UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

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| Plaintiff Plaintiff Plaintiff, *et al.*, | ) | |
| | ) | |
| *Plaintiffs*, | ) | |
| | ) | |
| v. | ) | Case No. 1:06-cv-172 |
| | ) | |
| Defendant Defendant PUBLIC SCHOOL SYSTEM BOARD OF EDUCATION, *et al.*, | ) | Judge Mattice |
| | ) | |
| | ) | |
| *Defendants.* | ) | |

**MEMORANDUM AND ORDER**

Plaintiffs assert causes of action for discrimination and retaliation under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 42 U.S.C. § 1983, as well as several state-law claims. Before the Court is Defendants' Motion for Summary Judgment (Court Doc. 35). For the reasons set forth below, the Court will **GRANT IN PART** and **DENY IN PART** Defendants' motion.

## I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where "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). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot

weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material facts exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may meet this burden either by producing evidence that demonstrates the absence of a genuine issue of material fact or by simply " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. To refute such a showing, the nonmoving party may not simply rest on its pleadings. *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996); *see Anderson*, 477 U.S. at 249. The nonmoving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Celotex*, 477 U.S. at 322. A mere scintilla of evidence is not enough. *Anderson*, 477 U.S. at 252; *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). The Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 248-49; *Nat'l Satellite Sports*, 253 F.3d at 907. If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251-52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

## II. FACTS

Below are the facts at the time relevant to the instant motion, in the light most favorable to Plaintiffs.

Plaintiffs Plaintiff Plaintiff Plaintiff and Plaintiff Plaintiff two children attend the School Primary School ("school") in Defendant, Tennessee. (Court Doc. 39-2, Plaintiff Dep. 7, 46.) Defendant Principal is the principal at school. (Court Doc. 1, Compl. ¶ 9.) Defendant Director is the Director of Schools for the Defendant Defendant School System. (*Id.* ¶ 10.) Defendants BOE member, Plaintiff, BOE member, BOE member, BOE member, BOE member, and BOE member ("BOE member Defendants") are members of Defendant Defendant Public School System Board of Education ("BOE"). (*Id.* ¶¶ 11-17.)

Plaintiffs take an active role in their children's education, and volunteered in their classrooms. (Plaintiff Dep. 194-196.) During the 2004-2005 school year, Plaintiffs experienced what they perceived as racial discrimination at school. (*See id.* at 154-56, 160). As a result, on August 23, 2005, Plaintiffs complained to Defendant Principal (*id.* at 152-53). Plaintiffs then filed a complaint with the Tennessee Department of Education ("TN DOE") on August 30, 2005. (*Id.* 171-72.)

Defendant Principal learned about Plaintiffs' TN DOE complaint sometime in August of 2005. (Court Doc. 39-6, Principal Dep. 110.) Defendant Principal discussed the complaint with Mr. Defendant's Attorney Defendant's Attorney, the BOE's attorney, shortly after Plaintiffs lodged it with the TN DOE, in early September of 2005. (*See id.* at 114-115.) On October 11, 2005, Defendant Principal revoked Plaintiffs' volunteer privileges at school. (Court Doc. 39-11, Oct. 11 Mem. from principal Principal to Mr. and Mrs. Plaintiff Plaintiff.) Mr. Defendant's Attorney was copied on this memorandum. (*Id.*) In response to this memorandum, Plaintiffs

contacted the TN DOE and alleged that they were subject to retaliatory treatment. (Court Doc. 39-14, October 12 Letter from Ms. TN DOE L. TN DOE to Mr. Defendant's Attorney Defendant's Attorney.) The TN DOE warned the BOE, through Mr. Defendant's Attorney, that retaliatory conduct was not permitted, and would subject the BOE to liability. (*Id.*)

After investigating the matter, the TN DOE issued a Letter of Findings, which concluded that Defendants' decision to revoke or restrict Plaintiffs' volunteer privileges amounted to unlawful retaliation. (Court Doc. 39-15, TN DOE March 20, 2005 Letter of Findings.) Defendants did not agree to fully reinstate Plaintiffs volunteer privileges until May 26, 2006. (Court Doc. 39-19, Corrective Action Plain.)

In the instant action, Plaintiffs assert against Defendant BOE discrimination and retaliation causes of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq.*,. (Court Doc. 1, Compl. 17-18.) Plaintiffs also brings a First Amendment retaliation claim, via § 1983, against the BOE member Defendants and Defendants Principal and Director. (*Id.* 19-20.) Finally, Plaintiffs assert a state-law claim for intentional infliction of emotional distress against Defendants Principal and Director. (*Id.* 20-21.)

## III. ANALYSIS

Defendants seek summary judgment on several of Plaintiffs' claims. The Court will address each in turn.

### A. BOE's Capacity to be Sued

Defendant BOE first argues that it has no capacity to sue or be sued. Capacity to be sued is governed by Federal Rule of Civil Procedure 9(a), which requires that, "[t]o raise any [defense of lack of capacity], a party must do so by a specific denial, which

must state any supporting facts that are peculiarly within the party's knowledge." Fed. R. Civ. P. 9(a)(2). This " 'specific negative averment' provision is mandatory, and . . . proper enforcement of the rule requires early waiver of the right to object to capacity." *Tri-Med Fin. Co. v. Nat'l Century Fin. Enters*., 208 F.3d 215, 2000 WL 282445, at 5 (6th Cir. 2000) (quoting *Wagner Furniture v. Kemner*, 929 F.2d 343, 345 (7th Cir. 1991)).

It is undisputed that Defendant BOE first raised the issue of capacity in the instant motion, more than twenty-one months after Plaintiffs filed their Complaint. In similar instances, the United States Court of Appeals for the Sixth Circuit has held the issue of capacity waived. *See id.* (finding that a two-year interval between a plaintiff's complaint and defendant's capacity defense amounted to waiver). Accordingly, the Court holds that Defendant BOE has waived its capacity defense under Rule 9(a)(2), and will **DENY** its Motion for Summary Judgment as to these grounds.

**B. Plaintiff's "§ 1983 [A]ction [A]gainst the BOE"**

For reasons not apparent to the Court, Defendants devote three and one-half pages of their Memorandum of Law in Support of Summary Judgment to the argument that Defendant BOE cannot be held liable under 42 U.S.C. § 1983. (*See* Court Doc. 36, Defs.' Mem. of Law in Supp. of Mot. Summ. J. 10-13.) Plaintiffs assert no such claim against the BOE. (*See* Compl. 17-21; Court Doc. 40, Pls.' Mem. of Law in Opp'n to Defs.' Mot. Summ. J. 14 n.7.) As the Court is powerless to grant summary judgment on a claim not before it, Defendants' motion will be **DENIED** in this regard.

**C. Plaintiffs' § 1983 Claims Against Individual BOE Members**

Plaintiffs do assert § 1983 claims against the BOE member Defendants individually. Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. "Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law." *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005). To establish a claim pursuant to § 1983, a plaintiff must demonstrate two elements: "(1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that he was subjected or caused to be subjected to this deprivation by a person acting under color of state law." *Gregory v. Shelby County*, 220 F.3d 433, 441 (6th Cir. 2000). Section 1983 "creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *Gardenhire v. Schubert*, 205 F.3d 303, 310 (6th Cir. 2000).

In response to Plaintiffs' § 1983 claim, Defendants assert that they are protected by qualified immunity. The doctrine of qualified immunity shields " 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Ewolski v.* Defendant *of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The United States Supreme Court has articulated a two-part test for determining whether an officer is entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under this test, district courts must "consider whether 'the facts alleged show the

officer's conduct violated a constitutional right.' If the plaintiff can establish that a constitutional violation occurred, a court must determine "whether the right was clearly established . . . . ' " *Lyons v.* Defendant *of Xenia*, 417 F.3d 565, 571 (6th Cir. 2005) (quoting Saucier, 533 U.S. at 201). Once a defendant claims the affirmative defense of qualified immunity, the burden shifts to the plaintiff to demonstrate that the defendant is not entitled to the defense of qualified immunity. *Myres v. Potter*, 422 F.3d 347, 352 (6th Cir. 2005).

1. *Whether Defendants' Conduct Violated a Constitutional Right*

Plaintiffs allege that the BOE member Defendants retaliated against them for exercising First Amendment rights. Specifically, Plaintiffs allege that Defendants revoked their volunteer privileges in retaliation for their complaints to the TN DOE of discriminatory treatment. To establish a prima facie case of First Amendment retaliation, a plaintiff must show

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two-that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

*Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). Under the burden-shifting framework set forth in *Mount Healthy* Defendant *School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a defendant may nonetheless prevail on summary judgment if he "can show that he would have taken the same action in the absence of the protected activity." *Thaddeus-X*, 175 F.3d at 399.

In the instant case, Plaintiffs have established the first element quoted above—that they were engaging in protected conduct. A parent's complaints regarding her

child's treatment at school are protected by the First Amendment. *Jenkins v. Rock Hill Local School Dist*., 513 F.3d 580, 588 (6th Cir. 2008).

Plaintiffs have also established the second element of their prima facie retaliation case. Although not directly addressed in the Sixth Circuit, another federal court of appeals has held that revoking school volunteer privileges is sufficient to deter an ordinary person from engaging in protected conduct. *Mosely v. Board of Educ. of* Defendant *of Chicago*, 434 F.3d 527, 534 (7th Cir. 2006) (holding that fact that a plaintiff was a volunteer for defendant school system, as opposed to a paid employee, was not dispositive of her First Amendment retaliation claim). While the plaintiff's volunteer duties in *Mosley* were more extensive than those at issue in the instant case, the Court finds the case's holding instructive nonetheless The record, viewed in the light most favorable to Plaintiffs, shows that they valued the opportunity to take an active role in their children's education via volunteerism. The threat of suspending volunteer privileges would likely deter a person of ordinary firmness who shares Plaintiffs' mindset.

Defendants contest in earnest the third element of Plaintiffs' prima facie case; that is, that the adverse action was motivated in part by Plaintiff's protected conduct. In evaluating this third element, "the subjective motivation of the defendants is at issue." *Thaddeus-X*, 175 F.3d at 399. To determine Defendants' motivation, the court must look to the circumstances of the alleged retaliation. "A logical prerequisite to causation is a showing that defendants, in fact, were aware of [the constitutionally protected activity]." *Mills v.* TN DOE, No. 07-1444, 2008 WL 1836730, at 2 (6th Cir. April 24,

2008). The Court must then consider the amount of time which elapsed between the protected activity and the adverse action. *Id*.

Defendants argue "that the Individual Board Members did not know that the Plaintiffs were experiencing any difficulties with the School, that the Plaintiffs had filed a complaint with the TN DOE, or that their volunteering privileges had been suspended until after the TN DOE released its findings in March, 2006." (Defs.' Mem. of Law in Supp. of Mot. Summ. J. 15.) Defendants base this argument on Defendant Director's testimony, which states that he did not report anything regarding Plaintiffs' discrimination and retaliation complaints to the BOE until the instant suit was filed. (Court Doc. 36-2, Director Dep. 72-73.) Plaintiffs have put forth evidence, however, that Defendant Principal discussed the complaint with Mr. Defendant's Attorney, the BOE's attorney, shortly after Plaintiffs lodged it with the TN DOE in early September of 2005. (*See* Principal Dep. 114-115.) Further, Mr. Defendant's Attorney was copied on the memorandum of October 11, in which Defendant Principal revoked Plaintiffs' volunteer privileges. (*See* Oct. 11 Mem. from principal Principal to Mr. and Mrs. Plaintiff Plaintiff.)

The Sixth Circuit recognizes, as a matter of general agency law, that "[a] person generally is held to know what his attorney knows and should communicate to him, and the fact that the attorney has not actually communicated his knowledge to the client is immaterial." *Daniel v. Cantrell*, 375 F.3d 377, 385 (6th Cir. 2004) (quoting *Smith v. Petkoff*, 919 S.W.2d 595, 597-98 (Tenn. Ct. App. 1995)). Thus, Plaintiffs have established for purposes of the instant motion that Mr. Defendant's Attorney—and, therefore, the BOE as his client—was on notice of Plaintiffs' TN DOE complaints less than one month after they were made. Further, Plaintiffs have established that the adverse action—

embodied in the memorandum of October 11—occurred within one and one-half months of their TN DOE complaint. Given these circumstances, the Court concludes that the facts, viewed in the light most favorable to Plaintiffs, establish both that the BOE member Defendants were on notice of Plaintiffs' protected conduct, and that a sufficiently abbreviated amount of time elapsed between Plaintiffs' protected conduct and the adverse action to support an inference of causation. Accordingly, Plaintiffs have established the third element quoted above, and have presented a prima facie case of First Amendment retaliation. *See Mills*, 2008 WL 1836730, at 2. As Defendants do not argue that Plaintiffs volunteer privileges would have been suspended even if they had not filed their TN DOE complaint, *see Mount Healthy*, 429 U.S. 274, the Court concludes that Plaintiffs have preserved their § 1983 claim of First Amendment discrimination.

2. *Whether Plaintiffs' Rights Were Clearly Established*

Generally, the First Amendment right against retaliation for protected speech is well established. Nonetheless, the Court must "not assess the right violated at a high level of generality, but, instead, . . . must determine whether the right was 'clearly established' in a more particularized, and hence more relevant, sense . . . ." *Myers*, 422 F.3d at 356. In the context of the instant case, "the impermissibility of [First Amendment] retaliation [by a school board] is sufficiently well established that the defendants are not entitled to qualified immunity." *Ward v. Athens* Defendant *Bd. of Educ*., 187 F.3d 639, 1999 WL 623730, at 4 (6th Cir. 1999) (citing *Zilich v. Longe*, 34 F.3d 359, 365 (6th Cir. 1994)). Accordingly, the Court finds that Plaintiffs rights were clearly established so that the BOE member Defendants are not entitled to qualified immunity.

The Court will therefore **DENY** Defendants' Motion for Summary Judgment as to Plaintiffs § 1983 claims against the BOE member Defendants.

### D. Plaintiffs' § 1983 Claim Against Defendants Principal and Director

Defendants Principal and Director argue that they are entitled to qualified immunity because "Dr. Director and Mrs. Principal both testified that they did not know that their actions in suspending the volunteering privileges of the Plaintiffs was considered to be retaliation and thus a violation of clearly established law." (Defs.' Mem. of Law in Supp. of Mot. Summ. J. 16.) Their argument fails.

As is true in criminal law, "[k]nowledge of illegality on the part of Defendants is not a requirement," *United States v. Abboud*, 438 F.3d 554, 594 (6th Cir. 2006), for liability under § 1983. And while Plaintiffs must "demonstrate that the defendant is not entitled to the defense of qualified immunity," *Myres*, 422 F.3d at 352, they have done so here. As the Court explained above, Plaintiffs have established a prima facie case of First Amendment retaliation, and have demonstrated that their rights in this context were clearly established. Accordingly, as Defendants Principal and Director are not entitled to qualified immunity, Defendants' Motion for Summary Judgment will be **DENIED** in this respect.

### E. Plaintiff's State-Law Intentional Infliction of Emotional Distress Claim Against Defendants Principal and Director

Plaintiffs also bring a state-law claim of intentional infliction of emotional distress. To establish a prima facie case, Plaintiffs must show the following elements:

> (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury. Liability for severe mental distress clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities. Although no legal standard exists for determining whether particular conduct is "so intolerable as to be tortious, [Tennessee courts] have applied the high threshold standard described in the RESTATEMENT (SECOND) OF TORTS [§ 46 comment d (1965)] as follows:
>
> > The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'

*Downs v. Bush*, No. M2005-01498-COA-R3-CV, 2007 WL 2471484, at 21 (Tenn. Ct. App. Aug. 31, 2007), *application for permission to appeal granted by Tennessee Supreme Court* (Feb. 25, 2008) (internal citations and quotations omitted).

In the instant case, neither Defendants' alleged discrimination nor retaliation is sufficiently outrageous to pass the high threshold imposed by Tennessee courts. As the Tennessee Court of Appeals has remarked:

> Certainly, discrimination based on race is insulting and humiliating. The discouragement of such discriminatory behavior is at the very core of the federal Civil Rights Acts and the Tennessee Human Rights Act. However, discriminatory conduct does not automatically give rise to the imposition of liability for intentional infliction of emotional distress. If it did, virtually every action brought under these statutes would include an intentional infliction of emotional distress claim.

*Arnett v. Domino's Pizza I, L.L.C.*, 124 S.W.3d 529, 540 (Tenn. Ct. App. 2003). Plaintiffs have offered no evidence suggesting that the discrimination or retaliation they allegedly suffered at the hands of the Defendants was anything more than normal when compared to other such claims. Accordingly, Plaintiffs have failed to establish that Defendants' conduct was sufficiently outrageous to support their claim of intentional infliction of emotional distress. The Court will **GRANT** Defendants' motion as to this claim.

## IV. CONCLUSION

For the reasons explained above, the Court **GRANTS IN PART** Defendants' Motion for Summary Judgment [Court Doc. 35] as to Plaintiffs' state-law claim of intentional infliction of emotional distress, and **DENIES** Defendants' motion as to all other of Plaintiffs' claims.

SO ORDERED this 12th day of May, 2008.

*/s/ Harry S. Mattice, Jr.*
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE