, and $125,000 in other damages. Punitive damages are assessed against defendant Linda Remele in the amount of $25,000, and against defendant Alicia Gillen in the amount of $25,000.

IT IS SO ORDERED this 10th day of March, 2022.

/s/ Brian S. Miller
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JANICE HARGROVE WARREN PLAINTIFF

v. Case No. 4:19-CV-00655-BSM

MIKE KEMP, *et al.* DEFENDANTS

ORDER

(Filed Mar. 4, 2022)

At the close of plaintiff Janice Warren's case in chief, defendants moved for judgment as a matter of law. Doc. No. 161. The only issue regarding that motion remaining unresolved is the request for dismissal of plaintiff's punitive damages claim against the Pulaski County Special School District (PCSSD).

That motion is granted because Warren cannot recover punitive damages against PCSSD under Title VII because it is a political subdivision of the state of Arkansas. *See* 42 U.S.C. § 1981a(b) (excluding recovery of punitive damages against a political subdivision); *Dermott Special Sch. Dist. v. Johnson*, 32 S.W.3d 477, 480 (Ark. 2000) (holding school districts are political subdivisions of the state). Warren also cannot recover punitive damages against PCSSD under section 1981. *See City of Newport v. Fact Concert, Inc.*, 453 U.S. 247 (1981) (municipalities are immune from punitive damages under section 1983); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (public school districts are

considered municipalities, and section 1981 claims against state actors must go through section 1983).

Despite PCSSD's failure to affirmatively plead that it is not subject to punitive damages, the law simply does not permit an award of punitive damages against it, and the jury cannot award Warren what the law does not permit. Even if PCSSD should have pled this as an affirmative defense, PCSSD's punitive damages argument is not waived because it does not unfairly surprise or prejudice Warren. *See First Union Nat'l Bank v. Pictet Overseas Tr. Corp., LTD.*, 477 F.3d 616, 622 (8th Cir. 2007). This is true because the question presented is a legal one that did not require the resolution of any factual issues at trial, and Warren has been given an opportunity to argue why punitive damages are assessable. *See Blonder-Tongue Labs. Inc., v. Univ. of Ill. Found.*, 402 U.S. 313, 150 (1971) (the purpose of Federal Rule of Civil Procedure 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it). Warren's unfair surprise argument is also diminished by the fact that PCSSD's motion is based on the same statutes upon which Warren brought her claims.

IT IS SO ORDERED this 4th day of March, 2022.

/s/ Brian S. Miller
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JANICE HARGROVE WARREN PLAINTIFF

v. Case No. 4:19-CV-00655-BSM

PULASKI COUNTY SPECIAL SCHOOL DISTRICT, *et al.* DEFENDANTS

VERDICT FORM

(Filed Feb. 25, 2022)

I. Race discrimination claim

A. On Janice Warren's race discrimination claim, for not being interviewed or hired for the superintendent position, as submitted in Instruction 9, we find in favor of:

		Defendant
Plaintiff Janice Warren	or	Defendants

Note: If you found in favor of Warren on A, proceed to B. If you found in favor of Defendants on A, proceed to II.

B. Has it been proved that Defendants would not have interviewed or hired Janice Warren regardless of her race?

___ Yes ___ No

Note: If you answered no to B, then proceed to C. If you answered yes to B, proceed to II.

C. We find Janice Warren's lost wages and benefits through the date of this verdict, as a result of her not being interviewed or hired, to be:

$_____ (stating the amount or, if none, write the word "none")

We find Janice Warren's other damages, excluding lost wages and benefits, as a result of race discrimination, to be:

$_____ (stating the amount or, if you find that Warren's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00).

D. We assess punitive damages, as submitted in Instruction 21, against Defendants, as follows:

PCSSD: $_____ (stating the amount or, if none, write the word "none")

Mike Kemp: $_____ (stating the amount or, if none, write the word "none")

Linda Remele: $_____ (stating the amount or, if none, write the word "none")

Shelby Thomas: $_____ (stating the amount or, if none, write the word "none")

Alicia Gillen: $_____ (stating the amount or, if none, write the word "none")

Eli Keller: $_____(stating the amount or, if none, write the word "none")

Brian Maune: $_____ (stating the amount or, if none, write the word "none")

II. Sex discrimination claim

A. On Janice Warren's sex discrimination claim, for not being interviewed or hired for the superintendent position, as submitted in Instruction 11, we find in favor of:

		Defendants
Plaintiff Janice Warren	or	Defendants

Note: If you found in favor of Warren on A, proceed to B. If you found in favor of Defendants on A, proceed to III.

B. Has it been proved that Defendants would not have interviewed or hired Janice Warren regardless of her sex?

___ Yes ___ No

Note: If you answered no to B, then proceed to C. If you answered yes to B, proceed to II.

C. We find Janice Warren's lost wages and benefits through the date of this verdict, as a result of her not being interviewed or hired, to be:

$_____ (stating the amount or, if none, write the word "none")

We find Janice Warren's other damages, excluding lost wages and benefits, as a result of sex discrimination, to be:

$_____ (stating the amount or, if you find that Warren's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00).

D. We assess punitive damages, as submitted in Instruction 21, against Defendants, as follows:

PCSSD: $_____ (stating the amount or, if none, write the word "none")

Mike Kemp: $_____ (stating the amount or, if none, write the word "none")

Linda Remele: $_____ (stating the amount or, if none, write the word "none")

Shelby Thomas: $_____ (stating the amount or, if none, write the word "none")

Alicia Gillen: $_____ (stating the amount or, if none, write the word "none")

Eli Keller: $_____ (stating the amount or, if none, write the word "none")

Brian Maune: $_____ (stating the amount or, if none, write the word "none")

III. Retaliation claim

A. On Janice Warren's retaliation claim, for not being interviewed or hired for the position of superintendent, as submitted in Instruction 13, we find in favor of:

Plaintiff

Plaintiff Janice Warren or Defendants

Note: If you found for Warren on A, then proceed to B. If you found for Defendants, proceed to IV.

B. We find Janice Warren's lost wages and benefits through the date of this verdict to be:

$208,025.40 (stating the amount or, if none, write the word "none")

We find Janice Warren's other damages, excluding lost wages and benefits, to be:

$125,000 (stating the amount or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00).

C. We assess punitive damages, as submitted in Instruction 21, against Defendants, as follows:

PCSSD: $273,000 (stating the amount or, if none, write the word "none")

Mike Kemp: $none (stating the amount or, if none, write the word "none")

Linda Remele: $25,000 (stating the amount or, if none, write the word "none")

Shelby Thomas: $none (stating the amount or, if none, write the word "none")

Alicia Gillen: $25,000 (stating the amount or, if none, write the word "none")

Eli Keller: $none (stating the amount or, if none, write the word "none")

Brian Maune: $none (stating the amount or, if none, write the word "none")

IV. Retaliation claim

A. On Janice Warren's retaliation claim, for not being hired for the position of deputy superintendent, as submitted in Instruction 14, we find in favor of:

	Defendant
Plaintiff Janice Warren or	Defendants

Note: If you found for Warren on A, then proceed to B. If you found for Defendants, proceed to V.

B. We find Janice Warren's lost wages and benefits through the date of this verdict to be:

$_____ (stating the amount or, if none, write the word "none")

We find Janice Warren's other damages, excluding lost wages and benefits, to be:

$_____ (stating the amount or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00).

C. We assess punitive damages, as submitted in Instruction 21, against Defendants, as follows:

PCSSD: $_____ (stating the amount or, if none, write the word "none")

Mike Kemp: $_____ (stating the amount or, if none, write the word "none")

Linda Remele: $_____ (stating the amount or, if none, write the word "none")

Shelby Thomas: $_____ (stating the amount or, if none, write the word "none")

Alicia Gillen: $_____ (stating the amount or, if none, write the word "none")

Eli Keller: $_____ (stating the amount or, if none, write the word "none")

Brian Maune: $_____ (stating the amount or, if none, write the word "none")

V. Breach of contract claim

A. On Janice Warren's breach of contract claim for not being interviewed or hired for the position of superintendent, against Defendants, as submitted in Instruction 16, we find in favor of:

		Defendants
Plaintiff Janice Warren	or	Defendants

Note: If you found for Warren on A, then proceed to B. If you found for Defendants, proceed to VI.

B. We find Janice Warren's damages to be $_____ (stating the amount)

VI. Breach of contract claim

A. On Janice Warren's breach of contract claim for not being hired for the position of deputy superintendent, against Defendants, as submitted in Instruction 16, we find in favor of:

		Defendants
Plaintiff Janice Warren	or	Defendants

Note: If you found for Warren on A, then proceed to B. If you found for Defendants, you have completed your service. Have the foreperson sign and date the verdict form and notify the Court Security Officer that you have reached a verdict.

B. We find Janice Warren's damages to be $_____ (stating the amount)

/s/ Mark Wood
Foreperson

Dated: 2-25-2022

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2067

Janice Hargrove Warren

Appellee

v.

Mike Kemp, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity, et al.

Appellants

No: 22-2169

Janice Hargrove Warren

Appellant

v.

Mike Kemp, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity, et al.

Appellees

Appeals from U.S. District Court for the Eastern District of Arkansas – Central
(4:19-cv-00655-BSM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 05, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

No. 22-2067

No. 22-2169

IN THE UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Janice Hargrove Warren

Petitioner, Plaintiff-Appellee/Cross-Appellant

v.

Mike Kemp, in his official capacity as a Member of the Board of the Pulaski County Special School District and in his individual capacity, *et al.*, Respondent, Defendants – Appellants/Cross-Appellees

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Appeal from the United States District Court
for the Eastern District of Arkansas
The Honorable Brian S. Miller, District Judge
4:19-cv-0655 BSM

Petition for Rehearing En Banc

(Filed Sep. 13, 2023)

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A. FED. R. APP. P.35 (b) STATEMENT

On August 22, 2023, a panel of this Court decided *Warren v. Kemp*, No. 222067, slip op. (8th Cir. August 22, 2023), a Title VII, 42 U.S.C. §§ 2000e-2, 2000e-3, and 42 Sections 1981, 1983 case. The panel majority ruled contrary to prevailing Eighth Circuit law and U.S. Supreme Court authority on significant substantive issues in employment discrimination and retaliation cases and failed to follow the longstanding standard for appellate review. Therefore, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

Specifically, the panel majority ruled contrary to *Wedow v. City of Kansas City*, 442 F.3d 661 (8th Cir. 2006), on an employer's obligation to provide equal and comparable work facilities without regard to race; it held contrary to *Sisco v. J. S. Alberici Const. Co.*, 655 F.2d 146, 150 (8th Cir. 1981), that required an objective standard for determining an employee's reasonable belief that she was opposing an unlawful employment practice. The panel majority insisted on a subjective declaration of the employee's belief. *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2414-2415, 165 L.Ed.2d 345, 548 U.S. 53, 68-69 (2006) (Title VII's

retaliation provision requires an objective standard for judging harm and other Title VII requirements).

Most importantly, the panel majority disregarded the applicable standard for appellate review *de novo* that judgment as a matter of law is proper "'[o]nly when there is a complete absence of probative facts to support the conclusion reached' so that no reasonable juror could have found for the nonmoving party." *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997). The panel majority did not identify a single issue submitted to the jury that was unsupported by sufficient evidence, and the panel majority did not draw any reasonable inferences from the objective evidence admitted to the jury. The panel majority substituted conflicting rules and made its own factual findings. Consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

B. The panel's rulings are contrary to laws of the Circuit.

In this Court, a panel majority must apply the first-in-time interpretation of an applicable provision of law. *Mader v. U.S.*, 654 F.3d 794, 800 (8th Cir. 2011) (*en banc*). "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002). Unless a prior panel decision is cast into doubt by a U.S. Supreme Court opinion, a panel majority cannot overrule a prior panel decision. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997). None of the

applicable Eighth Circuit panel interpretations have been adversely impacted by U.S. Supreme Court opinions. The panel majority in *Warren v. Kemp*, violated the applicable principles of appellate review.

1. Providing unequal and incomparable work facilities or workplaces is an unlawful employment practice.

The panel majority held that Janice Warren ("Warren"), as Interim Superintendent, did not engage in a "protected activity" because Pulaski County Special School District ("PCSSD"), her employer, did not engage in an unlawful employment practice when it provided unequal and incomparable working facilities for school administrators, teachers, and staff at Mills High School ("Mills"), who were predominately black. "[T]he disparity in the facilities had nothing to do with 'compensation, terms, conditions, conditions [sic], or privileges of employment.'" *Warren v. Kemp*, p. 9.

Wedow v. City of Kansas City, 442 F.3d 661 (8th Cir. 2006), was the first case in this Circuit to address an employer's obligation to provide equal and comparable work facilities pursuant to Title VII, 42 U.S.C. § 2000e-2000e-17. *Wedow* is the law of the Circuit. In *Wedow*, two female firemen sued the City of Kansas ("City") alleging ongoing sex discrimination through the City's failure to provide them with adequately fitting protective clothing or adequate facilities such as private bathrooms, shower facilities, or changing areas. *Id.*, at 667. The improper fitting uniforms made

the women's job more difficult and hazardous than necessary. *Id.* The Wedow-panel held the *terms and conditions* of a female firefighter's employment are affected by a lack of adequate protective clothing and private, sanitary shower and restroom facilities. These conditions jeopardize her ability to perform the core functions of her job in a safe and efficient manner. *Id.*, at 671-672.

Likewise, here, the record demonstrated that the discriminatorily constructed facilities affected the terms, conditions, privileges, and benefits for black administrators, teachers, and staff at Mills under Title VII. These terms, conditions, privileges, and benefits were also employee contract rights and PCSSD's performance obligations under § 1981.[1]

The jury viewed a video-comparison of Mills High and Robinson Middle, graphically displaying the unequal and incomparable workplaces and establishing that the construction adversely impacted the performance of the core responsibilities of teaching and training students. The jury saw the theater styled, raked monogrammed leather seats, a large wall-mounted flat screen TV with internet access in Robinson's team room versus the flat concrete floor without chairs, a desk top TV, and an old wooden desk in Mills' team

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[1] 42 U.S.C. Sec. 1981, Equal rights under the law "(b) 'Make and enforce contracts' defined: For purposes of this section, the term 'make and enforce contracts' includes the making, *performance*, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." (emphasis added).

room that was one-third the size of Robinson's. (Plaintiff's Trial exh. 1 & exh. 35, p. 4) Here, coaches would preview plays and opponents as part of the training program.

Teachers at Mills share smaller classrooms without proper storage, thereby hindering their creation and management of a proper teaching and learning environment. Unlike a work assignment in predominately white communities with lavished conditions and stable workplaces, five teachers at Mills rotate in and out of small classrooms (Plaintiff's Trial Exh. 3, *Little Rock School District v. PCSSD*, 4:82-cv-0066-DPM (E.D. Ark. 2021), pp. 29-30), moving their materials, enduring stress of not having a classroom, and increasing the demands on their time. Mill's indoor practice facility was a metal, tin, building unlike the masonry brick walls of Robinson's indoor facility. Robinson's staff would be safer during storms. (Trial Tr., vol. 3, pp. 529-530, 535, 560-563) Mills' coaches and students walked a quarter of a mile, through overgrown brush and rough terrain from the gym to the practice field. While at Robinson, the coaches simply raised, remotely, three huge doors to exit the gym to the field house. (Plaintiff's Trial exh. 35, pp. 3-4)

During construction, Mills' administrators were denied the opportunity to provide input on the construction, a benefit and a privilege enjoyed by their white counterparts at Robinson (Plaintiff's Trial Exh. 35, pp. 3-5). Mills' black Athletic Director, unlike his Robinson counterpart, was denied access to the building plans, denied the privilege of providing input when

he asked, and did not have an office in the newly constructed Mills facility. *Id.* Robinson's Athletic Director was invited, at least twice, to provide input on what he felt was important in the design and specific attributes of the facility. Robinson's Athletic Director had an office with a private restroom. *Id.* Mills was constructed with gypsum or sheetrock rather than masonry walls like Robinson and made Mills unsafe during severe Arkansas weather; at Mills, hallways were reduced and ceilings lowered two feet. (Trial Tr., vol. 3, pp. 535, 556-570) The disparity in the facilities impaired the terms, conditions, and privileges of black administrators, teachers, and staff, employees, at Mills.

a. Other Circuits agree that unequal and incomparable facilities are unlawful under Title VII.

Whether addressing workplace conditions or the privileges and benefits of employment, those circuits addressing the question agree that providing unequal and incomparable facilities is an unlawful employment practice. *Equal Empl. Opportunity Commn. v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) (employer provided work attire for male but not its female sales personnel); *Robinson v. City of Fairfield*, 750 F.2d 1507, 1509 (11th Cir. 1985) (maintaining segregated dressing and lounge facilities for black and white employees that differed drastically in the quality of amenities held a discriminatory employment practice); *Harrington v.*

Vandalia-Butler Bd. of Educ., 585 F.2d 192, 193 n.3 (6th Cir. 1978) (school board discriminated against female physical education teacher in the conditions of her employment; facilities she shared with students were neither equal nor comparable to the private and exclusive toilet, lockers, and shower facilities provided to male physical education teachers); EEOC Compliance Manual, ¶2, § 10 (May 12, 2000) ("An employer may not provide segregated or unequal facilities"); *see also Warren v. Kemp*, Judge Kelly dissenting, slip op. at 11-13. Whether the provision of unequal, incomparable work facilities or workplaces is an unlawful employment practice must be clarified. The panel majority, here, did not follow *Wedow* or assess the facts pursuant to *Wedow.*

2. An employee opposing discrimination as a term of her employment engages in a protected activity in the Eighth Circuit.

Dr. Jerry Guess ("Guess"), PCSSD's Superintendent from March 2011 through July 18, 2017, was the final authority and policy maker on all desegregation matters until January 2017. (Trial Tr., vol. 1, pp. 75-76) Guess knowingly constructed racially discriminatory facilities at Mills. Guess' decision and conduct established a policy of discriminating against black administrators, teachers, staff, and female and black students. Guess and, therefore, PCSSD engaged in racially discriminatory conduct. *St. Louis v. Praprotnik*, 485 US 112, 108 S.Ct. 915 (1988) (only one with

policy-making authority causes the particular constitutional violation).

Testimony from disinterested witnesses established the substantial and extensive inequity of the physical facilities as a workplace for educators and the shocking treatment of female athletes. High school girls were required to share a portable toilet with boys on the practice field – two units for girls and two for boys. The girls did not have a separate locker room in the athletic facility. There weren't any restrooms inside the locker rooms. (Trial Tr., vol. 2, 218-219, 222-233; Plaintiff's Trial exh. 35, pp. 3-5) Boys and girls at Robinson had separate constructed restrooms on the practice field. (Plaintiff's Trial exh. 35, pp. 3-5)

When Warren reported the discriminatory construction, she expressed opposition to and refused to engage in the unlawful employment practice of discriminating against black administrators, teachers, staff, and female and black students. Permitting or continuing the discriminatory construction would support Guess' discriminatory policy and discriminate against black employees and female and black students as a condition of Warren's employment. Requiring an employee to discriminate is an unlawful employment practice. *Foster v. Time Warner Entm't. Co.*, 250 F.3d 1189, 1994 (8th Cir. 2001) (employee engaged in protected opposition activity when questioning and refusing to implement a revised sick leave policy on previously granted ADA accommodations for employee she supervised); *Womack v. Munson*, 619 F.2d 1292, 1297 (8th Cir. 1980) (filing a lawsuit alleging a former

employer violated Title VII by requiring black employees to abuse black suspects is protected activity).

The Ninth Circuit agrees. *Moyo v. Gomez*, 32 F.3d 1382, 1385 (9th Cir.), *amended*, 40 F.3d 982 (9th Cir. 1994) (a policy requiring the employee to deny showers to black inmates made race discrimination a condition of the employee's employment and was an unlawful employment practice).

a. Warren raised "discrimination" as a term of her employment before oral argument.

The panel majority incorrectly asserts that Warren waited until oral argument to contend that "her report was about discrimination against employees too and the affected contractual relationship was her own and others' employment contract." *Warren v. Kemp*, slip op. at 9, n2. Warren raised a meaningful argument on this issue before this Court prior to oral argument; the argument was not waived. *Gelschus v. Hogen*, 47 F.4th 679, 687 (8th Cir. 2022); *United States v. Perdoma*, 621 F.3d 745 (8th Cir. 2010); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 756 (8th Cir. 2004). Warren introduced evidence to the jury, asserted this argument in her response to PCSSD's Motion for JNOV (Appellants' App., pp. 1051-1056, R. Doc. 188), and before this Court in her response (Appellee/Cross-Appellant's Brief at 26-27). Warren provided PCSSD with an adequate opportunity to respond, and the District Court was given a basis for an informed decision. *Perdoma,*

supra, at 752. Based on the law of the Circuit, Warren engaged in protected activity when she opposed PCSSD's racially discriminatory policy established by Guess. The panel majority *sub judice* simply failed to follow the law of the Circuit.

C. Proof of opposition requires proof of an employer's violation of Title VII *or* objective evidence of the employee's reasonable belief that the employer's conduct violates the law.

The jury found that Warren reported the disparity between the construction of Mills and Robinson to PCSSD, its lawyer, or the court. (Appellant App., R. Doc. 170, p. 978, Instruction #13 ¶ 1)[2] Disparity in construction based on race is an unlawful employment practice. *Wedow, supra.* If not, Warren only needed to demonstrate, with objective evidence, that she held a reasonable belief that PCSSD's conduct was unlawful. *Sisco v. J. S. Alberici Const. Co.*, 655 F.2d 146, 150 (8th Cir. 1981). *Sisco* is the law of this Circuit for determining an employee's reasonable belief that she is opposing an unlawful employment practice. The panel majority must follow *Sisco*; it did not. *Warren v. Kemp*, slip op. at 9-10. Instead, the panel majority required Warren's subjective declaration of her reasonable belief as part of her testimony. This is not the law of the Circuit.

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[2] The jury instruction conference addressed Instruction #13. (Trial Tr., Jury Inst. Conf., vol. 5, at 1198-1202, 1209-1211).

In *Sisco*, the panel rejected the employee's declaration of his belief as a basis for finding his reasonable belief and sought to assess from the circumstances the employee's belief. This Court remanded for a jury determination of the question of the employee's belief based on the objective evidence. *Sisco.*, at 150. See also, *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 714 (8th Cir. 2000) (sufficient evidence appears to exist on which a jury could reasonably believe Buettner engaged in protected activity); *E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998) (evidence of a climate of racial hostility and the events preceding and following Helms' discharge were relevant to establish employee's reasonable belief Helms' discharge was racial discrimination); *Evans v. Kansas*, 65 F.3d 98, 101 (8th Cir. 1995) (Evans claimed a belief that he . . . would be required to discriminate, such a belief was unfounded and unreasonable in the light other circumstances).

Eighth Circuit precedent on the question of reasonable belief relies on an objective assessment of the circumstances to determine the reasonableness of the employee's belief that she was opposing an unlawful employment practice, not the employee's declaration of what she believed. PCSSD agrees. (PCSSD's Reply Brief, Entry ID: 5248946, pp. 4-5) *See*, *generally, Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2414, 165 L.Ed.2d 345, 548 U.S. 53, 74 USLW 4423 (2006) (adopting an objective reasonable employee standard for determining if retaliatory conduct results

in a material adversity and recognizing the use of an objective standard for other Title VII tests).

Eight other circuits hold an employee's belief is determined objectively from circumstances. Unless the underlying complaint is sexual or racial harassment or a hostile workplace, these circuits do not require proof of the merits of the underlying discriminatory complaint to establish reasonable belief: *Scott v. U.S. Bank Nat'l Ass'n*, 16 F.4th 1204, 1211 (5th Cir. 2021); *Reznik v. inContact, Inc.*, 18 F.4th 1257 (10th Cir. 2021) (requiring objective evidence of both a subjective good faith and objectively reasonable belief); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 273, 285 (4th Cir. 2015) (for retaliation claims, Liberto made the lesser showing that the harassment was sufficiently severe to render reasonable her belief that a hostile environment was occurring); *Grosdidier v. Governors*, 709 F.3d 19 (D.C. Cir. 2013) (no reasonable employee could believe that the complained conduct amounted to a hostile work environment under Title VII); *Moore v. City of Philadelphia*, 461 F.3d 331 (3rd Cir. 2006); *Fine v. Ryan Intern. Airlines*, 305 F.3d 746, 752 (7th Cir. 2002); *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 1999); *Moyo v. Gomez*, 32 F.3d 1382, 1385 (9th Cir.), *amended*, 40 F.3d 982 (9th Cir. 1994), *Trent v. Valley Elec. Ass'n Inc.*, 41 F.3d 524 (9th Cir. 1994), *citing Sisco, supra*. The panel majority ruled inconsistent with Eighth Circuit authority, U.S. Supreme Court authority, and the majority of sister circuits.

The applicable standard for determining reasonable belief is an objective one derived from the

circumstances surrounding the employer's alleged unlawful misconduct, the employee's actions and statements in context, and the employer's response to the employee's actions and statements. This panel's holding directly conflicts with *Sisco, Buettner*, and *Evans*. Therefore, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

D. The panel majority disregarded the establish standard for *de novo* review

This Court consistently holds judgment as a matter of law is proper "'[o]nly when there is a complete absence of probative facts to support the conclusion reached' so that no reasonable juror could have found for the nonmoving party." *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997). A jury's verdict must be *affirmed*: "[U]nless, viewing the evidence in the light most favorable to the prevailing party, we conclude that a reasonable jury could not have found for that party." *Cross v. Cleaver*, 142 F.3d 1059, 1066 (8th Cir. 1998) (emphasis added). "We review the district court's decision to grant or deny judgment as a matter of law with great deference to the jury's verdict." *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 875 (8th Cir. 2000). The court must draw all reasonable inferences in favor of the nonmoving party without making credibility assessments or weighing the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000).

In its *de novo* review, the panel majority declared these principles of law but disregarded them, failed to adhere or apply them. The majority opinion does not identify any issue addressed by the jury that was supported by insufficient evidence. Inconsistent with precedent, the panel majority required a subjective factual determination of "reasonable belief." Then, the panel majority concluded this inapplicable fact was not supported by sufficient evidence. *Warren v. Kemp*, slip op. at 10. Consequently, the panel majority required the introduction of irrelevant evidence to support an issue not required by prevailing law. To say the least, the panel majority's approach is perplexing, and its holding of insufficient evidence on reasonable belief a total disregard for the *de novo* review processes.

Reasonable inferences were not drawn. There are several reasonable inferences from Judge Miller's omission of a question of fact on "reasonable belief" from Instruction #13. *Warren v. Kemp*, at 9. For example, "The evidence supported a conclusion that no reasonable juror could fail to find Warren had a reasonable belief that she was opposing an unlawful employment practice." Or, "Proof of an unlawful employment practice negated the need to address Warren's reasonable belief." The panel majority did not draw any inferences from the plethora of evidence introduced to the jury.

The Eighth Circuit "places a high standard on overturning a jury verdict because of the danger that the jury's rightful province will be invaded when judgment as a matter of law is misused." *Hunt v. Nebraska*

Pub. Power Dist., 282 F.3d 1021, 1029 (8th Cir. 2002). In this case, neither deference nor respect is accorded the jury's verdict. Rather, the panel majority displaced the law of the Circuit with its preferred legal rules, made a factual finding, and replaced the jury's verdict with its own. The verdict of eight Arkansas citizens who invested seven days of their lives diligently fulfilling their civic duty and the judgment of the District Judge, the 9th juror, were disregarded.

The law of the Circuit requires *affirming* the jury's verdict, "[U]nless, viewing the evidence in the light most favorable to the prevailing party, we conclude that a reasonable jury could not have found for that party." *Cross v. Cleaver*, 142 F.3d 1059, 1066 (8th Cir. 1998). The panel majority did not view the evidence in the light most favorable to Warren. Its analysis does not reflect an assessment of the evidence supporting Warren's arguments regarding protected activity. Indeed, other than noting the absence of Warren's testimony about her reasonable belief, the panel declared: "[T]here is no other evidence from which a jury could infer that she had a good-faith [sic] belief that she believed she reported discrimination against employees." *Warren v. Kemp*, at 9-10. The panel was unaware of the testimony of 16 witnesses and the contents of more than 70 exhibits.

Warren is entitled to a *de novo* review consistent with the principles of law that govern in this Circuit. The panel majority failed to adhere to the processes required by Eighth Circuit appellate jurisprudence. An *en banc* review will ensure Warren's right to her day in

court is honored, the time invested by the thoughtful jury is respected, and the uniformity of this Court's decisions is maintained.

CONCLUSION

For the foregoing reasons, Warren asks this Honorable Court to rehear this matter and affirm the District Court's judgment. Furthermore, Warren asks this Court to resolve the pending matters of her cross-appeal and to dismiss PCSSD's remaining challenges that were not raised in its Motion for JNOV before the District Court. Those allegations were waived. *Mulvenon, supra*; *Jenkins, supra*; and *Fair, supra.* Furthermore, those allegations are an impermissible attempt to relitigate the denial of PCSSD's Motion for Summary Judgment after a trial on the merits. *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 875 (8th Cir. 2012) (whether the issue is factual or "purely legal" denial of summary judgment is not appealable after a trial on the merits); *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 354 (8th Cir. 1997).

If, however, this Court rehears and overrules the prevailing law of the Circuit, affirming the panel majority, Warren, pursuant to Fed. R. Civ. Pro. 50(e), requests this Court to order a new trial or remand directing the District Court, given its "first-hand knowledge of witnesses, testimony, and issues," to determine whether a new trial should be granted. *Weisgram v. Marley Co.*, 528 U.S. 440,120 S.Ct. 1011, 145 L.Ed.2d 958 (2000). The panel majority did not find any insufficiency in the

evidence to support the jury's factual determinations. There was legally sufficient evidence to support the jury's verdict. Finally, fairness and the principles of just resolution of disputes require proper notice of the new standards and rules applied by the panel majority. If the laws of the Circuit are overruled, the foregoing reasons necessitate a new trial. *Id.*; *Neely v. Martin K Eby Construction Co.*, 386 U.S. 317 (1967).

Respectfully Submitted this 13th day of September, 2023,

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[Certificate Of Compliance Omitted]

[Certificate Of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JANICE HARGROVE WARREN PLAINTIFF

v. CASE NO. 4:19-CV-00655-BSM

MIKE KEMP, et al. DEFENDANTS

COURT'S JURY INSTRUCTIONS

* * *

COURT'S INSTRUCTION NO. 13

Janice Warren seeks damages from PCSSD on her claim that it did not interview or hire her for the position of Superintendent as retaliation. Warren has the burden of proving the following essential propositions:

First, Warren reported a disparity between the construction of Mills High School and Robinson Middle School to PCSSD, its lawyer, or the court;

Second, PCSSD did not interview or hire Warren for the position of Superintendent;

Third, PCSSD's failure to interview or hire Warren for the position of Superintendent might dissuade a reasonable worker in the same or similar circumstances from reporting a disparity between the construction of Mills High School and Robinson Middle School; and

Fourth, PCSSD would have interviewed and hired Warren for the position of Superintendent but-for her

reporting a disparity between the construction of Mills High School and Robinson Middle School.

If you find from the evidence that each of these propositions has been proved, then your verdict should be for Warren. If, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for PCSSD.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JANICE HARGROVE WARREN

Plaintiff

Vs.

MIKE KEMP, LINDA REMELE, SHELBY THOMAS, ALICIA GILLEN, ELI KELLER, BRIAN MAUNE, PULASKI COUNTY SPECIAL SCHOOL DISTRICT

Defendants

No. 4:19-CV-655-BSM
February 14, 2022
Little Rock, Arkansas
9:00 a.m.

TRANSCRIPT OF TRIAL IN CHIEF – VOLUME 1
BEFORE THE HONORABLE BRIAN S. MILLER
UNITED STATES DISTRICT JUDGE AND JURY

APPEARANCES:

On Behalf of the Plaintiffs:

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Little Rock, Arkansas 72223

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On Behalf of the Defendants:

GEORGE JAY BEQUETTE JR.
WILLIAM CODY KEES
Bequette, Billingsley & Kees, PA
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* * *

[68] to being able to speak with you more through the presentation of witnesses.

THE COURT: Ms. Jenkins, I know you had a witness teed up for today. Is he here?

MS. JENKINS: Let me check, Your Honor.

THE COURT: Does anybody on the jury need a break before we get started? We wanted to try to take this witness before we recess for the day.

MS. JENKINS: He's here.

MR. PORTER: Your Honor, at this time we would ask that the Rule to be invoked.

THE COURT: Okay. Mr. Porter has invoked the Rule. What that means is that if we have any witnesses in the courtroom you will have to step out. And for all of the witnesses who would be called, they have to – they cannot discuss the case or the testimony or the questions that were asked in the courtroom. Everybody has to testify of his or her own knowledge.

Thank you, Mr. Porter.

Hold on just is second.

JOHNNY KEY, PLAINTIFF'S WITNESS,
DULY SWORN

DIRECT EXAMINATION

BY MS. JENKINS:

Q. Would you state your name for the Court, please?

A. Yes. Johnny key.

[69] Q. And state your occupation and your current position?

A. I'm the Secretary of Education for the state of Arkansas.

Q. And what is the relationship between the Department of Education and a school district?

A. The Department of Education supports and makes sure that the funding and also all of the compliance issues within the school districts are maintained on a regular basis in support of our students across the state.

MS. JENKINS: Your Honor, could the witness step to the ELMO and simply diagram how the state Department of Education looks in relationship to a school district?

THE WITNESS: Okay.

THE COURT: You can stand down. Do you have a sheet of paper or something you can write on?

MS. JENKINS: I do. And this is the ELMO.

THE COURT: Is there a darker Sharpie or – it looks like a highlighter.

THE WITNESS: I don't know what happened to it.

MS. JENKINS: Thank you, Your Honor.

BY MS. JENKINS:

Q. Could you explain this please?

A. All right. So the Arkansas Department of Education is the cabinet level agency. And the Division, DESE, the Division of Elementary and Secondary Education that overseas the K-12 portion of our education system in the state. We have school districts that act independently. We are not in charge of the school districts in normal circumstances.

* * *

[74] Q. Okay. So would you explain how you –

A. Sure.

Q. – broke or distinguished what you mean by school district?

A. Under statute, a school district is governed by an elected board. And that elected board hires a superintendent to manage the day-to-day operations, to bring recommendations on budgets, hiring, staffing, facilities, all of the systems within operating a school district comes as a recommendation from the

superintendent to that board. So it is a – I would say a relationship that really sets up a structure for how effective operation of a school district should go.

Q. All right. When in distress this is eliminated, correct?

A. Yes, that's correct.

Q. And then when the financial distress is removed, that declaration is removed, then the district returns to the normal operating system?

A. Yes.

Q. All right. And when was PCSSD removed from fiscal – when was that declaration removed?

A. The state board action was in March of 2016, and subject to election of a board in November of 2016. And the training of that board in the – I'm not sure exactly when they assumed their office, but it was sometime after November of 2016.

Q. All right. Let's take a look at –

Mr. Key, do you recognize this document?

[75] A. Yes, I do.

Q. All right. Would you explain what it is, what its purpose?

A. It is a board action item approval that would have been submitted to me or was submitted to me for review and approval under provisions of state law where the board, and in this case an absence of the

board with the Commissioner acting in lieu of the board would have the responsibility of approving an expenditure.

Q. And what expenditure is this, sir?

A. This is for facilities for the Mills High School replacement project and the Robinson Middle School replacement project.

Q. And what was your expectation – is that your signature on that?

A. Yes, it is.

Q. All right. And what was your expectation when you signed this document?

A. In this case, it was a unique situation because of the desegregation litigation that was ongoing that Pulaski County School District was engaged in. And under the Court's directive, my role was simply to sign what the state law expected to be signed. So I approved this, signifying that with the authority of the board or acting in lieu of the board that I approved about 80 million dollars in expenditure funded by their building fund and second lien bond proceeds. It was, because [76] facilities was part of the deseg case, the Court at the time had directed that the state or the Commissioner would have no real authority, that the superintendent at the time, Dr. Guess, would be the lead, and the lead decisionmaker on all things related to desegregation.

Q. All right.

THE COURT: What is the Exhibit number on that?

MS. JENKINS: 42.

BY MS. JENKINS:

Q. So this document was approved, a mechanical process for you, is that what you're saying?

A. Yeah. That's what I'm saying, yes.

Q. All right. Were you aware at the time that you signed this, were there any orders from the federal court regarding the construction of Mills or Robinson?

A. I don't recall what orders were in place for those two campuses.

Q. All right. So you simply read this, signed it, had no expectations whatsoever?

A. No. No. Expectations.

Q. All right. No understanding of the process?

A. Well, the understanding of the process was that whatever they were doing with facilities would be driven by the desegregation rulings from the Court, the litigation at the time. And as I mentioned, we at the department, nor I as [77] Commissioner were actively engaged in that.

Q. You all were actively, the department was actively engaged in the desegregation case?

A. We were not at this time.

Q. You were not at that time involved in the desegregation case?

A. Right.

Q. All right. You mentioned that – do you recall whether PCSSD had an advisory board? I think we talked about that a moment ago. Do you recall if there was an advisory board in place?

A. There may have been at this point, but I don't recall specifically –

Q. All right.

A. – if it was in place at this time.

Q. All right. Okay.

MS. JENKINS: Your witness.

THE COURT: Cross-examination, Mr. Bequette?

CROSS-EXAMINATION

BY MR. BEQUETTE:

Q. Mr. Secretary, I think I just have a couple of questions for you. I believe you are aware that the matter you are testifying in today pursuant to a subpoena revolves around Dr. Janice Warren's claim that the PCSSD and its board discriminated against her when the board hired a permanent

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JANICE HARGROVE WARREN,

Plaintiff,

v.

No. 4:19-CV-655-BSM

MIKE KEMP, LINDA REMELE, SHELBY THOMAS, ALICIA GILLEN, ELI KELLER, BRIAN MAUNE, PULASKI COUNTY SPECIAL SCHOOL DISTRICT,

February 22, 2022
Little Rock, Arkansas
8:30 a.m.

Defendants.

TRANSCRIPT OF TRIAL IN CHIEF – VOLUME 5
BEFORE THE HONORABLE BRIAN S. MILLER
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

On Behalf of the Plaintiff:

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On Behalf of the Defendant:

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WILLIAM CODY KEES
Bequette, Billingsley & Kees, PA
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Little Rock, Arkansas 72201

* * *

[1198] motivating factors.

MR. PORTER: I think that would be better.

MS. JENKINS: My preference would be to put it in front of 8. That's the definition –

THE COURT: Put it in front of 8?

MS. JENKINS: Yes. Definition comes first –

THE COURT: Any objection to putting that in front of 8?

MR. BEQUETTE: No, Your Honor.

THE COURT: Let's take Instruction Number 13 and make it Instruction Number 8.

MS. JENKINS: Thank you.

THE COURT: And I heard Ms. Jenkins, you wanted me to put in a Section instruction?

MS. JENKINS: Your Honor, my concern is if you use Title 7, because I absolutely agree they are substantively the same. I mean, the proof for 1981 and 1983 is identical to Title 7. My concern is we may be

confronted with a – defendants might seek a remittor based on the Title 7 caps, having used a Title 7 instruction.

THE COURT: What would remedy that? A – would it be just giving a Section 1983 instruction? I'm not sure how that instruction would read.

I know the standard Section 1983 instruction is one that I don't know that we need to give here. It just basically says [1199] that a person acting under the color of state law in X, Y, and Z, of course, USC Section 19.3 gives a party the right to sue a persons acting under color of state law. And then –

MS. JENKINS: Your Honor, if you are committed to -and I agree slimming it down is great. It makes it easy. It is not intimidating. If on the Title 7 instruction you added a proviso that said Title 7 caps are inapplicable for 1981, 1983, or somehow footnote it.

THE COURT: Here's what I would say. I would rather not put that in the hands of the jury. Is the defendant going to argue – are the defendants going to argue there are caps on damages?

MR. BEQUETTE: No, sir.

THE COURT: I didn't think you were even going to go in that direction.

MR. BEQUETTE: Not in closing arguments.

MR. KEES: Part of the law, but not in closing arguments.

THE COURT: And I think that is an issue we can take up as a matter of law after the trial. If the jury comes back here and they give you 2.7 million dollars, which is what you have asked for, then I'm sure the defendant is going to move to have it remitted down. And then it will be up to me to decide if it gets remitted or not. And to be very honest with you, I would have to look at the law on that to see. I don't know that [1200] I have ever really had the occasion to look and see in a case where it has been pled under 83 and 81 whether you can get more than what Title 7, the caps that Title 7 allows. I just haven't looked at it.

MS. JENKINS: You can –

THE COURT: That's an issue of law that I can take up. So I think we give it to the jury. And to be fair and honest with you, as the 13th juror or as the 9th juror here, this is kind of a fairly simple case. I know it has a lot of moving parts. Either the jury is going to believe what these people – that Dr. Remele didn't like her and she had problems with her and these other people had problems with her and they set up this process to sort of shield themselves, but they knew they weren't going to hire her and they did it for discriminatory purpose, whether it is race or sex or to retaliate, because she embarrassed them by filing this information. It's simple, but each jurors can have a different point of view on that, right, so we don't know what the jury is going to do. But if the jury rules in favor of Dr. Warren, they could give her all of those damages. They could. Or they come back with a big zero and say no, we just don't agree that these people

discriminated against her. And so that's what – the punitives, I was talking to my clerk about punitives and stuff. And I said, you know, very rarely do I – although in discrimination cases, you would think that people would get punitives more than they do in other [1201] cases. I don't see them a whole lot, but this is a case where because of the case you put on to show that there was all of this subterfuge. That's the case you put on. This isn't a clear case. And so for them to set up all of the subterfuge to try to hide it, it would have to be very malicious, because to go through all of this to hide it. And so you could get punitives in this case, but then we'll take that up after the trial and –

MR. PORTER: Your Honor, just for the record, I think it's obvious that the plaintiff has proceeded on the case, not just limited to Title 7, but also 1981. And there is case law that said that, that when you would have those dual-type proceedings then the caps would not limit us.

THE COURT: Well, and here is what I'm saying. I have never had a case that has gotten to the trial, or gotten to the jury where both were still available. And so we'll just see what the jury says. And yeah, I mean, let's just let the jury decide. First, they are going to have to get past liability and say we really believed this happened, but then if they get there let's see what they do. And then we'll take up the argument about what damages are appropriate under that circumstance if we get there.

MS. JENKINS: Thank you.

THE COURT: I just think if we start adding too much, it's not helpful to either side. Keep it just here is what it [1202] is. Let the jury make a decision and then we'll handle the law on the back end.

Any other specific instructions plaintiff wants to include?

Do you have any that I have in here that you think are just inappropriate? I think they are pretty simple and straightforward.

MR. PORTER: Yes.

THE COURT: Let me hear from the defendant.

And y'all keep looking. If you think of anything else you want to add just let me know, but now to the defendant.

Anything in there that you think was just inappropriately stated or should be stated differently or instructions that I should not give?

MR. KEES: No, Your Honor. I just had two little things.

THE COURT: Okay.

MR. KEES: On Page 13, it was Court Instruction 12. I may have changed, but it's where – it's the Discrimination Claim Number 12, the bottom paragraph, the last sentence. If on the other hand you find from the evidence that – I think that would be any.

THE COURT: Any. That's right. I think that – I took that from the race and sex where it says –

MR. KEES: And my last thought would be, Your Honor, a couple of times you used PCSSD and then you used PCSSD board.

* * *

[1209] down to three separate elements you are trying to make me prove. I only had to prove one.

MS. JENKINS: Or.

THE COURT: Okay. Or.

MR. PORTER: And I think the fourth one would have to be consistent with Number 1.

THE COURT: We would have interviewed or hired Warren for the position of superintendent but for her –

MR. PORTER: But for her reporting –

THE COURT: Okay.

MR. PORTER: But for her reporting.

THE COURT: And just put the same thing in there.

MR. PORTER: Racial inequities.

THE COURT: Reporting of the disparity between.

MR. PORTER: Okay. Disparity.

THE COURT: Yeah.

MR. PORTER: Okay. That's all, I think.

THE COURT: Do you want us to make these changes and give them to you right now, or do you want us to email them to you?

MR. BEQUETTE: You can just give email them to us.

THE COURT: And I see Mr. Kees.

MR. KEES: And I'm not trying to complicate things, but you are making the change to the assistant superintendent on the verdict form, not the jury instruction?

[1210] THE COURT: Which one?

MR. KEES: Well, like the assistant superintendent.

THE COURT: Yeah, because you have on the jury instruction there is a breach of contract claim, right. And there is a retaliation claim. And I guess they are specific to those two separate –

MR. KEES: Just like on Number 12, would it not be simpler – not make more sense to just add assistant superintendent there and then keep the deputy superintendent and then keep the verdict form – keep it omitted of any specific titles like the court currently has?

THE COURT: Here's the problem. If I rule post trial that the – that we're not conforming to the facts, then we wouldn't be able to divide it out if we didn't put it separately on the verdict form.

MR. KEES: Okay.

THE COURT: By having separate verdicts for each one then we will know which ones they ruled and which way on.

MR. KEES: Oh, so you are going to add a retaliation claim.

THE COURT: I have got to add a separate one for that.

MR. KEES: Okay. That's actually preferable.

THE COURT: No.

MR. KEES: I thought you were taking the existing claim and just adding it to the –

[1211] THE COURT: No. No. No. I'm going to make that a separate section for you.

MR. KEES: That's very agreeable.

MR. BEQUETTE: Same for breech of contract as well?

THE COURT: That's right. That way whatever I rule it after trial, we know exactly what they did in each case.

MR. BEQUETTE: Okay.

THE COURT: Mr. Porter, last thing. You want us to make these changes and then give them to you or you want us to email them to you this afternoon.

MR. PORTER: You can email them, that's fine with me.

THE COURT: Okay. Here, we are going to do that now.

Are you getting my emails, because I noticed you haven't been responding. I know we have had responses from Ms. Jenkins. I had them –

MR. PORTER: Yes, Your Honor. I got your email.

THE COURT: Because you asked me last time to make sure I emailed you. Just making sure.

All right. Let's recess. And 8:30 in the morning let's get started. For the lawyers, what I do is I read all the substantive instructions first, but I keep the procedural instruction, which is final instruction that tells the jury what they do when they go back to the jury room. I will not read that when we – before they close. I will I wait until you all finish, plaintiff, defendant, and then rebuttal. And then I

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