[Cite as *Speller v. Toledo Pub. Schools Bd. of Edn.*, 2015-Ohio-2672.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Sandra Meeks Speller	Court of Appeals No. L-14-1149
Appellant	Trial Court No. CI0201303777
v.	
Toledo Public School District Board of Education	**DECISION AND JUDGMENT**
Appellee	Decided: June 30, 2015

* * * * *

Dennis D. Grant and Jolene S. Griffith, for appellant.

Roman Arce, John A. Borell, Jr., and Meghan Anderson Roth, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Sandra Meeks Speller, appeals the December 16 and 18, 2013 judgments of the Lucas County Court of Common Pleas which, following her administrative appeal of appellee Toledo Public Schools Board of Education's ("the Board") resolution terminating her employment, affirmed the Board's decision. Further,

the court dismissed appellant's claims for a violation of R.C. 3319.12 and malicious breach of contract and dismissed claims for punitive damages and attorney fees for alleged acts in violation of R.C. 4112.02. For the reasons that follow, we affirm.

{¶ 2} The relevant facts of the administrative proceedings and appeal are as follows. Appellant has been employed by the Board for 17 years. Appellant was employed by Toledo Public Schools ("TPS") as a mathematics teacher from 1996-2003, and from 2003-08 acted as a high school facilities coordinator (the job was abolished by the Board.) Beginning the 2008-09 school year, appellant was transferred to DeVeaux Middle School as assistant principal. She was acting principal for a short period until Chad Henderly was appointed principal and appellant resumed her assistant principal position.

{¶ 3} On May 31, 2010, Henderly wrote a letter to his supervisor detailing his problems with appellant's job performance including allegations of insubordination, failure to perform job duties, due process violations (relating to the handling of expulsions, suspensions), and unprofessional conduct.

{¶ 4} Following multiple parent complaints about appellant's demeanor and attitude, appellant was transferred to the assistant principal positon at Spring Elementary beginning the 2011-12 school year. Shortly after school began, Spring Elementary Principal, Victoria Dipman, maintained a log of appellant's allegedly improper activities which included failing to cover her cafeteria duty shifts, unprofessional comments made to teachers, leaving students in a classroom unsupervised, physical and verbal abuse of

students, and failure to report suspected child abuse. There were also several notations regarding long lunches and leaving early. Further, there were multiple teacher complaints about appellant interrupting their classrooms and requests that teachers leave their rooms and attend unscheduled parent meetings.

{¶ 5} As a result of these incidents, several "buff" sheets (buff colored paper containing disciplinary action notice) were issued and disciplinary hearings held. These culminated in the June 2012 three-day Continuing Disciplinary Investigation ("CDI") hearing conducted by TPS. On July 30, 2012, TPS Hearing Officer Carol Thomas issued a written decision recommending that appellant be immediately terminated.

{¶ 6} In a letter dated August 2, 2012, appellant was notified pursuant to R.C. 3319.16 of the Board's intent to consider her termination based on Thomas' report. The letter stated that "[s]pecification of the charges includes poor job performance, repeated and consistent failure to perform job duties, unprofessional behavior, insubordination, and creating and contributing to an offensive work environment at Spring Elementary School."

{¶ 7} Attached to the letter was Thomas' eight page report detailing the testimony presented at the CDI hearing. Thomas noted that the scope of the decision was limited to the prior three school years and included nine specific instances of insubordination.

{¶ 8} Appellant requested an appeal of the hearing officer's recommendation that she be terminated. In November 2012, a six-day hearing was conducted by a referee appointed by the Ohio Department of Education. The May 6, 2013 referee's decision and

recommendation discredited the testimony of the principals at DeVeaux Middle School and Spring Elementary based, in part, upon appellant's "superior" prior career at Scott High School. The referee suggested that as to Henderly's increasingly negative evaluations, he was part of the "all-white male administrative hierarchy" at DeVeaux. The referee discounted Dipman's testimony finding that she had communicated with Henderly and that he had "poisoned the well" regarding appellant's transfer to Spring. The referee further noted that Dipman began keeping a log on appellant from the start of the school year belying the concept of a "fresh start." The referee concluded that the Board failed to meet its burden proving appellant, by competent evidence, was guilty of the conduct of which she was accused and recommended that appellant not be terminated.

{¶ 9} On June 25, 2013, the Board approved a 15 page resolution rejecting the referee's recommendation and terminating appellant's employment. The Board found that the referee ignored "important facts" concerning appellant's inappropriate conduct when she was the assistant principal at DeVeaux. The Board further detailed 12 specific findings relating to incidents of insubordination made by the referee which it rejected as being against the weight of the evidence. The Board rejected the findings that the physical contact with students did not constitute excessive discipline and that none of the events rose to a level of just cause for termination.

{¶ 10} On July 23, 2013, appellant filed her administrative appeal/complaint against the Board pursuant to R.C. 3319.16, in the Lucas County Court of Common Pleas. On September 17, 2013, appellant filed an amended complaint raising the claims

of (1) violation of R.C. 3319.16, for terminating her without just cause, (2) violation of R.C. 3319.12, a reduction in salary without providing the proper notice and where it is not part of a uniform plan affecting the entire district, (3) malicious breach of contract, (4) defamation, (5) infliction of emotional distress, (6) unlawful discrimination- at DeVeaux, (7) unlawful discrimination- at Spring, (8) unlawful discrimination, and (9) unlawful retaliation. Appellant requested that she be reinstated and receive all lost salary and benefits and be awarded attorney fees and punitive damages. The Board filed its answer on October 4, 2013.

{¶ 11} Appellant filed a brief in support of her administrative appeal on September 3, 2013. The Board filed its merit brief on October 4, 2013.

{¶ 12} On October 4, 2013, the Board filed a Civ.R. 12(B)(6) motion to dismiss appellant's claims of violation of R.C. 3319.12, malicious breach of contract, defamation, and infliction of emotional distress. The Board argued that claims two through five were duplicative of count one and that claim three, malicious breach of contract, does not exist under Ohio law. The Board argued that appellant could not prevail on her claims for attorney fees and punitive damages against a political subdivision, R.C. Chapter 4112. The Board further argued that it was statutorily immune, R.C. Chapter 2744, from liability as to the defamation and infliction of emotional distress claims.

{¶ 13} In her October 21, 2013 opposition to the Board's motion to dismiss, appellant argued that the Board is not immune from tort liability for employment-related claims, R.C. 2744.05. Appellant argued that this section further eliminates immunity

from punitive damages liability. As to attorney fees, appellant argued that because of the tortious nature of her claims, attorney fees along with punitive damages were warranted.

{¶ 14} Appellant also contended that as to the claims that the Board argued were duplicative, the civil rules permit a pleader to state a single claim under alternative theories. Appellant further argued that each claim does not need to be wholly independent of all other counts.

{¶ 15} On December 16, 2013, the trial court granted the Board's motion to dismiss as to counts two and three of the complaint, breach of R.C. 3319.12 and malicious breach of contract, and the claims for attorney fees and punitive damages. The court denied the motion with respect to the infliction of emotional distress and defamation claims. The court found that counts two and three failed to state viable claims for relief. As to punitive damages, the court found that because neither R.C. 4112.02 nor 4112.99 expressly authorize a punitive damages award against a political subdivision, they were not recoverable. Similarly, the court found that because there is no statutory provision for an attorney fee award, they are not recoverable.

{¶ 16} On December 18, 2013, the court entered its decision on appellant's administrative appeal. The court first noted that the Board was required to accept the referee's findings of fact unless they were "against the greater weight, or preponderance, of the evidence" but that the Board had the discretion to reject the referee's recommendation unless doing so was contrary to law. The court noted that its review included the ability to weigh the evidence, hold additional hearings if needed, and make

factual determinations. The court then stated that it could not reverse the Board's decision unless it was not supported or was against the weight of the evidence. Thus "if the Board present[ed] 'substantial and credible evidence'" to support its claims and a fair hearing was held, the court could not reverse its judgment.

{¶ 17} The court found that the Board's rejection of the referee's finding that appellant's physical contact with students did not constitute excessive discipline or insubordination was within its discretion. Also within the Board's discretion was its determination that various comments that appellant made to students were inappropriate and insubordination. The court further found that the Board's conclusion that the referee "minimalized" appellant's failure to contact children's services regarding suspected child abuse was within its discretion. Finally, the court found that the Board's rejection of the referee's finding regarding the claim of insubordination based on appellant's failure to perform her assigned cafeteria duty was within its discretion. The court then concluded that the Board presented "'substantial and credible evidence'" to support its charges against appellant and affirmed the termination order.

{¶ 18} Appellant filed motions for reconsideration of both of the judgment entries which were denied. The court denied a request to add Civ.R. 54(B) language to its December 2013 judgment entries but granted appellant's motion to dismiss, without prejudice, her remaining claims. This appeal then followed.

{¶ 19} Appellant now raises the following four assignments of error for our review:

1. In affirming the defendant-appellee's ("Board") termination order, the trial court erred by considering incidents of plaintiff-appellant's ("Ms. Speller") alleged misconduct which were not specified in the R.C. § 3319.16 notice provided to her by the Board's Treasurer and which the R.C. § 3319.161 Referee, Hon. Anthony L. Gretick, therefore, found to be beyond the scope of the relevant issues he was to analyze and rule upon.

2. The trial court erred in testing the Board's purported "findings" via a minimal substantial and credible evidence standard when, instead, it should have tested Referee Gretick's findings by the preponderance of the evidence standard and should have deferred to his findings of fact since he, not the Board, functioned as the fact finder and observed the witnesses.

3. The trial court erred when it dismissed Count Three of Ms. Speller's Amended Complaint as stating only a contract claim and as duplicative of Count One.

4. The trial court erred when it dismissed Ms. Speller's claims for punitive damages and attorney fees on the theory that political subdivisions are immune therefrom under judicial pronouncements rendered prior to the Ohio Supreme Court's decision in *Carbone v. Overfield*, 6 Ohio St.3d 212 (1983).

{¶ 20} Guiding us in our examination of appellant's first two assignments of error, this court has recently set forth the relevant standards of review in proceedings conducted

pursuant to R.C. 3319.16. *Martin v. Bd. of Edn. of Bellevue City School Dist.*, 6th Dist. Huron No. H-12-002, 2013-Ohio-4420. In *Martin*, we noted that following a referee's recommendation regarding the potential termination of a public school employee:

> * * * the Board must accept the referee's findings of fact unless those findings are against the greater weight, or preponderance, of the evidence. *Aldridge v. Huntington Local School Dist. Bd. of Edn.*, 38 Ohio St.3d 154, 527 N.E.2d 291 (1988), paragraph one of the syllabus. The school board, however, has the discretion to accept or reject the referee's recommendation, unless such acceptance or rejection is contrary to law. *Id.* at paragraph two of the syllabus. *Id.* at ¶ 17.

{¶ 21} On appeal to the court of common pleas, the court may

> "weigh the evidence, hold additional hearings if necessary, and render factual determinations." *Katz v. Maple Hts. City School Dist. Bd. of Edn* ., 87 Ohio App.3d 256, 260, 622 N.E.2d 1 (8th Dist.1993), citing *Graziano v. Amherst Exempted Village Bd. of Edn.*, 32 Ohio St.3d 289, 293, 513 N.E.2d 282 (1987). The common pleas court, however, may only reverse the board's order of termination if it finds that the order is not supported by or is against the weight of the evidence. *Id.* citing *Hale v. Lancaster Bd. of Edn.*, 13 Ohio St.2d 92, 234 N.E.2d 583 (1968), paragraph one of the syllabus. Accordingly, "[i]f substantial and credible evidence is presented to support the charges of the board, and a fair administrative

hearing is had, the reviewing court cannot substitute its judgment for the judgment of the administrative authorities." *Strohm v. Reynoldsburg City School Dist. Bd. of Edn.*, 10th Dist. Franklin No. 97APE07-972, 1998 WL 151082 (Mar. 31, 1998); *see also Bertolini v. Whitehall City School Dist. Bd. of Edn.*, 139 Ohio App.3d 595, 604, 744 N.E.2d 1245 (10th Dist.2000). *Id.* at ¶ 18.

{¶ 22} Our standard of review is limited to a determination of whether the lower court abused its discretion. *Id.* at ¶ 19, citing *James v. Trumbull Cty. Bd. of Edn.*, 105 Ohio App.3d 392, 396, 633 N.E.2d 1361 (11th Dist.1995). An abuse of discretion connotes that the lower court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 23} In appellant's first assignment of error, she questions the breadth of the lower court's review. Appellant argues that the court considered alleged incidents of misconduct that were not specified in the R.C. 3319.16 notice and that the referee found beyond the scope of the issues before him. Specifically, appellant notes that the referee's decision and recommendation limited the scope to "those actions by Ms. Speller appropriately alleged which Ms. Thomas [CDI hearing officer] found to be the basis of her recommendation of termination, and those will be addressed as developed on the record." The referee further excluded events occurring on March 8, April 26 and May 9, 2011, due to either a lack of evidence or a prior no fault determination.

{¶ 24} The CDI hearing officer, following a three-day hearing, specifically found that appellant committed nine instances of insubordination: (1) violated board policy by failing to contact parents about a student being arrested, (2) failed to complete the duties of testing coordinator for which she was paid, (3) did not follow through with a directive regarding attendance of students as DeVeaux, (4) failed to put up an attendance board as directed, (5) continued to interrupt teachers during planning time, (6) inappropriate physical contact with students (putting a foot on a student, grabbing an arm, putting a student in a headlock, pushing a student against a wall, and grabbing a student by the neck and bending him or her over), (7) several instances of yelling and making sarcastic remarks to students, (8) threats to teachers to take away their lunch periods, and (9) comments regarding her ability as a black teacher to "touch" black children.

{¶ 25} Reviewing the assertions of appellant, we can find no instances where the Board relied on evidence that was not before the referee during the course of the hearing, although the referee chose not to consider it. Appellant contends that the scope of the investigation must be limited to the specific incidents in the R.C. 3319.16 notice. We disagree.

{¶ 26} R.C. 3319.16 provides that "[b]efore terminating any contract, the employing board shall furnish the teacher a written notice signed by its treasurer of its intention to consider the termination of the teacher's contract with full specification of the grounds for such consideration." While the term "full specification" is not defined in the statute, is has been found that evidence of other instances of alleged misconduct

which are "interrelated" to the grounds stated in the notice are permissible at the hearing. *See Beranek v. Martins Ferry City School Bd. of Edn.*, 7th Dist. Belmont No. 88-B-11, 1989 WL 3929 (Jan. 20, 1989). The purpose of R.C. 3319.16, is to provide the essential requirements of due process: notice and an opportunity to respond. *Badertscher v. Liberty-Benton School Dist. Bd. of Edn.*, 2015-Ohio-1422, 29 N.E.3d 1034 (3d Dist.)

{¶ 27} In *Badertscher*, following a hearing before a referee appellant-teacher was terminated by the board of education. *Id.* at ¶ 21. Badertscher filed an administrative appeal. The court requested briefing on the issue of whether the R.C. 3319.16 notice was sufficient to apprise Badertscher of the additional incident that was not enumerated in the notice but was used by the board in its order of termination. *Id.* at ¶ 23. The court ultimately determined that it would not consider the newly enumerated ground as an "independent" ground; rather, it would look to the event as "support" for the ten enumerated grounds. *Id.* at ¶ 26. The court then reversed the Board's decision to terminate Badertscher's employment contract. *Id.* at ¶ 27.

{¶ 28} On appeal, the court held that even assuming that the R.C. 3319.16 notice was deficient, "the overall record from the outset overwhelmingly reflects that Badertscher was fully apprised at every stage of the proceedings * * * and that he had the opportunity to prepare a response and be heard on this incident at every stage, which comports with the essential requirements of due process." *Id.* at ¶ 42. The court ultimately affirmed the trial court's judgment that the Board failed to demonstrate just

cause to terminate where the record lacked evidence that Badertscher was ever warned or told that his conduct was in violation of Board policy. *Id.* at ¶ 52.

{¶ 29} In the present case, appellant participated in and was represented by the union at a three-day disciplinary hearing which immediately preceded the statutory termination notice. Although we do not have a transcript of these proceedings, we note that appellant had the opportunity to fully participate in the hearing, including presenting evidence and questioning witnesses. Further, the events detailed in the Board's decision were the subject of prior discipline; thus, unlike *Badertscher*, appellant was aware that they were considered violations of Board policy. Here, we find that appellant was fully apprised of the claims against her and was afforded her due process protections. Appellant's first assignment of error is not well-taken.

{¶ 30} Appellant's second assignment of error challenges the lower court's review of the Board's findings by a "substantial and credible evidence" standard claiming it should have tested the referee's findings by a "preponderance of the evidence" standard and deferred to those findings. The Board contends that the lower court correctly determined that it acted within its discretion in giving significance to certain undisputed facts.

The Referee's Decision and Recommendation

{¶ 31} The referee found that while at DeVeaux, appellant's initial evaluations were positive; however, commencing in the 2009-10 school year and with a new principal, appellant's evaluation had marginal scores in nine categories. In May and

November 2010, DeVeaux Principal Chad Henderly attempted to initiate disciplinary hearings based on a series of complaints; no hearings were held. A third disciplinary hearing was called for May 2011, but was cancelled. In appellant's 2010-11 evaluation, she received a marginal score in ten categories and an unsatisfactory in two categories.

{¶ 32} Appellant was transferred to Spring Elementary for the 2011-12 school year. Within a week of her arrival, Principal Victoria Dipman began keeping a log of appellant's activities. The referee discredited Dipman's and Henderly's testimony based on his determination that they were untruthful about their conversation regarding appellant. The referee listed Dipman's complaints about appellant including that she called a child "slow," that she put a child in a headlock, that she failed to supervise children which resulted in a fight, that she failed to take emergency contact cards with her on a field trip, that appellant improperly disclosed to a parent the name of a teacher that had contacted children services based on suspected child abuse, that on March 15 and 19, 2012, an individual observed appellant grab two students by the neck and took one student to the ground, and that a threat made by appellant to a student that she would "whip the dog shit out of you" if she encountered him on the street, and that appellant, despite a directive prohibiting the conduct, continued to call teacher's classrooms during instruction time and conduct unscheduled meetings with parents.

{¶ 33} The referee then detailed the hearing officer's findings and, specifically, the instances of insubordination that the officer found as just cause to terminate, and made his own findings relative thereto. A summary of the findings is as follows.

A. Hearing Officer: Appellant's failure to contact parents about students' arrest was insubordination.

A. Referee: District failed to show insubordination or, in any event, de minimus.

B. Hearing Officer: Insubordination where appellant failed to perform the duties of testing coordinator, an additional position which she was paid to perform.

B. Referee: Testing coordinator complaint found without merit due to lack of instruction by Henderly.

C. Hearing Officer: Appellant failed to follow through with directive regarding attendance of students.

C. Referee: District failed to show insubordination or, in any event, de minimus.

D. Hearing Officer: Appellant failure to put up an attendance board as directed by Dipman was insubordination.

D. Referee: District failed to show insubordination or, in any event, de minimus.

E. Hearing Officer: Insubordination where appellant continued to interrupt teachers during planning time despite being directed not to do so.

E. Referee: District failed to show insubordination or, in any event, de minimus.

F. Hearing Officer: Testimony offered by several people who observed appellant putting her hands on students in an inappropriate manner including:

1. Putting a foot on a student.

2. Grabbing a student's arm and twisting until the student was on the ground.

3. Putting a student in a headlock and walking around.

4. Pushing a student against a wall.

5. Grabbing student by the neck and bending them over.

These are serious violations of Board policy and insubordination.

F. Referee: It is found by competent and probative evidence that these events do not constitute the exercise of excessive discipline and cannot constitute insubordination.

G. Hearing Officer: Testimony was presented by the principal that on several occasions, appellant yelled at and used sarcastic remarks to students; this is insubordination.

G. Referee: none of the events rose to good and just cause for termination and, in any event, were not insubordination.

H. Hearing Officer: A teacher testified that appellant threatened to take away her lunch period; threats are insubordination.

H. Referee: The "threat," if made, was beyond the scope of appellant's power. Further the threat, if made, was in poor judgment but was not insubordination.

I. Hearing Officer: Testimony was presented that appellant said that white teachers cannot touch black students but she can because she is black. Also that she would not discipline a black student as harshly if the student was referred by a white teacher.

I. Referee: The comments were ill-advised but do not amount to insubordination.

{¶ 34} The referee then concluded that appellant had "superior academic credentials" and a long and a "stellar" career with Toledo Public Schools. He suggested that her issues began and resulted from her transfer to DeVeaux, and continued with her transfer to Spring Elementary. The referee labeled her tenure at the schools a "toxic work environment" and stressed that at both schools, she was the only African-American administrator. The referee then found that the Board "failed to carry the burden that the conduct by Ms. Speller of which she has been accused which has been proven by competent evidence is good and just cause for the termination."

The Board's Resolution

{¶ 35} With a four-to-one vote in favor, the Board rejected the referee's recommendation concluding that it "is both against the weight of the evidence presented and incorrectly concludes that Ms. Meeks Speller's conduct does not amount to good and

just cause for termination." The Board concluded that the referee ignored "important facts" concerning appellant's inappropriate conduct.

{¶ 36} In over ten pages of text, the Board first detailed incidents that it felt the referee ignored including an incident where appellant told a student with autism who was being bullied that he should hit or "knock out" the other student because he was larger. These statements were made in front of and were reported by the student's mother. Also, numerous parent complaints regarding inappropriate comments made to students. In particular, the comment that a student "acts slow" and that she would "whip the dog shit" out of a student.

{¶ 37} The Board then addressed numerous findings made by the referee. Regarding the incident of suspected child abuse, the referee simply noted that it was later determined that there was no basis for the report to children services. The Board recounted that a counselor and a teacher (without each other's knowledge) reported to children services that a student had been hit by her mother with a fishing pole. The school personnel stated that under state law the reporting was mandatory and that appellant tried to intervene and criticized them.

{¶ 38} The Board next rejected the referee's finding that appellant's act of calling classrooms was not insubordination because the policy only prohibited calls from parents being forwarded to classrooms. The Board referenced the February 28, 2012 letter to teachers noting the policy change that parents' calls were no longer going through to classrooms and that, if insistent, a parent could speak with an administrator who then

would "have the parent schedule the appointment at a later time when the teacher has planning." The Board stressed that appellant's act of calling into the classrooms and having teachers come to her office for unscheduled parent meetings was in conflict with the express purpose of the directive.

{¶ 39} Regarding the referee's finding that appellant was not responsible for the February 29, 2012 cafeteria food fight, the Board noted some testimony that appellant was supposed to be in the lunchroom but was involved in a Black History Day luncheon. The Board further stressed that the referee ignored the evidence that appellant failed to perform her lunchroom duties on 19 separate occasions.

{¶ 40} Next, the Board took issue with the referee's finding that appellant's physical contact with students was "a bonding experience" meant to "humanize the 'school environment.'" The Board noted the testimony of two witnesses who observed appellant's inappropriate physical contact with students. There was also a dispute over her handling of a kindergarten student.

{¶ 41} The Board also disagreed with the referee's statements regarding the role of race and gender in appellant's disciplinary proceedings and the suggestion that DeVeaux Principal Chad Henderly "poisoned the well" in regard to appellant's transfer to Spring based upon Spring Principal Dipman's act of maintaining a log on appellant soon after she began her tenure.

Decision of the Court of Common Pleas on Appeal

{¶ 42} Affirming the Board's resolution, the lower court found that the Board's decision terminating appellant's employment based on a disagreement with the referee's interpretation of the significance of the facts was properly within its discretion. The court noted the Board's rejection of the referee's finding that appellant's physical contact with students was not inappropriate; that the comments to students were either unsubstantiated or, though "ill-advised" were not insubordination; and that the contention that appellant failed to cover her cafeteria duty on February 29, 2012, was unsupportable because the complainant left school at noon that day. The court then noted that the Board presented "substantial and credible evidence" to support its charges against appellant and that she had a fair administrative hearing. The court then affirmed the Board's decision; it also agreed with the Board's decision.

{¶ 43} As set forth above, our review is substantially narrower than the lower court's; we must affirm the decision unless we find that the common pleas court abused its discretion. *Martin*, 6th Dist. Huron No. H-12-002, 2013-Ohio-4420, at ¶ 19. Appellant argues that the court erred in finding that the Board's act of rejecting the referee's findings of fact was within its discretion without determining whether the findings were supported by the preponderance of the evidence.

{¶ 44} In *Martin,* we noted that although it is the referee's primary duty to ascertain facts, "because 'the ultimate responsibility for the school system lies with the school board * * * [t]he board's primary duty it to interpret the significance of the facts.'"

Id. at ¶ 28, quoting *Aldridge v. Huntington Local School Dist. Bd. of Edn.*, 38 Ohio St.3d 154, 157-158, 527 N.E.2d 291 (1988).

{¶ 45} In the present case, many of the salient facts were not in dispute; it was the interpretation and significance given to these facts. The physical contact with students while the referee considered the actions a "bonding experience," the Board interpreted it as inappropriate handling of students. The referee discounted the failure of and attempt to prevent reporting suspected abuse to children services because the report turned out to be unsubstantiated. The Board noted that the initial act of reporting is mandatory. Further, the a call to a teacher's classroom which the referee found did not violate the directive, the Board interpreted the act of calling a classroom and having a teacher come to an unscheduled parent meeting as a violation of the directive. Finally, the Black History Day luncheon incident aside, the referee did not even address the evidence of appellant's numerous failures to perform her assigned cafeteria duty.

{¶ 46} Even disregarding incidents that the referee found unsubstantiated, we find that the lower court did not abuse its discretion when it found that the weight of the evidence established good and just cause for terminating appellant's employment and it affirmed the Board's June 25, 2013 resolution. Appellant's second assignment of error is not well-taken.

{¶ 47} In her third assignment of error, appellant contends that the court erred when it dismissed her claim for malicious breach of contract under R.C. 3319.16. Review of the granting of a motion to dismiss for failure to state a claim upon which

relief can be granted is de novo. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. "In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that [the plaintiff] can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [the plaintiff's] favor." *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St.3d 580, 581, 669 N.E.2d 835 (1996).

{¶ 48} Appellant argues that the count alleged a tort claim, not contract, so it was not duplicative of count one of her complaint. Appellant urges that the substance of the claim controls, not merely the title. Appellant argues that the claim alleged a violation of her statutory rights under R.C. 3319.16, "in an outrageous manner that is not acceptable in a civilized society," and that such a violation sounds in tort.

{¶ 49} "Where the duty allegedly breached by the defendant is one that arises out of a contract, independent of any duty imposed by law, the cause of action is one of contract." *Schwartz v. Bank One*, 84 Ohio App.3d 806, 810, 619 N.E.2d 10 (4th Dist.1992). "It is not a tort to breach a contract, no matter how willful or malicious the breach." *Salvation Army v. Blue Cross and Blue Shield,* 92 Ohio App.3d 571, 578, 636 N.E.2d 399 (8th Dist.1993). *See Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983)

{¶ 50} Notably, punitive damages are recoverable for a malicious breach of contract, which must be evidenced by some intentional wrong or gross negligence

amounting to an independent tort. Evidence of aggravating circumstances of wanton, reckless, or malicious conduct gives rise to the punitive damages. *Spalding v. Coulson*, 104 Ohio App. 3d 62, 78, 661 N.E.2d 197 (8th Dist.1995); *Ali v. Jefferson Ins. Co.*, 5 Ohio App.3d 105, 107, 449 N.E.2d 495 (6th Dist.1982).

{¶ 51} Reviewing the allegations contained in the complaint, on its face it fails to allege tortious conduct "independent" of the actions surrounding the alleged breach of contract under R.C. 3319.16. Thus, we agree that the count fails to state a cognizable claim for relief and the trial court did not err when it granted the Board's motion to dismiss. Appellant's third assignment of error is not well-taken.

{¶ 52} In appellant's fourth and final assignment of error, she contends that the trial court erred when it dismissed her claims for punitive damages and attorney fees pursuant to alleged violations of R.C. 4112.02. R.C. 4112.99 provides, generally, that punitive damages may be awarded upon a showing of actual malice. "However, punitive or exemplary damages may not be awarded against a political subdivision unless such damages are specifically authorized by statute." *Henderhan v. Jackson Twp. Police Dept.*, 5th Dist. Stark No. 2008-CA-00055, 2009-Ohio-949, ¶ 39. *See Fernandez v. City of Pataskala*, S.D.Ohio No. 2:05-CV-75, 2006 WL 3257389 (Nov. 9, 2006) (partial judgment on the pleadings on punitive damages and attorney fees warranted where no express authorization under R.C. Chapter 4112).

{¶ 53} Also in *Fernandez*, the court noted that the "American rule" precludes an attorney fees award to the prevailing party absent express statutory authorization. *Id.*,

citing *Sorin v. Board of Edn. of Warrensville School Dist.*, 46 Ohio St.2d 177, 179, 347 N.E.2d 527 (1976). The court concluded that, like punitive damages, R.C. Chapter 4112 does not expressly authorize and award of attorney fees and, thus, they may not be recovered. *Id.*

{¶ 54} Based on the foregoing, we find that the trial court did not err when it dismissed appellant's claims for punitive damages and attorney fees. Appellant's fourth assignment of error is not well-taken.

{¶ 55} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE