Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00088-CV

TREV CLARK, Appellant

V.

COMMISSIONER OF EDUCATION AND LA MARQUE INDEPENDENT SCHOOL DISTRICT, Appellees

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On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 97CV1002

O P I N I O N

This case arises out of an administrative appeal under Chapter 21 of the Texas Education Code. We affirm.

I. BACKGROUND

Appellant, Trev Clark was employed by the La Marque Independent School District ("La Marque ISD") as a teacher and a coach. During the fall 1995 semester, school personnel received reports that Clark was having an inappropriate relationship with a minor female student. On November 17, 1995, Clark was advised of these allegations. Further, by memorandum dated November 27, 1995, Clark was directed to:

> 1) Avoid any contact with any female student that may be perceived as inappropriate;
>
> 2) Do not question or attempt to contact any students to discuss the allegations that have been made;
>
> 3) Do not display any behaviors that may be interpreted as retaliatory against students who brought forth charges . . . .

The memorandum expressly admonished Clark that "[f]ailure to comply with these directives may result in a variety of disciplinary actions up to and including termination."

In March 1996, the parents of a minor female student, A.C., reported to La Marque ISD that A.C. and Clark were involved in a sexual relationship. The La Marque ISD Police Department instituted an investigation that same day. In a statement A.C. made to the La Marque ISD Police Chief, she described distinguishing marks on Clark's body as well as Clark's bedroom, where Clark stored condoms in his home, and the brand and color of the condoms.

A few weeks later, the police arrested Clark in his home. In Clark's bedroom, they found condoms, of the brand and color A.C. had described, in the exact place she had described. In addition, a body search of Clark revealed the distinguishing mark A.C. had described to the police. Moreover, during the course of the investigation, La Marque ISD learned that from early September 1994, through mid-March 1996, 717 telephone calls were placed from the telephone number at A.C.'s residence to the telephone number at Clark's residence.

In late February 1997, the Board of Trustees for La Marque ISD proposed the termination of Clark's employment contract. Clark challenged the proposed termination. An independent hearing examiner conducted a hearing and issued findings of fact and conclusions of law recommending that Clark's employment contract be terminated. In July 1997, the La Marque ISD Board adopted the hearing examiner's findings of fact and conclusions of law. Clark then appealed to the Commissioner of Education. In September 1997, the Commissioner affirmed the Board's decision. In October 1998, the trial court

entered a final judgment upholding the Commissioner's decision to terminate Clark's employment contract.

II. ISSUES PRESENTED FOR REVIEW

In appealing the judgment of the trial court, Clark appears to assert the following fourteen points of error: 1) the trial court abused its discretion in denying his request for a jury trial on federal causes of action he claims to have asserted; 2) the trial court erred in dismissing his federal causes of action in the absence of a motion to dismiss or motion for summary judgment; 3) the trial court erred in failing to give him notice that his federal causes of action were subject to dismissal; 4) the trial court erred in failing to hear his Commission appeal and federal claims together; 5) the application of *Hicks*[1] abridges his rights under the United States Constitution; 6) the trial court impermissibly shifted the burden of going forward; 7) the trial court erred in denying his plea in abatement; 8) exculpatory evidence, withheld during the administrative proceeding, adversely affected the outcome of his case; 9) no substantial evidence existed to support his termination; 10) the school principal's directive he was found to have violated was overly broad; 11) appellant was denied the opportunity to adequately develop the record before the independent hearing examiner; 12) evidence regarding alleged sexual abuse of A.C. by her father should have been admitted; 13) no intervening event has occurred since his contract renewal to justify termination; and 14) La Marque ISD should have had A.C. evaluated by a licensed psychologist. We are unpersuaded that all alleged fourteen points of error present something for our review. Moreover, many of Clark's complaints are actually sub-parts of a single point of error. Accordingly, for purposes of this appeal we will examine whether, 1) the Commissioner's decision is supported by substantial evidence; 2) the Commissioner's decision was based on procedural errors or irregularities; 3) the trial court erred in denying Clark's motion for jury trial; 4) the trial court impermissibly shifted the

[1] *See Hicks v. Lamar Consol. ISD*, 943 S.W.2d 540, 542-43 (Tex. App. – Eastland 1997, no writ) (holding that school employment claimant asserting federal constitutional, federal statutory, or state constitutional employment claims is required to exhaust any available state law administrative remedies prior to seeking judicial remedy, unless such claims involve solely questions of law).

burden of going forward to Clark; and 5) the trial court erred in denying Clark's plea in abatement.

III. SUBSTANTIAL EVIDENCE REVIEW

Clark complains on appeal that there is not substantial evidence to support the termination of his employment contract. We disagree.

"Substantial evidence" means more than a mere scintilla , or some evidence, but less than is required to sustain a verdict as against the great weight and preponderance of the evidence. *Mollinedo v. Texas Employment Comm'n*, 662 S.W.2d 732, 735 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). Evidence may be substantial even though the preponderance of the evidence leans the other way. *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11, 13 (Tex. 1977); *Mollinedo*, 662 S.W.2d at 735.

A.C. testified before the independent hearing examiner that she and Clark shared a sexual relationship. In her testimony, she described various sexual encounters. A.C. also gave a detailed description of Clark's house, including where Clark kept his condoms. Moreover, A.C. testified to many late night telephone calls with Clark. Clark, who did not testify before the hearing examiner, maintains that A.C. is a habitual liar and that he never engaged in any sexual relationship with A.C. "Substantial evidence," however, requires only a finding of some evidence to support the termination of Clark's employment. A.C.'s testimony was sufficient to satisfy the "substantial evidence" test. Clark's first point of error is overruled.

IV. PROCEDURAL ERRORS OR IRREGULARITIES

Clark next complains of numerous alleged procedural errors or irregularities that he claims resulted in an erroneous decision by the Commissioner. Specifically, Clark complains of 1) the alleged withholding of exculpatory evidence, 2) the alleged failure to adequately develop the record before the hearing examiner, 3) the exclusion of evidence regarding alleged sexual abuse of A.C. by her father, and 4) the failure to have A.C. evaluated by a licensed psychologist. We lack jurisdiction to consider these claimed

errors.

Section 21.301of the Texas Education Code provides that no later than the twentieth day after the board of trustees announces its decision to not renew the teacher's contract, the teacher may appeal the decision by filing a petition for review with the commissioner. TEX. EDUC. CODE ANN. § 21.301(a) (Vernon 1996). The school district then must file a response no later that the twentieth day after the date the petition for review is filed. TEX. EDUC. CODE ANN. § 21.301(b) (Vernon 1996). The commissioner must issue a decision no later than the thirtieth day after the last day on which a response to the petition for review may be filed. TEX. EDUC. CODE ANN. § 21.304(b) (Vernon 1996). Accordingly, the petition for review with the commissioner frames the issues for appeal. *See* TEX. EDUC. CODE ANN. § 21.301(c) (Vernon 1996).

Clark's petition for review asserted the following grounds for relief from the commissioner: 1) since renewal of Clark's contract, no event occurred to justify termination; 2) A.C.'s telephone records were improperly admitted into evidence; 3) the principal's directive Clark was alleged to have violated was overly broad; 3) there was an *ex parte* meeting between the La Marque ISD Board and counsel for the La Marque ISD; 4) there was no evidence of sexual misconduct other than the testimony of A.C.; 5) A.C.'s testimony was unreliable; and 6) it was inappropriate for the La Marque ISD Board meeting to be held on a Sunday. Clark then attempted to file an amended petition to raise the following additional complaints: 1) the alleged withholding of exculpatory evidence, 2) the alleged failure to adequately develop the record before the hearing examiner, 3) the exclusion of evidence regarding alleged sexual abuse of A.C. by her father, and 4) the failure to have A.C. evaluated by a licensed psychologist. The Commissioner refused to accept Clark's amended petition, reasoning that the administrative review process found in the Texas Education Code section 21.301 did not allow Clark the opportunity to amend his initial petition. In support of this position, the Commissioner cited to *Maxey v. Midland Indep. Sch. Dist.*, 184-R1-597 (Comm'r Educ. July 1997), for the proposition that the time lines found in section 21.301 are mandatory, and pleading deadlines would be

meaningless if amended pleadings were allowed. We agree with the Commissioner's reading of section 21.301. The statute provides the teacher no right to amend the petition for review, and no cases speak to the existence of a right to amend the initial petition for review. We will not expand the language of the statute to find rights not expressed in it. Accordingly, we find Clark had no right to amend his original petition for review.

All of the additional errors of which Clark complained in his amended petition are alleged to have occurred at the hearing before the independent hearing examiner, and therefore should have been included in his initial petition for review. Because Clark failed to timely raise these complaints in his petition for review to the Commissioner, these complaints were never part of the administrative review process. Clark thus failed to exhaust his administrative remedies with regard to these complaints, and we are without jurisdiction to hear the complaints now. *See Texas Educ. Agency v. Cypress-Fairbanks, I.S.D.*, 830 S.W.2d 88, 90 (Tex. 1992). Accordingly, we overrule Clark's points of error regarding 1) the alleged withholding of exculpatory evidence, 2) the alleged failure to adequately develop the record before the hearing examiner, 3) the exclusion of evidence regarding alleged sexual abuse of A.C. by her father, and 4) the failure to have A.C. evaluated by a licensed psychologist.

Clark, however, does raise two procedural errors that we can address, 1) the determination by the Commissioner that the school principal's directive was overly broad, and 2) the termination of Clark's contract after it was renewed.

A. The Principal's Directive

The essence of Clark's complaint regarding the principal's directive "to avoid any contact with any female student that may be perceived as inappropriate," is that such language fails to give him fair notice of prohibited conduct. The Commissioner determined that while the directive "was not a model of clarity," it "should be interpreted by a reasonable individual as forbidding a sexual relationship with a female student and prohibiting long phone conversations after midnight with a minor female student." We agree.

The testimony before the independent hearing examiner primarily concerned sexual activity between A.C. and Clark. There is no question that such conduct would be perceived as inappropriate and would fall within the prohibitions of the above quoted directive. Further, A.C.'s testimony before the independent hearing examiner indicated that A.C. and Clark engaged in numerous late night telephone conversations. We are unpersuaded by Clark's argument that he was unaware that such telephone conversations may be perceived as inappropriate. A reasonable person in Clark's position, who had been accused of having sexual relations with a minor female student, would certainly understand that engaging in late night telephone conversations with that same student would be perceived as inappropriate.

B. The Termination of Clark's Contract after Renewal

Clark complains that because La Marque ISD renewed his contract on April 25, 1996, after the alleged misconduct involving A.C., and no intervening event occurred justifying termination, La Marque ISD had no cause to terminate his renewed contract. The Commissioner agrees that, generally, a teacher's contract cannot be terminated for actions committed in a prior school year when the district was aware of such actions and took no action after learning of the conduct. However, the Commissioner points out that La Marque ISD did take action. La Marque ISD placed Clark on administrative leave with pay while it investigated the allegations. Moreover, we find it persuasive that La Marque ISD did not take the affirmative step of renewing Clark's contract; it merely failed to take action before the date to terminate Clark's contract passed, while it was investigating the allegations against Clark. The facts and circumstances surrounding the renewal of Clark's contract do not demonstrate that La Marque ISD in any way condoned the conduct of which Clark had been accused. We can find no procedural irregularity in the renewal of Clark's contract that would have led to an erroneous decision by the Commissioner. *See* TEX. EDUC. CODE ANN. § 21.307(g) (Vernon 1996). Accordingly, Clark's points of error complaining of the principal's directive and the termination of his contract after renewal are overruled.

V. MOTION FOR JURY TRIAL

Clark next complains that the trial court erred in denying his motion for a jury trial. Generally, in an appeal under the substantial evidence rule, the issue is one of law, and trial of the fact issues by either a judge or jury is avoided. *McConnell v. Alamo Heights Indep. Sch. Dist.*, 576 S.W.2d 470, 476–77 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.). However, Clark could assert independent causes of action. *See generally Carillo v. Anthony Indep. Sch. Dist.*, 921 S.W.2d 800 (Tex. App.—El Paso 1996, no writ) (allowing the appellant's breach of contract claim to be presented to a jury for determination). Clark argues that he did, in fact, assert an independent cause of action under 42 U.S.C. 1983 in his first amended petition, which entitled him to a jury trial.

A petition is sufficient if it gives fair notice of the facts upon which the pleader bases his or her claims so that the opposing party may adequately prepare a defense. TEX. R. CIV. P. 45(b), 47(a); *McNeil v. Nabors Drilling USA, Inc.*, 36 S.W.3d 248, 250 (Tex. App.—Houston [1st Dist.] 2001, no pet. h.); *Hand v. Dean Witter Reynolds, Inc.*, 889 S.W.2d 483, 489 (Tex. App.—Houston [14th Dist.] 1994, writ denied). The test is whether an opposing attorney of reasonable competence, with the pleadings before him, can ascertain the basic issues in controversy. *Hand*, 889 S.W.2d at 489. However, the actual cause of action and the elements do not have to be pleaded with specificity; it is sufficient if a cause of action can be reasonably inferred. *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993); *McNeil*, 36 S.W.3d at 250. Lacking filed special exceptions, a petition should be liberally construed in favor of the pleader. *Boyles*, 855 S.W.2d at 601; *McNeil*, 36 S.W.3d at 250. Where a plaintiff pleads none of the elements of a viable cause of action, however, the defendant is not obligated to file special exceptions which would suggest to the plaintiff possible causes of action against the defendant. *Crabtree v. Ray Richey & Co., Inc.*, 682 S.W.2d 727, 728 (Tex. App.—Fort Worth 1985, no writ).

Clark does not dispute that his first amended petition contains no specific reference to 42 U.S.C. 1983; however, he maintains that through his use of the terms "due process" and "fundamental fairness" in his first amended petition, La Marque ISD and the

Commissioner were put on notice of a claim under 42 U.S.C. 1983. We disagree.

While the attorneys for La Marque ISD and the Commissioner could have ascertained from the first amended petition that Clark was alleging procedural irregularities that violated his due process rights and therefore entitled him to a reversal of the decision to terminate his employment contract, such an allegation would not necessarily make them aware of an independent cause of action under 42 U.S.C. 1983.

First, section 21.307(g) allows, on the appeal of the commissioner's decision to the district court, for the district court to reverse the commissioner's decision on the grounds that a procedural irregularity or error led to an erroneous decision by the commissioner. TEX. EDUC. CODE ANN. § 21.307(g) (Vernon 1996). Clark's first amended petition is entirely consistent with such a challenge. Clark's first amended petition alleges a violation of due process with regard to 1) the independent hearing examiner refusing him discovery necessary to determine whether A.C. made accusations against other male employees and how the school district handled prior claims of sexual harassment by its employees, and 2) the denial of the existence of documents by the school district which later proved to exist. Further, in describing his due process challenge in his first amended petition, Clark uses the following language: "The assumption is that, if certain procedures are followed, fairness will be assured. In essence, procedural due process focuses on how the decision was made." Such language indicates that Clark was asserting a challenge based on a procedural error or irregularity rather than a violation of 42 U.S.C. 1983.

Second, in section one of Clark's first amended petition entitled "Jurisdictional Authority and Statutory Standard of Review," it is absolutely clear that no independent cause of action is being asserted. The section provides, in part, as follows:

> The statutory standard of review is contained in sections 21.307(e) through section 21.307(g). In pertinent part, the statutory standard provides that the Court shall, under the substantial evidence rule, review the evidence on the evidentiary record made at the local level. The Court may reverse the decision of the Commissioner if the decision was not supported by substantial evidence or if the

> Commissioner's conclusions of law are erroneous. Additionally, the Court may reverse a decision of the Commissioner based on a procedural irregularity by a hearing examiner if the court determines that the irregularity was likely to have led to an erroneous decision by the Commissioner.
>
> New evidence is generally not allowed. Plaintiff asserts, however, that in cases where the administrative hearing judge denies the Plaintiff adequate discovery necessary to insure due process and fundamental fairness, the reviewing Court has authority to remand the cause to the administrative judge with orders that satisfactory discovery be made and a rehearing granted thereafter.

A reading of this section makes it clear that Clark's due process assertions pertain, not to an independent claim under 42 U.S.C. 1983, but rather to a challenge under section 21.307(g) of his termination based upon alleged procedural errors or irregularities. Because Clark's first amended petition is a statutory appeal under section 21.307 of the Education Code and fails to assert any independent causes of action which would have entitled him to a jury trial, the trial court did not err in denying the jury trial. Accordingly, Clark's point of error regarding his denial of a jury trial is overruled.

VI. BURDEN SHIFTING

Clark complains that the trial court impermissibly shifted the burden of proof from La Marque ISD and the Commissioner to him. Specifically, Clark complains that he was forced to prove a negative — that the Commissioner's decision was not supported by substantial evidence. We disagree.

Section 21.307(f) provides that "[t]he court may not reverse the decision of the commissioner unless the decision was not supported by substantial evidence. . . ." TEX. EDUC. CODE ANN. § 21.307(f) (Vernon 1996). Implicit in this language is Clark's burden to establish that the Commissioner's decision was not supported by substantial evidence. *Id.*; *see State v. Public Utility Comm'n of Texas*, 883 S.W.2d 190, 203 (Tex. 1994) (holding

that decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise). We find Clark's point of error alleging an impermissible burden shift without merit. Accordingly, it is overruled.

VII. PLEA IN ABATEMENT

Lastly, Clark complains that the trial court erred in denying his plea in abatement. Specifically, Clark asserts that the trial court erred in not abating the proceedings until the conclusion of his criminal trial so that he could preserve his privilege against self-incrimination. We disagree.

There is no question that a party in a civil suit retains his Fifth Amendment privilege against self-incrimination. *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17 (1924); *Texas Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995) . However, the extent of this privilege in the civil context is not unlimited. A party must not assert the privilege in a way that renders the civil proceeding unfair. *Denton*, 897 S.W.2d at 760; *Marshall v. Ryder System, Inc.*, 928 S.W.2d 190, 195 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Moreover, the assertion of the privilege against self-incrimination must be raised in response to each specific inquiry or it is waived. *Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App.—San Antonio 1995, no writ). Blanket assertions of the privilege are not permitted. *Id.* Additionally, the pendency of a criminal proceeding does not affect a contemporaneous civil proceeding based on the same facts or parties. *Gebhardt*, 891 S.W.2d at 330; *McInnis v. State*, 618 S.W.2d 389, 393 (Tex. App.— Beaumont 1981, writ ref'd n.r.e.). "[P]utting a defendant to trial in a civil case while criminal charges arising out of the same conduct were pending did not unconstitutionally force him to choose between preserving his Fifth Amendment privilege and losing his civil suit where there was no indication that invocation of the Fifth Amendment would necessarily result in an adverse civil judgment." *Gebhardt*, 891 S.W.2d at 330-31 (citing *United States v. White*, 589 F.2d 1283, 1286-87 (5th Cir. 1979)).

On October 13, 1999, Clark filed his plea in abatement asserting that the civil appeal to the district court should be abated until his criminal proceeding was concluded because

of his inability to testify without waiving his Fifth Amendment privilege against self-incrimination. Clark has failed to point to a single instance in which he asserted his Fifth Amendment privilege against self-incrimination in response to a specific inquiry made of him during the civil appeal to the district court. More importantly, the record reflects that even before he filed his plea in abatement, the trial court denied Clark's motion for jury trial and confined the civil proceeding to a substantial evidence review of the administrative proceeding. As a result, no new evidence was to be taken in the civil case. Accordingly, Clark's plea in abatement amounted to nothing more than an impermissible blanket invocation of his privilege against self incrimination. Clark's point of error challenging the trial court's denial of his plea in abatement is overruled.

Having overruled all of Clark's points of error, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Edelman, Frost, and Cannon.[**]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[**] Senior Justice Bill Cannon sitting by assignment.