

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

BETH J. WINTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:21-CV-04073-BCW
	)	
COLUMBIA PUBLIC SCHOOLS,	)	
	)	
Defendant.	)	

ORDER

Before the Court is Defendant’s motion for summary judgment. (Doc. #45). The Court, being duly advised of the premises, grants the motion with respect to Count I and denies the motion as moot with respect to Count II.

BACKGROUND

Plaintiff Beth Winton asserts two claims of retaliation against Defendant Columbia Public Schools (“the District”): Count I under Missouri’s whistleblower law, Mo. Rev. Stat. § 105.055, and Count II under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. Plaintiff filed this action on March 7, 2021 in the Circuit Court of Boone County, Missouri and the District removed the matter to this Court pursuant to 28 U.S.C. § 1441(c).

Plaintiff is employed by the District as the Coordinator of Secondary Gifted Education and a gifted education teacher. Plaintiff alleges the District retaliated against her in that it did not hire her for two positions she sought because of statements she made to District officials in an August 2, 2019 meeting regarding the District’s student selection process for its gifted program. In the instant motion, the District argues there are no issues of material fact in dispute such that it is entitled to judgment as a matter of law on both counts.

LEGAL STANDARD

A moving party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A party who moves for summary judgment bears the burden to establish that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). When considering a motion for summary judgment, the court evaluates the evidence in the light most favorable to the nonmoving party and the nonmoving party is entitled to “the benefit of all reasonable inferences.” Mirax Chem. Prods. Corp. v. First Interstate Comm. Corp., 950 F.2d 566, 569 (8th Cir. 1991); White v. McKinley, 519 F.3d 806, 813 (8th Cir. 2008).

UNCONTROVERTED FACTS

Plaintiff is employed as the District’s Coordinator of Secondary Gifted Education and as a gifted education teacher.

In July 2019, Plaintiff spoke with her supervisor, Kristi Shinn, regarding her belief that 36 students had been misidentified for the District’s gifted program by then-Elementary Gifted Director Terry Gaines in violation of District and Missouri Department of Elementary and Secondary Education (“DESE”) policies. Shinn advised Plaintiff to share her concerns with Assistant Superintendent of Elementary Education Dr. Jill Brown.

On August 2, 2019, Plaintiff met with Shinn and Dr. Brown to discuss her belief that Gaines had placed students in the gifted program who did not qualify. The parties dispute certain aspects of that discussion. In particular, they dispute whether Plaintiff showed student protocols or other records to Shinn and Dr. Brown or merely discussed the misidentification of students more broadly. The parties also dispute whether it was discussed that the makeup of the gifted program

was racially disproportionate. Plaintiff alleges she did not raise the issue of disproportionality because Shinn raised the issue first.

During the 2019-2020 school year, Dr. Brown transferred her supervisory duties over the gifted program to K-12 Executive Director Susan Deakins. However, Deakins did not attend the August 2, 2019 meeting with Shinn and Dr. Brown.

On October 7, 2019, Plaintiff met with Dr. Brown and Assistant Superintendent of Secondary Education, Jennifer Rukstad, regarding Plaintiff's proposal for reorganizing the District's gifted program. The District's Cabinet reviewed the proposal and ultimately rejected it on budgetary grounds.

Sometime in August 2019, after Plaintiff's meeting with Shinn and Dr. Brown, Gaines announced her intent to retire from her position as Elementary Gifted Director at the end of the 2019-2020 school year. The parties agree Gaines made the decision to retire at the end of the 2019-2020 school year in 2018 when she became aware that she would need to obtain principal certification, per DESE policy, in order to maintain her position as Elementary Gifted Director.

The District's Talent Acquisition Specialist drafted a job description for Gaines' position. The position was renamed "Elementary Gifted Principal" (formerly "Director") based on the new DESE policy requiring the position be held by someone with principal certification. The job description for Elementary Gifted Principal set forth three requirements: a master's degree, gifted certification, and principal certification. In addition, principal experience was "preferred."

Plaintiff alleges, and the District denies, that Dr. Brown, Deakins, and Human Resource Officer Nicki Smith also contributed to the development of the job description and minimum applicant requirements. The parties agree that Dr. Brown approved the job description after it was drafted by the Talent Acquisition Specialist.

Plaintiff applied for the position and was among three applicants selected for an interview. Plaintiff interviewed on March 6, 2020.

The interview committee was comprised of five individuals: Nicki Smith, Susan Deakins, Assistant Supervisor of Student Services Erica Dickson, and Gifted Elementary Teachers Jill Rocket and Robin Elletson.

Each member of the committee ranked the three candidates and anonymously submitted their rankings to Smith. The committee's top choice was applicant Kristen Palmer.

Palmer was ultimately selected for the position by the Board of Education on the recommendation of District Superintendent Peter Stiepleman.

In May 2020, Plaintiff spoke to then-AVID Coordinator Shanna Dale about transferring to an AVID building coordinator position. Plaintiff's request to transfer was ultimately presented to Nicki Smith by Plaintiff's supervisor. Plaintiff never spoke with Smith about the request. Smith denied the request.

In July 2020, Plaintiff filed a formal grievance with the District regarding her belief that students had been misidentified for the gifted program.

Plaintiff alleges the District retaliated against her when it did not hire her for the positions of Elementary Gifted Principal or AVID building coordinator because of her August 2, 2019 meeting. Plaintiff alleges retaliation by four District employees: Gaines, Smith, Deakins, and Dr. Brown. Their knowledge of Plaintiff's August 2, 2019 meeting and her belief that students had been improperly identified for the gifted program is as follows.

- **Gaines:** The parties agree Gaines first learned about Plaintiff's complaints when Plaintiff filed a grievance with the District in July 2020.
- **Smith:** The parties agree Smith first learned about Plaintiff's complaints when she filed her July 2020 grievance.

- **Deakins:** Deakins testified she did not learn about Plaintiff's complaints until after Plaintiff filed her lawsuit (filed in March 2021). Plaintiff denies this point without alleging any facts to the contrary, stating only "it is incredible (and unreasonable to think) that the person responsible for the elementary gifted program at the time, Ms. Deakins, was unaware that a grievance was filed with concerns about the identification of elementary gifted children." (Doc. #47, ¶ 29).
- **Dr. Brown:** Dr. Brown attended the August 2, 2019 meeting with Plaintiff.

Shinn and Dr. Brown testified they did not tell anybody about the August 2, 2019 meeting. Although Plaintiff denies this point in part, she does not allege any facts to suggest that Shinn and Dr. Brown discussed the meeting with anyone.

Plaintiff filed a formal grievance with the District in July 2020 pertaining to the same issues that were discussed at the August 2, 2019 meeting. Plaintiff never spoke with any person on the interview panel regarding her August 2, 2019 meeting and the issues raised therein.

The parties agree Dr. Stiepleman first learned about Plaintiff's complaints when she filed her July 2020 grievance.

ANALYSIS

I. Defendant's motion for summary judgment as to Count II is denied as moot.

The District argues it is entitled to judgment as a matter of law on Count II for retaliation because Title VI does not create a private right of action for claims of retaliation for opposing disparate impact discrimination. In response, Plaintiff requests dismissal of Count II without prejudice pursuant to Federal Rule of Civil Procedure 41. Because a motion for summary judgment has been filed, Rule 41 requires a court order to dismiss Count II. Fed. R. Civ. P. 41(a)(1). The Court will dismiss Count II, but with prejudice, as Plaintiff's failure to respond to the District's motion with respect to Count II is properly considered an abandonment of that claim. Thomas v. United Steelworkers Local 1938, 743 F.3d 1134 (8th Cir. 2014) (finding that because Fed. R. Civ.

P. 41 is the proper vehicle for dismissing a claim, Plaintiff could not unilaterally dismiss or withdraw his claims through summary judgment briefing, and further holding failure to respond to defendant's arguments for summary judgment on certain claims constituted an abandonment of those claims). The Court thus dismisses Count II with prejudice and Defendant's motion for summary judgment as to Count II is denied as moot.

II. Defendant's motion for summary judgment as to Count I is granted.

In Count I for retaliation under Missouri's whistleblower statute, Mo. Rev. Stat. § 105.055, Plaintiff alleges she reported policy violations with respect to the District's gifted program and, in retaliation, the District did not hire her for the positions of Gifted Elementary Principal and AVID Coordinator. Mo. Rev. Stat. § 105.055 prohibits disciplinary action against a public employee for the disclosure of "any alleged prohibited activity under investigation . . . or for the disclosure of information which the employee reasonably believes evidences a violation of any law, rule, or regulation"

In the instant motion, the District argues it is entitled to summary judgment on Plaintiff's whistleblower claim because (1) the failure to hire and/or promote Plaintiff is not "disciplinary action," (2) Plaintiff did not complain to the individuals specified in § 105.055, and (3) the substance of Plaintiff's complaint is not protected under § 105.055 because Plaintiff did not allege violations of law or policy. In response, Plaintiff argues (1) the failure to hire is "disciplinary action," (2) she did complain to individuals covered by the statute, and (3) her complaints alleged violations of federal and state law, and District policy, such that the complaints are protected under the statute.

With respect to the first issue of whether the failure to hire Plaintiff amounts to disciplinary action, Defendant argues that the statute defines disciplinary action as "any dismissal, demotion,

transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work,” Mo. Rev. Stat. § 105.055, indicating that the failure to hire or promote as a form of disciplinary action was intentionally excluded. Plaintiff argues the failure to hire falls under “withholding of work” and, furthermore, the Court should interpret disciplinary action to include a failure to hire/promote because courts have likewise interpreted the denial of a promotion to be an “adverse employment action” under analogous statutes, including the Missouri Human Rights Act, Mo. Rev. Stat. § 213.070.1(2), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Plaintiff further argues that because § 105.055 is remedial, the term “disciplinary action” should be broadly construed to effectuate the statute’s purpose, citing Steger v. Franco, Inc., 228 F.3d 889, 894 (8th Cir. 2000).

In the absence of authority on the issue of whether failure to hire and/or promote constitutes disciplinary action under § 105.055, the Court could remand the interpretation of the Missouri statute to the Boone County Circuit Court, as no federal claims remain, and the Court’s exercise of supplemental jurisdiction is discretionary. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988). However, the Court finds Plaintiff’s claim fails and Defendant is entitled to judgment reaching the “disciplinary action” issue, because the uncontroverted facts demonstrate none of the individuals responsible for the allegedly retaliatory failure to hire were aware of Plaintiff’s allegedly protected activity at the time Plaintiff was not hired. As such, Plaintiff cannot prove causation.

Plaintiff alleges Gaines, Smith, Deakins, and Dr. Brown retaliated against her. (Doc. 47, ¶ 109). Plaintiff admits Gaines did not learn of Plaintiff’s statements until July 2020 when Plaintiff filed her grievance. Moreover, Plaintiff does not allege Gaines had any input in the hiring decisions. Plaintiff likewise admits Smith did not learn of Plaintiff’s statements until she filed the

July 2020 grievance. Plaintiff thus concedes that Gaines and Smith could not have retaliated during the 2019-2020 year when Plaintiff was not hired.

Next, Deakins testified in her deposition that she was unaware of Plaintiff's statements until after the lawsuit filed in March 2021. Plaintiff denies Deakins' statement, stating she had a feeling Dr. Brown and Deakins had "conversations" and that "it is incredible (and unreasonable to think) that the person responsible for the gifted program at the time . . . was unaware that a grievance was filed with concerns about the identification of elementary gifted children." However, Plaintiff admits she has no knowledge of any conversation between Dr. Brown and Deakins (or Gaines). Plaintiff's beliefs are speculative and unsupported by facts, such that Plaintiff has failed to put forth sufficient evidence to support a finding in her favor. Mann v. Yarnell, 497 F.3d 822, 825 (8th Cir. 2007) (finding that a non-movant needs to substantiate its allegations with "sufficient probative evidence" more than "mere speculation, conjecture, or fantasy.").

Last, Dr. Brown was aware of the meeting at the times Plaintiff was not hired for the positions she sought. However, Plaintiff admits Dr. Brown was not on hiring committee and did not make decision as to hiring. Plaintiff does allege that Dr. Brown helped draft the job description for Elementary Gifted Principal and that Dr. Brown informed Plaintiff that principal experience would be preferred with the intent of discouraging Plaintiff from applying for the position (Plaintiff does not have principal experience). Drawing all inferences in favor of Plaintiff as the non-movant, the Court assumes Plaintiff's allegations are true. Even so, Plaintiff has not demonstrated, and the law does not provide, that drafting a job description or discouraging an individual from applying to a job amounts to "disciplinary action" under Mo. Rev. Stat. § 105.055.

Plaintiff is therefore unable to demonstrate that Gaines, Smith, Deakins, and/or Dr. Brown subjected Plaintiff to disciplinary action "because of" her August 2, 2019, statements, and thus,

under the uncontroverted facts, she cannot establish a claim for retaliation pursuant Mo. Rev. Stat. § 105.055. Accordingly, it is hereby

ORDERED Count II is DISMISSED WITH PREJUDICE pursuant to Federal Rule of Civil Procedure 41(a)(2). It is further

ORDERED Defendant's motion for summary judgment is granted in part and denied as moot in part. The motion is granted as to Count I. The motion is denied as moot as to Count II.

IT IS SO ORDERED.

Date: August 19, 2022

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT