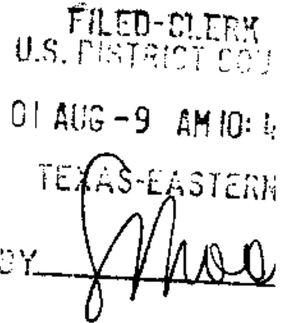
IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION



JANIS MULLINAX Plaintiff V. TEXARKANA INDEPENDENT SCHOOL DISTRICT, ET AL. Defendants	§ § § § § § § §	No. 5:99CV190

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for Assignment of Duties to United States Magistrate Judges dated January 15, 1994, Defendant's Motion for Summary Judgment (Docket Entry # 80) was referred to the Honorable Caroline M. Craven for the purpose of making a report and recommendation. The Court, after reviewing the motion, the response, the reply, and the supplemental reply,[1] recommends that Defendant's motion be **GRANTED**.

I. FACTUAL BACKGROUND

Janis Mullinax ("Plaintiff") was a teacher at an elementary school within the Texarkana Independent School District ("TISD"). Plaintiff was also the faculty sponsor of a school dance club. In 1998 and early 1999, Plaintiff raised a number of complaints regarding various actions by the school and other teachers, including a formal complaint. The superintendent of TISD, Defendant Dr. Larry Sullivan ("Dr. Sullivan"), resolved the formal grievance in Plaintiff's favor. In March 1999, Plaintiff's employment contract was renewed.

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[1] Defendants' Objections to Plaintiff's Summary Judgment Evidence (Docket Entry # 97), Plaintiff's Response, and Defendants' Reply have been considered in writing this opinion.

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Plaintiff also complained of the school's policy forbidding her use of Christian music in the school dance club routines. On about April 20, 1999, Plaintiff and several students were interviewed by a local newspaper about the dance club and their use of Christian music. Plaintiff alleges that her discussions with the newspaper caused TISD to become concerned about negative publicity in advance of an upcoming bond issue.

On April 22, 1999, Plaintiff led a class of third grade students on a nature hike. During the hike, some of the students ingested a plant called "sour weed" and became ill. The next day, Plaintiff was suspended. Pursuant to Texas law, on May 17, 1999, Dr. Sullivan recommended to TISD's Board of Trustees that Plaintiff be fired. *See* TEX. EDUC. CODE § 21.211 *et seq.* The School Board accepted the recommendation. Plaintiff received notice of the proposed decision and appealed the decision to an Independent Hearing Examiner, who would make findings of fact and recommend either termination or reinstatement.

After an extensive hearing, wherein Plaintiff was represented by counsel, called thirteen witnesses, cross-examined the witnesses called by TISD, and offered sixteen exhibits, the Hearing Examiner issued a "Proposal for Decision," recommending termination of Plaintiff's employment contract. The only basis for termination claimed by the School Board was "good cause." While the Hearing Examiner made findings of fact as to whether the sour weed incident constituted good cause for termination, the Hearing Examiner made no findings regarding Plaintiff's claims that she was terminated in retaliation for her exercise of protected First Amendment rights.

II. PROCEDURAL BACKGROUND

On August 7, 2000, this Court granted summary judgment in favor of Defendants on Plaintiffs' claim based on Texas Government Code § 617.005. This court also granted summary

judgment on Plaintiff's claims under 42 U.S.C. § 1983 and the Texas Whistleblower Act, TEX. GOV'T. CODE § 554.001 *et seq.* The Fifth Circuit affirmed the Court's grant of summary judgment on Plaintiff's claim under Texas Government Code Section 617.005. The Fifth Circuit reversed the Court's grant of summary judgment on Plaintiff's claims under section 1983 for retaliatory discharge and under the Texas Whistleblower Act, because the findings of the Hearing Examiner, although issue preclusive on Plaintiff's claims under the Texas Government Code, do not establish that the defendants must prevail as a matter of law on the other two claims.

In considering Defendants' Motion for Summary Judgment on remand, the Court must apply the *Mt. Healthy* burden-shifting analysis to determine whether Plaintiff's allegedly protected conduct was a "substantial" or "motivating" factor in Defendants' decision to terminate her. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *see also Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 632-37 (Tex. 1995)(discussing the Texas Whistleblower Act). The burden then shifts to Defendants to prove that they would have made the decision to terminate Plaintiff's employment even in the absence of the protected conduct.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the movant is able to demonstrate that the pleadings, affidavits, and other evidence available to the Court establish that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(C). The movant bears the responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Topalian v. Ehrman,* 954 F.2d 1125 (5th Cir.1992), *cert. denied,* 113 S.Ct. 82

(1992).

The nonmovant is not required to respond to a motion for summary judgment until the movant first meets its burden of demonstrating that there are no factual issues warranting trial. *Ashe v. Corley,* 992 F.2d 540 (5th Cir.1993). Once the movant has shown the absence of material fact issues, however, the opposing party has a duty to respond, via affidavits or other means, asserting specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e). It is not enough for the party opposing summary judgment to rest on mere conclusory allegations or denials in his pleadings. *Topalian,* 954 F.2d at 1131. The nonmovant must point out, with factual specificity, evidence demonstrating the existence of a genuine issue of material fact on every component of the nonmovant's case. *Dunn v. State Farm & Casualty Co.*, 927 F.2d 869, 872 (5th Cir.1991). If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2551, 91 L.Ed.2d 265 (1986). In assessing the proof, the court views the evidence in the light most favorable to the nonmovant. *Matshusita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The findings of the Hearing Examiner establish that one legitimate, motivating factor in Plaintiff's termination was her conduct in the sour weed incident. Plaintiff is bound by the factual findings of the Hearing Examiner, which are as follows:

(1) Plaintiff took third graders on a hike, and some had to be sent to the nurse after ingesting sour weed;

(2) Dr. Sullivan investigated the sour weed incident and "determined as a result of the investigation that he could no longer place students in Ms. Mullinax's care without any confidence";[2]

(3) Dr. Sullivan recommended Mullinax's termination to the School Board;

(4) The School Board voted to accept the recommendation of Dr. Sullivan;

(5) The sour weed incident "is sufficient and does rise to the level of good cause for termination"; and

(6) "Ms. Mullinax's employment with the Texarkana Independent School District should be terminated."

Fifth Circuit Opinion, pp. 5-6. The Fifth Circuit reversed and remanded certain claims because there is no finding that Plaintiff's allegedly protected conduct was not a "substantial" or "motivating" factor in her termination nor is there any finding that Dr. Sullivan would have recommended Plaintiff's termination, or that the School Board would have accepted the recommendation, even in the absence of her allegedly protected conduct.

Therefore, this Court must determine "not whether the employer justifiably could have made the same decision [in the absence of the protected conduct] but whether it actually would have done so." *Mt. Healthy*, 429 U.S. at 287. Defendants argue Plaintiff's remaining allegations do not constitute "protected speech" and Plaintiff does not have a "Whistleblower" claim.[3] Defendants further argue Plaintiff would have lost her job anyway "even in the absence of the allegedly protected conduct" because she endangered the safety and welfare of children in her care.

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[2] The Fifth Circuit noted that the Hearing Examiner presumably meant "with any confidence." The Hearing Examiner confirmed this interpretation later in the decision: "Whether knowingly or not, [Plaintiff] placed the students in a potentially dangerous situation, that could have resulted in dire circumstances. This showed very poor judgment and led the Superintendent to believe he could no longer have any confidence in her ability to be in charge of students."

[3] Defendants' mot. at 11.

A. First Amendment Retaliation Claims

To prove a First Amendment retaliation claim, Plaintiff must show that: (1) she suffered an "adverse employment decision"; (2) her speech involved was "a matter of public concern"; (3) her "interest in commenting on matters of public concern . . . outweigh[s] the Defendant's interest in promoting efficiency"; and (4) her speech motivated the adverse employment decision. *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir.), *cert. denied*, 528 U.S. 1022 (1999). Plaintiff must show that she engaged in protected conduct and that it was a motivating factor in her discharge. "Then, the burden shifts to [D]efendants to show by a preponderance of the evidence that they would have come to the same conclusion in the absence of the protected conduct." *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 601 (5th Cir. July 5, 2001), *citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

The Court now considers whether Plaintiff has met her initial burden of demonstrating that her speech motivated her discharge.[4] Plaintiff first alleges that a substantial or motivating factor for Dr. Sullivan's recommendation and the board's decision to terminate her contract was Plaintiff's exercise of her rights of association with the Texas State Teachers Association ("TSTA"). Early in the 1998-1999 school year, Plaintiff was a "vocal supporter of a TSTA inspired outcry regarding the allegedly illegal extension of the school day and the undermining of the state mandate regarding the preparation and planning period."[5] Plaintiff asserts the campus principal was angry with

[4] Defendants argue Plaintiff's grievances and complaints are not speech involving a matter of public concern, and if so, TISD's interest in avoiding a violation of the Establishment Clause outweighs any interest Plaintiff might have in complaining that the dance group could not use Christian music. However, the Court focuses on the causation element.

[5] Plaintiff's response at 7.

Plaintiff, giving her "an angry, go to hell look."[6]

Plaintiff further asserts a genuine issue of material fact exists as to whether Defendants' actions were substantially motivated by Plaintiff's exercise of her free speech rights, especially her involvement in a newspaper interview. Plaintiff's evidence that Defendants violated her rights is based on her assertion that she had "always received excellent evaluations from her supervisors at the Defendant school district."[7] In the early spring of 1999, Plaintiff filed a formal grievance through TSTA when her principal gave her a written reprimand for going home sick. Around March 10, 1999, Plaintiff and her TSTA representative met with Dr. Sullivan regarding her grievance. Dr. Sullivan ruled in Plaintiff's favor. During the hearing, Plaintiff allegedly discussed with Dr. Sullivan "her concerns that there were several incidents of illegal activities taking place at the school district."[8] Plaintiff also voiced her disagreement with the directive she had been given as the sponsor of the dance club not to perform to Christian music. Several days before Plaintiff's suspension for alleged endangerment of students on the nature hike, Plaintiff and several students and parents were interviewed by Les Tracey, a newspaper reporter for the *Texarkana Gazette* regarding the use of Christian music. Lisa Phillips, a dance club member's parent, testified she expressed concern to the reporter about the ban of Christian music as well as "racial insensitivity, prejudice, and uncaring by the TISD administration toward the large number of African American students who were involved

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[6] Plaintiff's response at 8; Carmen Shaver's Depo. at 38, lines 5-11.

[7] Plaintiff's response at 7. Defendant asserts the evidence actually states that Plaintiff had "received a good performance appraisal" for the year in which the sour weed incident occurred.

[8] Plaintiff's response at 8.

in the dance team."[9]

Around April 12, 1999, Ms. Tracey conducted a telephone interview with Barbara Lewis, TISD's Director of Public Information. The parties disagree as to the content of the interview. Plaintiff alleges that either Lewis or Dr. Sullivan claimed the right to "approve" any newspaper article.[10] Plaintiff asserts Dr. Sullivan knew about the newspaper interview because his "major involvement was dealing with two parents who felt that [Plaintiff] had tricked them into attending the meeting."[11] Plaintiff also asserts that immediately prior to her suspension, the principal, Dr. Keener, called certain students out of class to question them regarding their involvement in the interview.[12]

Plaintiff believes the Court should infer improper motive from the timing of Dr. Sullivan's recommendation to terminate her employment, which occurred just days after the reporter called TISD to get the administration's comments regarding the interview with the dance club. Plaintiff argues this evidence supports "the allegation that Plaintiff's newspaper interview was a substantial or motivating factor for Dr. Sullivan recommending termination of Plaintiff's contract."[13]

The Court first notes that timing alone does not create an inference that the termination is

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[9] Affidavit of Lisa Phillips.

[10] Both Dr. Sullivan and Lewis denied making such a claim. *See* Transcript of Due Process Hearing held on June 21-22, 1999 ("Transcript") at 226, lines 5-14; *see also* Affidavit of Barbara Lewis.

[11] Plaintiff's response at 24; *see* Transcript at 198-200.

[12] Transcript at 135-136, lines 8-15. *But see* Affidavit of Lisa Phillips, wherein Ms. Phillips states that, as a parent of a dance club member, she participated in the interview, and saw Assistant Principal Hooey question her daughter about the interview.

[13] Plaintiff's response at 25.

retaliatory. *Beattie*, 254 F.3d at 605. Close timing between an employee's protected activity and adverse employment action may provide the "causal connection" required to make out a prima facie case of retaliation. *Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993). "However, once the employer offers a legitimate, nondiscriminatory reason that explains both the adverse action and the timing, the plaintiff must offer some evidence from which the jury may infer that retaliation was the real motive." *Swanson v. General Serv. Admin.*, 110 F.3d 1180, 1188 (5th Cir.), *cert. denied*, 522 U.S. 948 (1997). The Fifth Circuit concluded the Hearing Examiner's findings establish that one legitimate, motivating factor in the decision to terminate Plaintiff's employment was the sour weed incident, which occurred one month before the May 17, 1999 board meeting where Dr. Sullivan made his recommendation.

Defendants also rely on "timing" to argue all of Plaintiff's allegations, with the exception of the discussion with the newspaper reporter, occurred before March 12, 1999, the date on which Dr. Sullivan recommended to the school board that Plaintiff's contract be *renewed* and the date on which the unanimous school board approved the recommendation. Defendants argue, as a matter of logic, if Dr. Sullivan was truly motivated to retaliate against Plaintiff, it would have been easier for him to simply recommend non-renewal of her contract at the March 1999 board meeting. The Court also finds timing alone does not create an inference that the termination was not retaliatory. The Court must consider other evidence.

Plaintiff's evidence has no bearing on the school board's liability unless either the board acted in retaliation independently or the improper motives (if proven) of Dr. Sullivan can be imputed to the board. The board oversaw Dr. Sullivan's employment actions. Dr. Sullivan presented his recommendation to the board, and the board terminated Plaintiff. Dr. Sullivan is not a final

policymaker. Therefore, the board nor the school district is liable for the actions of Dr. Sullivan, unless his "allegedly improper motives can be imputed to the board." *Beattie*, 254 F.3d at 603. Plaintiff must impute Dr. Sullivan's allegedly improper motives to the board by demonstrating the board approved both Dr. Sullivan's decision and the basis for it. *Id.*

As in *Beattie*, all board members in this case testified the only reason that Dr. Sullivan gave to the board for his recommendation was Plaintiff's endangerment of the health and safety of the student under her care. Each member stated he or she did not vote to terminate Plaintiff for the reasons alleged in this lawsuit, but voted to terminate Plaintiff solely because she had endangered the health and safety of students during the nature walk. Each member stated he or she "did not vote to propose the termination of [Plaintiff] because she was a member of the Texas State Teachers Association or because of her membership in any other organization." Each member stated he or she did not vote to propose Plaintiff's termination "because of anything she might have allegedly said, whether in a grievance, to Dr. Sullivan, or to any other person." Finally, each member stated that even in the absence of the things alleged in the lawsuit, each would have voted to propose the termination of Plaintiff.

Moreover, Defendants have presented summary judgment evidence of Dr. Sullivan's motives in recommending Plaintiff's termination. Dr. Sullivan testified at the Due Process Hearing that he has a good working relationship with TSTA, and he has no reference as to why Plaintiff's membership with TSTA would be an issue. Dr. Sullivan stated his decision was based on the safety of the children, not on parental complaints about the meeting with Plaintiff.[14] Dr. Sullivan testified the substantial or motivating factor in his decision was his "inability to place children under

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[14] Transcript at 200, lines 10-24.

[Plaintiff's] supervision in the future with any degree of confidence. . . ."[15] The Hearing Examiner has held that Plaintiff's conduct in the sour weed incident was one legitimate, motivating factor for Defendants' decision to terminate her employment.

Plaintiff has presented no evidence that the board had actual knowledge of Dr. Sullivan's alleged improper motives. Therefore, TISD cannot be liable for the alleged retaliation. *Beattie*, 254 F.3d at 604. Moreover, assuming without deciding, that the board did terminate Plaintiff in retaliation for exercising her association and speech rights, "it can escape liability, because it would have terminated her for other reasons," namely the sour weed incident. *Id.* The board members testified they would have voted to terminate Plaintiff in the absence of the allegations made in the lawsuit because Plaintiff had endangered the health and safety of children under her care. As the Fifth Circuit stated in *Beattie*, Plaintiff "offers no evidence to refute these affidavits. Thus, the board's independent reason for her termination shields it from liability under *Mt. Healthy*." *Id.*

If Dr. Sullivan recommended Plaintiff's termination in retaliation for her membership in TSTA or for conducting the newspaper interview, Dr. Sullivan may have violated Plaintiff's First Amendment rights. *See Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1103 ("[A] government employer cannot retaliate against an employee for the exercise of first amendment rights."). As the Fifth Court further noted in *Beattie*, the superintendent did not fire Plaintiff directly, but "merely recommended her termination to the board, which made the final decision." *Id.* at 605. No matter how unconstitutional Dr. Sullivan's alleged motives may have been, he cannot be liable under 42 U.S.C. § 1983 because he did not cause the adverse employment action. "Moreover, even if the board adopted [Dr. Sullivan's] recommendation, that recommendation exhibited no

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[15] *Id.* at 215, lines 10-12.

unconstitutional motive on its face. Further, the evidence suggests that the board fired [Plaintiff] for independent reasons, and [Plaintiff] offers nothing but her own beliefs to the contrary." *Id.* The Court finds TISD fired Plaintiff for a permissive, constitutional motive independently of Dr. Sullivan's "unproven unconstitutional aims," and that "superseding cause" shields Dr. Sullivan from liability. *Id.* Accordingly, the Court recommends that Defendants' motion for summary judgment as to Plaintiff's 42 U.S.C. § 1983 be **GRANTED**.

B. Texas Whistleblower Act Claims

The Texas Whistleblower Act provides that certain employees discriminated against for reporting a violation of the law in good faith to an appropriate authority may sue for damages and other relief. *Texas Dep't. of Human Servs. of the State of Texas v. Hinds*, 904 S.W.2d 629 (Tex. 1995). The Texas Supreme Court held that the report need not be the sole motivation for the employer's discrimination, "but it must be such that without it the discriminatory conduct would not have occurred when it did." *Id.* at 631.

The employee has the burden of establishing a prima facie case of unlawful discrimination. Then, the employer has the burden of producing evidence of legitimate reasons for its actions. The employee has the burden of rebutting this evidence. *Id.* at 636. The burden of persuasion remains on the employee even though the burden of production shifts. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

The only specific law that Plaintiff ever reported as being violated was in her February 22, 1999 grievance, wherein she stated that she believed TISD was violating "TAC, title 19 230.560(1), (2), (3)" with respect to Plaintiff's aide. That specific portion of the Administrative Code required that aides are to perform "under the direction and supervision of a certified teacher." 19 TEX.

ADMIN. CODE § 230.560.

Even assuming Plaintiff has met her burden of proving a prima facie case of unlawful discrimination based on this report, the Court finds Defendants have produced evidence showing legitimate reasons for its actions as discussed previously. Accordingly, the Court recommends that Defendants' motion for summary judgment be **GRANTED** as to Plaintiffs' Texas Whistleblower Claims.

IV. CONCLUSION

Based on the foregoing, it is recommended that Defendants' Motion for Summary Judgment (Docket Entry # 80) be **GRANTED**.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir.1988).

SIGNED this 9th day of August, 2001.

CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE