

No: 17-6070

UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

**MARCIA KELLEY, ET AL
PLAINTIFF,
MEMPHIS-SHELBY COUNTY EDUCATION,
PLAINTIFF/APPELLANT**

v.

**SHELBY COUNTY BOARD OF
EDUCATION, ET AL
DEFENDANT/APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE AT DOCKET NO. 2:14-CV-02632**

**REPLY BRIEF OF APPELLANT
MEMPHIS-SHELBY COUNTY EDUCATION ASSOCIATION
TO PLAINTIFF/APPELLEES MARCIA KELLEY, ET AL.**

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Date: March 28, 2018

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3. Argument

The lower Court erred when it denied Plaintiff Memphis Shelby County Education's Association's ("M-SCEA") Motion for Joinder for being untimely. In making its ruling, the lower Court failed to consider that no party would be prejudiced by adding additional plaintiffs, and that ultimately any delay in adding additional plaintiffs is a result of inaction by Counsel for Plaintiffs Kelley, Steinberg, Jackson, Banks and Thompson. Now, Plaintiffs Kelley, Steinberg, Jackson, Banks and Thompson argue that these additional plaintiffs should not be joined because it is prejudicial and because the plaintiffs lack standing.

Plaintiffs' argument that they are somehow prejudiced by a delay in this request for joinder is unpersuasive, disingenuous and should be summarily dismissed based on the doctrine of unclean hands in light of the fact that Counsel for TEA is the actual cause for any delay to add additional plaintiffs.

Richard Colbert serves as Counsel for the Tennessee Education Association ("TEA") the state level affiliate of the National Education Association ("NEA"). Mtn. to Withdraw, R. 61, Page ID #727. M-SCEA was formerly the local affiliate of TEA and as a result, Mr. Colbert also served as Counsel for M-SCEA and its individual members including the five (5) named plaintiffs in this case. Mtn. to Withdraw, R. 61, Page ID 726-728. Mr. Colbert's representation of M-SCEA

lasted approximately two years, beginning in on or about August, 2014 until August, 2016. First Amended Complaint, R. 6 Page ID 1-88; Order Granting Mtn. to Withdraw, Page ID 729-730. During the time of Mr. Colbert's representation of M-SCEA the local chapter of M-SCEA disaffiliated from TEA. Mtn. to Withdraw, R. 61, Page ID #727. In addition, M-SCEA and the TEA and NEA had numerous litigated matters. Yet despite ongoing litigation and heated negotiations between TEA and M-SCEA, Mr. Colbert continued to serve as the attorney of record for M-SCEA in this matter until August, 2016. Order Granting Mtn. to Withdraw, R. 62, Page ID 729-730.

The initial Complaint in this matter was written by Mr. Colbert on behalf of the individually named plaintiffs and also "on behalf of and for the benefit of it's similarly situated professional employee members". First Amended Complaint, R. 6 Page ID 72. Yet, even though Mr. Colbert wrote the Complaint with an eye to add similarly situated professional employee members, in the two years as Counsel for MSCEA Mr. Colbert neglected to certify this action as a class, or take any affirmative steps to add the additional teachers illegally excessed by the Board.

In August, 2016 M-SCEA obtained new counsel and in October, 2016 Counsel filed a request for joinder. Notice of Appearance, R. 60, Page ID 724-725; M-SCEA's Mtn for Joinder, R. 66, Page ID 735-737, M-SCEA's Memo in Suppt

of Joinder, R. 67, Page ID 738-7346. Any delay to add additional plaintiffs was caused by the very counsel that now asserts it is prejudicial to add new plaintiffs.

A. AN ATTORNEY HAS A DUTY TO REPRESENT HIS CLIENTS UNTIL HE WITHDRAWS

Tennessee Rule of Professional Conduct 1.3 provides “[a] lawyer shall act with reasonable diligence and promptness in representing a client”. RPC 1.3. Further, a “lawyer shall provide competent representation to a client.” RPC 1.1. Comments to Rule 1.3 support that a lawyer has a duty to represent their client until such time as they are no longer the attorney of record. Comment 1 provides in part:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with zeal in advocacy upon the client’s behalf. . . .

Further comments to RPC 1.3 stress the importance of timely action. It is clear that Mr. Colbert agrees that timely action should have been required to add additional plaintiffs – this is one of his current arguments against adding these plaintiffs. However, it was clearly Mr. Colbert’s own inaction that led to a delay. Even though Mr. Colbert wrote the Complaint with an eye to “similarly situated professional employee members” he failed

to add any such M-SCEA members. Comment 3 to RPC 1.3 provides in part:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. . . .

Here there is a potential that hundreds of teachers who are M-SCEA members will have their valid claims forever barred because Mr. Colbert failed to act.

Comment 4 to RPC 1.3 provides in part:

Unless the relationship is terminated as provided in RPC 1.16 a lawyer should carry through to conclusion all matters undertaken for a client. . . .

Mr. Colbert served as counsel for the teachers union M-SCEA. He had a duty to protect the interests of these "professional employee members" and to "carry through to conclusion all matters undertaken for a client". RPC 1.3. Here, Mr. Colbert effectively abandoned the very teachers he represented and now points the finger and says their claims for recovery should be barred because they failed to timely act – even though any failure to act was Mr. Colbert's own fault.

B. FAILURE TO NAME ADDITIONAL TEACHERS DURING DEPOSITION

Even if this Court finds that Mr. Colbert did nothing wrong when he failed to protect M-SCEA members' rights by adding them to this matter, Mr. Colbert

also actively sought to foreclose teachers' rights during discovery. During the course of this matter, Ken Foster, then Executive Director of M-SCEA was deposed by defendant Shelby County Board of Education ("Board") as M-SCEA's corporate representative. Notice of F.R.C.P. 30(b)(6) Depo., R.18, Page ID 179-181. The Notice of Deposition required Mr. Foster testify concerning the identity of those M-SCEA members who were tenured teachers in Shelby County Schools and who had been excessed or surplussed from their particular assignments in 2013-14. *Id.*

During his deposition, Mr. Foster was unable to name the teachers that were similarly situated to the named Plaintiffs in the Complaint. Rick Colbert had a duty to prepare M-SCEA's corporate representative for his deposition. It is ludicrous that lead counsel wrote the Complaint with an eye towards adding similarly situated individuals and then presented a corporate representative that is unaware of the names of similarly situated M-SCEA members. Once again, Mr. Colbert's acts were in direct conflict with his client's best interests – protecting M-SCEA members.

Mr. Colbert actively foreclosed these additional M-SCEA members from receiving any relief by presenting or not preparing a corporate representative to

testify. Further, Mr. Colbert also foreclosed these teachers' rights by simply sitting by passively and allowing any time the teachers had to make a claim slip by.

M-SCEA members work tirelessly to educate the children of Shelby County and Memphis, often in poverty stricken communities. The District Court rightly found that the Board illegally exceded teachers from their positions. Many of these teachers went without a job and any type of income for extended periods of time. Yet even though these hardworking M-SCEA members and servants of the community went without pay they now have no remedy because of the actions of the very attorney that was supposed to protect their rights. To now allow Plaintiffs to point the finger and argue they are prejudiced by delay would result in injustice and go against the most basic principles of fairness.

These teachers were illegally stripped of their job in violation of Tennessee law and now these teachers may be stripped of any opportunity to be made whole because of the actions of their own union attorney. This Court should strike any argument made by Rick Colbert that the request to add additional teachers is untimely, and or prejudicial because ultimately it was Mr. Colbert's own actions that led to any delay. Further based on Mr. Colbert's actions any and all arguments made to bar these M-SCEA members from participating in this action should be stricken based on the doctrine of unclean hands.

C. PLAINTIFF’S ARGUMENTS TO BAR JOINDER OF ADDITIONAL PARTIES SHOULD BE BARRED BY THE DOCTRINE OF UNCLEAN HANDS

Our U.S. Supreme Court describes the doctrine of unclean hands as follows:

“It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.”

Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814–15, (1945).

The doctrine of unclean hands is “rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.” *Id.* Further, “while ‘equity does not demand that its suitors shall have led blameless lives,’ as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.” *Id.* Here, Mr. Colbert cannot on one hand say that M-SCEA delayed in requesting the Court add additional plaintiffs when Mr. Colbert himself was the attorney of record for M-SCEA for more than two years. Any failure to add these plaintiffs occurred under Mr. Colbert’s tenure as counsel. The fact that Plaintiffs are now arguing prejudice is suspicious.

The current plaintiffs are or have been M-SCEA members. But for their membership in M-SCEA Mr. Colbert would not currently be their attorney of

record. Other M-SCEA members experienced the same harm, yet Mr. Colbert chose to effectively foreclose these M-SCEA members' rights after M-SCEA's disaffiliation. In essence, Mr. Colbert sat back, picked and chose who would receive relief in this matter.

Mr. Colbert failed to zealously represent his client by failing to add the additional M-SCEA members who were similarly situated with the current plaintiffs. Although M-SCEA disaffiliated with TEA, Mr. Colbert still had a duty to represent his client with commitment, dedication and zeal until such time as his representation of M-SCEA ended. Mr. Colbert failed to meet this commitment. Further, Mr. Colbert's failure to effectively prepare a corporate representative for his deposition raises suspicion as to Plaintiffs' motives. This Court should bar all arguments made by Plaintiffs against joinder based on the doctrine of unclean hands and allow the similarly situated professional employee members of M-SCEA to be joined in this matter.

Respectfully submitted,

s/Darrell J. O'Neal

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4. Certificate of Compliance

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. Proc. 32(a)(7(B)). The foregoing brief contains 1,762 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word 2010 for Windows.

s/Darrell J. O'Neal
Darrell J. O'Neal

5. Proof of Service of Brief and Appendix

AFFIDAVIT OF SERVICE

I, Darrell J. O'Neal, Esquire, do hereby verify, under penalty of perjury, that this date, the 28th day of March, 2018, I served a copy of the within: **REPLY BRIEF AND APPENDIX OF APPELLANT MEMPHIS-SHELBY COUNTY EDUCATION ASSOCIATION IN ITS APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE AT DOCKET NO. 14-02632-SHL** on the following persons by ECF/ECM, and addressed as follows:

By:

Date: March 28, 2018

s/Darrell J. O'Neal
Darrell J. O'Neal