IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIVISION OF MISSISSIPPI
ABERDEEN DIVISION

LESLIE SMITH **PLAINTIFF**

VS. **CAUSE NO. 1:15CV147-NBB-DAS**

COLUMBUS MUNICIPAL SCHOOL DISTRICT, AND PHILIP HICKMAN, Individually and as Superintendent of Columbus Municipal School District **DEFENDANT**

DEFENDANTS COLUMBUS MUNICIPAL SCHOOL DISTRICT AND DR. PHILIP HICKMANS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants, Columbus Municipal School District and Dr. Philip Hickman, and submit their Brief in Support of their Motion for Summary Judgment.

INTRODUCTION

Plaintiff Leslie Smith filed suit against the Columbus Municipal School District alleging a breach of contract. He brought separate claims against the school and Superintendent Philip Hickman for negligent misrepresentation and malicious interference with a contract. The breach of contract claim is the primary claim in the case. Smith claims he and the school district entered into a year-long employment contract whereby Smith was hired as the Director of Schools in the district. The other claims arise from communications and dealings between Dr. Hickman and Smith after the alleged contract was in place and Dr. Hickman was confirming with Smith that he would not be employed. Although the school board did meet and initially approve Dr. Hickman's recommendation to hire Smith as Director of Schools, Smith never came to Columbus and never executed a valid school employment contract. He cannot establish an enforceable employment contract here and all claims in this case should be dismissed.

FACTUAL BACKGROUND

Dr. Philip Hickman began work as the Superintendent of the Columbus Municipal School District at the beginning of the 2014-15 school year. (Aff. of Dr. Hickman at ¶ 1, attached as Ex. A to Motion). He began talking with Plaintiff about coming to work with him at the school district soon after he got the job. (Leslie Smith depo. at pp. 41-43; Smith depo. attached as Ex. B to Motion). Plaintiff communicated with Dr. Hickman both verbally and by text messages. Smith was the uncle of Dr. Hickman's wife and lived in East St. Louis, Illinois. (Id. at p. 6). At his first school board meeting, Dr. Hickman made a recommendation to the school board that Smith be offered a position as Director of Schools. (Dr. Hickman aff. at ¶ 2). Prior to the vote on the recommendation, there was no discussion regarding the family ties between Dr. Hickman and Smith. The board supported Dr. Hickman's recommendation and voted in favor of the hire. (Id. at ¶ 2).

After the board meeting, the local media asked several board members if they were aware that Smith was the uncle of Dr. Hickman's wife. (Dr. Hickman aff. at ¶ 2). Several board members expressed concern over the approval of the hire. (Id.). Dr. Hickman immediately talked with Plaintiff about his concerns with bringing him to the school district under these circumstances. (Id.). As part of those discussions, Dr. Hickman sent Plaintiff a local newspaper article wherein the matter was discussed. (Dr. Hickman aff. at ¶ 4; August 12 Commercial Dispatch article on board action attached as Ex. 1 to aff.). Plaintiff was aware of the board meeting and the concerns of board members and the public after the decision to approve his hire was made. (Smith depo. at 55-59). After more controversy regarding the requested hire later that evening and the following day, Dr. Hickman asked Plaintiff to decline the job. (Dr. Hickman aff. at ¶ 4; Smith depo. at pp. 58-60). Dr. Hickman says that Plaintiff was agreeable to

not taking the position. (Dr. Hickman aff. at ¶ 3). Plaintiff says that he never told Dr. Hickman that he was declining the job. (Smith depo. at p. 60). Dr. Hickman informed the school board attorney and board members that Plaintiff declined the job. (Hickman aff. at ¶ 3; Aff. of Angela Verdell at ¶ 3; Verdell aff. attached as Ex. C to Motion). The school board attorney suggested that Dr. Hickman obtain a written letter from Plaintiff declining the job. (Dr. Hickman aff. at ¶ 3).

Dr. Hickman requested Plaintiff to provide him something in writing declining the job. (Dr. Hickman aff. at ¶ 4). He expected that Plaintiff would email or fax the letter, but Plaintiff never did. (Id. at ¶ 4). Instead, Dr. Hickman was scheduled to be in Kansas City for a class reunion over the weekend and Plaintiff suggested meeting there to provide a letter declining interest in taking the job. Plaintiff was apparently coming to Kansas City that weekend as well to visit with his sister (Dr. Hickman's mother-in-law), Radifah Zalzala, and other family. Plaintiff planned to meet Dr. Hickman at Ms. Zalzala's home. (Id. at ¶ 4). The two were not able to meet in person, but through phone calls and text messages, Dr. Hickman understood that Plaintiff would leave a written letter at the house. (Dr. Hickman aff. at ¶ 4; Group of text messages between Dr. Hickman and Plaintiff attached as Ex. 2).

In the evening hours of Saturday, August 16, 2014, Ms. Zalzala provided Dr. Hickman with an envelope containing a letter dated August 15, 2014, signed by Plaintiff declining employment with the school district. (Dr. Hickman aff. at ¶ 5; Letter declining position attached as Ex. 3 to Dr. Hickman aff.). Plaintiff claims that he never signed the letter. (Smith depo. at pp. 65-66). When Dr. Hickman returned to Columbus, he provided the letter to the school board counsel and the board. (Dr. Hickman aff. at ¶ 5). The local newspaper wrote another article about the matter on Monday, August 18. (Id.; August 18 Commercial Dispatch regarding

Plaintiff declining the position attached as Ex. 4 to Dr. Hickman aff.). The school board took no further formal action on the matter. (Verdell aff. at ¶ 4).

On Sunday, August 17, 2014, Plaintiff sent Dr. Hickman an email that was somewhat confusing. First, he said that, although we were unable to meet, he would get me the letter requested. (Dr. Hickman aff. at ¶ 6; August 17 email attached as Ex. 5 to Dr. Hickman aff.). The only letter Dr. Hickman ever discussed with Plaintiff was a letter declining the position. (Id.). After the above lead paragraph, Plaintiff said he would not make a decision on the alleged offer of employment until he received official notification that he had actually been hired for the position. (Id.; Smith depo. at pp. 69-71). Dr. Hickman attempted to contact Plaintiff by phone and text message after seeing the email, but Plaintiff never answered or returned any of calls. (Dr. Hickman aff. at ¶ 6).

ARGUMENT

Although the school board approved Dr. Hickman's request to hire Smith, Smith's failure to come to Columbus and execute a written employment agreement bars any potential claim for breach of contract. Smith never accepted or signed an employment agreement and has no basis to claim that a contract was ever entered into between he and the school district. He also claims that the school district and Dr. Hickman negligently misrepresented to Plaintiff that he had been hired and that he relied on the representation to his detriment. Text messages between Dr. Hickman and Plaintiff shortly after the board meeting in question establish that Smith was immediately aware of the controversy over Dr. Hickman's request to hire him and that he was informed immediately after that board meeting that he would not be hired for the Director of Schools position. He cannot support a negligent misrepresentation claim. All claims in this case should be dismissed.

A. Breach Of Contract Claim Fails As A Matter Of Law

In a breach of contract claim, Plaintiff must prove by a preponderance of the evidence: (1) the existence of a valid and binding contract, (2) the defendant has breached the contract, and (3) the plaintiff has been damaged monetarily. *Warwick v. Matheney*, 603 So.2d 330, 336 (Miss. 1992); *Suddith v. University of Southern Mississippi, et al.*, 977 So.2d 1158 (Miss. App. 2007). Contracts with administrative education employees are governed by the School Employment Procedures Act. Miss. Code Ann. § 37-9-101, et seq. Mississippi law mandates that a Superintendent shall enter into a contract with a licensed employee. Miss. Code Ann. § 37-9-23. A licensed employee is defined as an employee "required to hold a valid license by the Commission on Teacher and Administrator Education, Certification and Licensure and Development." Miss. Code Ann. § 37-9-1. The Mississippi Attorney General has further explained that Mississippi statutory employment scheme requires that licensed administrators and employees must serve under contract, whereas positions such as "tutors, substitute teachers and other temporary support personnel" are not required to execute a written contract. 1998 Miss. Ag. Lexis 155 (Miss. Ag. 1998). The Director of Schools position at issue in this case was a position that required Mississippi certification. The board meeting wherein Plaintiff was approved and the minutes from that board meeting reflect that his Mississippi certification was pending. (Verdell aff. at ¶ 5; August 11 board minutes attached as Ex. 1 to aff.). Given the position at issue, Plaintiff must execute an employment contract that includes the name of the school district, the length of term, the agreed upon salary, the method of salary payment and the scholastic year covered, among other things. Miss. Code Ann. § 37-9-23.

Although there are not many Mississippi cases that address this issue, the School Employment Procedures Act is clear that the position that Plaintiff claims that he was contracted

to perform requires the execution of a valid employment agreement. In *Fitch v. Upshaw*, 177 So.2d 57 (Miss. 1937), the Mississippi Supreme Court held that when an individual has failed to execute a written contract, despite any board approval, his rights to employment are null and void. In *Fitch*, the school board approved an individual's employment at the district's Maben school. After serving in the approved position for months, the board refused to authorize payment of the employee's salary. *Fitch*, 177 So. at 58. The *Fitch* court noted that Mississippi law requires that an employee agree upon a salary and contract to create a valid employment contract. Additionally, "the contract shall be signed in duplicate, each obtaining a copy, and shall set out the name of the school ... the position ... [hand] ... a monthly salary ...". *Id.* The court further noted that while the board had approved the employee for hire and such an action was legal, the employment was not completed in the absence of a written contract" between the employee and the school district. *Id.*

In this case, Plaintiff's hire was approved by a board vote. Immediately after that vote, some board members and the local media became concerned that Plaintiff and Superintendent Dr. Hickman were kin. After voicing their concerns, Dr. Hickman talked with Plaintiff and requested that he decline the position. According to Dr. Hickman, Plaintiff did decline employment and Dr. Hickman informed the school attorney and the school board that the position was declined. Dr. Hickman later provided written confirmation that Plaintiff had declined the position. Even though Plaintiff now claims he did not decline the job either verbally or in writing, Plaintiff never came to Columbus and never executed a valid employment contract. Plaintiff acknowledged that in his lengthy history working as a teacher and school administrator, he has never worked without a signed employment contract. (Smith depo. at pp. 72-74). He has no basis to bring a breach of contract claim under these circumstances.

Plaintiff alleges that the signature on the letter declining the position is not his signature. Even if this were true, the fact that no employment contract was ever presented to or signed by Smith bars any potential contract claim in this case. A valid contract must have: (1) two or more contracting parties, (2) consideration, (3) an agreement sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation. *Grenada Living Center, LLC v. Coleman*, 961 So.2d. 33 (Miss. 2007). Plaintiff sent Dr. Hickman an email on Sunday, August 17, 2014, indicating that he had been advised not to make any decision on the board's vote to hire him before he received "official notification from HR stating I have been hired to the above position". His own email several days after the board meeting where his hiring was approved establishes that he knew that no employment relationship had been created. Further he notes in the email that he had made no decision on the apparent offer to hire. Even if the board approval could be construed as creating a potential contract, Plaintiff has offered no factual evidence that he ever accepted employment. His last communication with Dr. Hickman or anyone else at the school district was the above email. Plaintiff's claim that a valid employment contract was created fails as a matter of law.

B. Evidence Does Not Support Negligent Misrepresentation Claim

Plaintiff claims the school district and Dr. Hickman negligently misrepresented that he was hired for a position with the school district. Negligent misrepresentation is applicable when a party proves: (1) a misrepresentation or omission of fact; (2) that the representation or omission is material or significant; (3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities; (4) that the plaintiff reasonably relied upon the misrepresentation or omission; and (5) that plaintiff suffered damages as a direct and proximate result of such reasonable reliance. *Horace Mann*

Life Ins. Co. v. Nunaley, 960 So.2d 455, 461 (Miss. 2007). Plaintiff has offered no evidence that Dr. Hickman or the school district negligently misrepresented any material fact to him. To the contrary, immediately after the board voted to approve the hire of Plaintiff, Dr. Hickman contacted Plaintiff and told him of the vote, but that there was some reservations about the vote due to the fact that Plaintiff was Dr. Hickman's wife's uncle. Through text messages and phone calls shortly after the vote to approve Smith's hire, Dr. Hickman informed Plaintiff of his concerns and the fact that Plaintiff did not need to work for the school district under these circumstances. Dr. Hickman never misrepresented or omitted any fact when discussing these matters with Plaintiff. The parties do not dispute that these discussion took place and there is no basis for a negligent misrepresentation claim.

C. Evidence Does Not Support Malicious Interference With Employment And/Or Prospective Employment Claim

Plaintiff also brings a separate claim of malicious interference with employment against Dr. Hickman and the school. An at-will employee can state a claim for tortious interference with his employment contract. *Levens v. Campbell*, 733 So. 2d 753 (Miss. 1999). In order to state such a claim, the Plaintiff must show:

(1) willful or intentional acts;

(2) that were done to cause damage to the plaintiff's business;

(3) that were done with the purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (i.e., maliciously); and

(4) that actual loss resulted from the acts.

Wertz v. Ingalls Shipbuilding, Inc., 797 So. 2d 841, 846 (Miss. 2001). These claims should be dismissed.

First, this tort only arises if there is interference with a contract between Plaintiff and some third party. In other words, "[a] party to a contract cannot be charged with interfering with his own contract." *Hinton v. Eagle One Majestics*, 2009 WL 2169846 at *8 (S.D. Miss. 2009); *Cenac v. Murray*, 609 So.2d 1257, 1269 (Miss. 1992). Dr. Hickman is the superintendent of the Columbus Municipal School District. As superintendent, he is a party to any alleged contract that could be at issue in this case. Given that he is superintendent of the school district, he cannot maliciously interfere with a school district contract as a matter of law.

Alternatively, Dr. Hickman's conduct would be protected by privilege. A person occupying a position of trust on behalf of another is privileged, within the scope of that responsibility and the absence of bad faith, to interfere with the principal's contractual relationship with a third person. *Hammonds v. Fleetwood Homes*, 907 So.2d 357, 361 (Miss. 2005). Plaintiff cannot provide any evidence that Dr. Hickman acted in bad faith in regard to any employment actions taken with him. In this case, it is undisputed that Dr. Hickman recommended Plaintiff for hire as the Director of Schools in the school district. After concern about the potential kinship between Dr. Hickman and Plaintiff, and local media making the matter an issue, Dr. Hickman decided that employment of Plaintiff would not be good for the school district. He discussed his concerns with Plaintiff on the phone and through text messaging. Although Plaintiff disputes that he declined the alleged offer of the position of Director of Schools, he does not dispute that Dr. Hickman made him aware of the concerns about the approved hire. Plaintiff has no basis to claim bad-faith or malice on the part of Dr. Hickman. For that reasons, he cannot support malicious interference with employment or interference with prospective employment claims in this case.

Finally, in considering a malicious interference with employment claim, courts should analyze the claims under the standard used for claims for intentional infliction of emotional distress. As found in *Jenkins v. City of Grenada*, 813 F.Supp. 433, 446-447 (N.D. Miss. 1993), mere "employment disputes" are not sufficient to support a claim for intentional infliction of emotional distress. The *Jenkins* court noted that "meeting the requisite elements of a claim for intentional infliction of emotional distress is a tall order in Mississippi" and that to prevail upon such a claim, plaintiff must demonstrate that the conduct complained of invoked outrage and/or revulsion. *Id*. at 446. The Fifth Circuit has stated that in Mississippi, in order to recover for intentional infliction of emotional distress, a plaintiff must prove that defendant's conduct is "extreme and outrageous." *Burroughs v. FFP Operating Partners, L.P.*, 28 F.3d 543, 546 (5th Cir. 1994) (citations omitted). The same analysis should apply to intentional interference with employment claims. These claims against Dr. Hickman and the school district should be dismissed.

D. No Basis For Claim Of Gross Negligence

Plaintiff also appears to allege a claim of gross negligence. Defendant is not aware of any stand-alone claim for gross negligence. Generally, gross negligence is an element that must be proven to support a punitive damage claim. Plaintiff did not make a request for punitive damages in the complaint and punitive damages are not available against the Columbus Municipal School District or Dr. Philip Hickman for decisions and actions taken with the course and scope of his employment. To the extent that the court considers a gross negligence claim, gross negligence is generally defined as:

> [T]he definition of gross negligence includes two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of [the] potential harm to others, and (2) the actor must have actual, subjective awareness

> of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

Transportation Insurance Company v. Moriel, 879 S.W. 2d at 23 (Tex. 1994). Plaintiff has no basis to allege gross negligence on the part of Dr. Hickman and the school district in this case. Even if a gross negligence claim is viable, that claim should be dismissed as a matter of law.

CONCLUSION

For all the reasons discussed above and any that the Court deems appropriate, all of Plaintiff's claims against Columbus Municipal School District and Dr. Philip Hickman should be dismissed as a matter of law.

This the 1st day of August, 2016.

Respectfully submitted,

COLUMBUS MUNICIPAL SCHOOL DISTRICT and DR. PHILIP HICKMAN

s/Berkley N. Huskison (MSB #9582)
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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, I electronically filed the foregoing with the Clerk of the Court using the ECF system and forwarded such filing via United States Postal Service or ECF notification to the following:

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This the 1st day of August, 2016.

s/Berkley N. Huskison