

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CHARLES E. COUGHLIN, JR. and)
 STAVROULA BOURIS)
 Plaintiffs,)
)
 v.)
)
 TOWN OF ARLINGTON AND)
 ARLINGTON SCHOOL COMMITTEE,)
 NATHAN LEVENSON (individually and in his)
 capacity as Superintendent of Schools),)
 TRACY BUCK (individually and in her)
 capacity as an employee of the Town of)
 Arlington), and JEFFREY THIELMAN)
 (individually and in his capacity as a member of)
 the Arlington School Committee).)
 Defendants.)
 _____)

Civil Action No. 10-CV-10203 MLW

**PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION TO
STAY CASE PENDING RESOLUTION OF ONGOING ARBITRATIONS**

The plaintiffs, Charles E. Coughlin, Jr. (“Coughlin”) and Stavroula Bouris (“Bouris”) oppose defendants’ motion to stay this case pending resolution of ongoing arbitrations and request that this Court deny the motion. Coughlin and Bouris brought this action as a result of the actionable misconduct of the named defendants which became known to them in the wake of their termination from employment with the Arlington Public Schools (“Arlington”). The complaint advances 42 U.S.C. §1983 claims and state law claims against the Town of Arlington; Town of Arlington School Committee; Nathan Levenson, individually and in his capacity as the Superintendent of Schools; Tracy Buck, individually and in her capacity as an employee of the Town of Arlington; and, Jeffrey Thielman, individually and in his capacity as a member of the

Town of Arlington School Committee. Following their termination, both Coughlin and Bouris invoked arbitration pursuant to M.G.L.c. 71 §§ 41 and 42. The defendants now seek to stay this lawsuit until those arbitrations have been completed. The plaintiffs submit the following in opposition:

BACKGROUND

Coughlin began his employment in Arlington in September, 1999. At the time of his dismissal, he was the lead teacher of the Technology Education Department at the Ottoson Middle School. Bouris began her employment in Arlington in September, 1998. At the time of her dismissal, she was the principal at the Ottoson. Both were highly regarded by supervisors, colleagues, co-workers, students, and parents. In June, 2007, Coughlin and Bouris received notifications from the Superintendent of the Arlington school system, Nathan Levenson (hereinafter “Levenson” or “Superintendent”), that a series of e-mails between them had been brought to his attention. Subsequently, both Coughlin and Bouris were dismissed from their positions based on a litany of charges predicated on the aforementioned e-mails and their content. (*See Exhibit A, Decision of the Arbitrator, pp. 1-2, 25, 28*).

In challenging their termination, Bouris and Coughlin voluntarily invoked arbitration pursuant to M.G.L.c. 71, §41 and §42, respectively.¹ Coughlin’s arbitration resulted in 27 days of hearings between January 15, 2008 and July 7, 2009 before

¹ M.G.L.c 71 §41 provides in relevant part: “A principal ... may seek review of a dismissal or demotion decision by filing a petition with the commissioner for arbitration.”

M.G.L.c 71 §42 provides in relevant part: “A teacher with professional status may seek review of a dismissal decision within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner.”

Arbitrator Richard Boulanger (“Arbitrator”). To date, Bouris’s arbitration has included 9 days of hearings and remains ongoing.

On October 27, 2009, the Arbitrator issued his ruling in which he concluded that Coughlin's dismissal was not consistent with M.G.L.c. 71 § 42. He ruled that Coughlin did not engage in conduct unbecoming a teacher or other just cause and that Coughlin’s dismissal from Arlington was not justified. Consequently, the Arbitrator reinstated Coughlin’s employment and ordered that he be made whole, including lost wages as well as all statutory and collective bargaining agreement rights and benefits. *See Exhibit A, page entitled “Award.”*

The Arbitrator concluded that the investigation and subsequent termination was based on anonymous information, in clear violation of a controlling policy. His factual analysis clearly established that this represented a departure from Arlington’s policies and practices, and that the e-mails in question were not open, notorious or in the plain view of co-workers or supervisors. *See Exhibit A, pp. 25-27.* He acknowledged Levenson’s credibility problems as well as the thickening plot regarding anonymous information. His conclusion was that Levenson failed to bar the investigation per policy, authorized further investigation in derogation of policy, and then ignored the policy and failed to disclose it when seeking advice regarding the propriety of his conduct. *Exhibit A, pp. 32-38.* The Arbitrator specifically concluded that Levenson was not a credible witness with respect to matters pivotal to his analysis. *See Exhibit A, pp. 25, 28, 32-40, 51.*

Thereafter, pursuant to M.G.L. c. 150C, §11, Arlington commenced an action in the Superior Court, Middlesex Division, seeking to vacate the arbitration award. On

March 4, 2010, the Court (Fremont-Smith, J.) issued an order vacating the arbitration award and ordering a rehearing before a new arbitrator. *See Order (Fremont-Smith, J.) a copy of which is attached to Defendant's Motion to Stay Case Pending Resolution of Ongoing Arbitration as Exhibit A.* The defendants now move to stay the instant lawsuit until the arbitration proceedings have been concluded. The defendants contend that a stay will serve the interests of judicial economy and avoid the possibility of inconsistent findings and rulings.

ARGUMENT

“A court in its sound discretion may stay any case pending before it as an exercise of its inherent power to control its own docket.” However, in its exercise of discretion, the court must consider judicial economy and efficiency and the potential for preclusive effect. *See Cannavo v. Enterprise Messaging Servs., Inc.*, 982 F.Supp. 54, 59 (D.Mass.1997); *see also Sevinor v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 807 F.2d 16, 20 (1st Cir.1986); *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 998 F.Supp. 140, 145-46 (D.P.R.1998); and *LaRosa v. United Parcel Service*, 23 F.Supp.2d 136, 150 (D.Mass. 1998). In the instant case, a stay would not promote efficiency, but instead would prejudice the plaintiffs and serve to further delay an already attenuated process.

The Educational Reform Act of 1993 (“Ed Reform Act” or “the Act”) was intended to depoliticize and simplify the termination process. The Act made significant changes to the governing structure and financing of Massachusetts public schools. In furtherance of the specific goals of the Act, changes were made to the statute governing teacher dismissals. *M.G. L. c. 71, § 42.* These statutory changes include:

- (1) [T]ransferring from school committees to school principals and superintendents the responsibility for dismissing teachers;

(2) expanding the statutorily enumerated grounds for dismissal to include failure to satisfy teacher performance standards, and changing the catchall ground from other "good" cause to other "just" cause; (3) depoliticizing and streamlining the dismissal process by requiring that contested dismissals proceed directly to arbitration, where timelines for decisions and detailed statements of supporting reasons are mandated; (4) providing for limited rather than de novo review of dismissal decisions (as confirmed or not by arbitration) in the Superior Court; and (5) requiring arbitrators specifically to take into account the best interests of students and the need for the elevation of performance standards in determining whether a school district has met its burden of proving grounds for dismissal.

M.G. L. c. 71, § 42; see also School Dist. of Beverly v. Geller, 435 Mass. 223, 225, n.1

(2001). Here, Levenson/Arlington chose to engage in misconduct, including lying and destroying evidence that attenuated and complicated the process and served to defeat the purposes of the Act. It is under these circumstances that the defendants come before this Court and advance the suggestion that a stay is appropriate in the interest of efficiency and judicial economy. The Coughlin arbitration hearings lasted 27 days spread over a 22 month period. Bouris's hearings have not concluded and there have been 9 days of hearings spread over 14 months.² Furthermore, if the Middlesex Superior Court ruling stands and the current timetable prevails these arbitration matters will not be resolved for at least three (3) or four (4) more years.

The arbitration rights here belong to the plaintiffs. Neither the defendants in this case nor Levenson/Arlington have arbitration rights. These arbitrations could be terminated unilaterally by the plaintiffs at any time and they would be unfettered in their pursuit of these claims. Coughlin and Bouris invoked their arbitration rights because these arbitrations are, per statute (M.G. L. c. 71, § 41& § 42), an exclusive remedy for a wrongful termination and the only way to get their jobs back. In a manner of speaking,

² Coughlin was terminated on August 9, 2007 and Bouris was terminated on September 5, 2007. Coughlin's arbitration commenced on January 15, 2008 and Bouris's commenced on January 27, 2009.

the plaintiffs are pursuing the only mechanism for mitigating their damages. There is no waiver argument here, the plaintiffs are not seeking to stay, bar or circumvent their arbitrations. They may, however, be forced to abandon them as the cost of the pursuit has become prohibitive.

The defendants' argument herein is perfectly consistent with the approach taken during arbitration. Levenson/Arlington consistently engaged in conduct that unfairly impacted the process and delayed the proceedings. In fact, during the Coughlin arbitration hearings, plaintiffs' counsel commented on or objected to the Levenson/Arlington delay tactics on no less than 22 occasions. The process was further impacted by Levenson's/Arlington's steadfast opposition to providing discovery; first, in the original state civil action seeking injunctive relief and later in the context of the arbitrations. In the civil action filed in the Middlesex Superior Court immediately following Coughlin's termination,³ Arlington moved to stay the discovery process and to obtain protective orders relative to deposition subpoenas.

Further delays were occasioned in the context of the arbitration by Levenson's/Arlington's opposition to a consolidated hearing and the refusal to provide requested discovery. During the Coughlin arbitration, counsel for the Superintendent proclaimed no less than 12 times that there was no discovery in arbitration. This needlessly hindered the process since cross-examination and ordinary investigative

³ On August 13, 2007, Coughlin and Bouris filed a civil action against the Arlington Public Schools as well as against Jane and/or John Doe (1) and Jane and/or John Doe (2). In Counts I and II of the Complaint, Coughlin alleged intentional interference with contractual relations and interference with advantageous relations against the unknown "Doe" defendants. In Count III, against the Arlington Public Schools, both plaintiffs set forth a request for injunctive relief seeking to enjoin Arlington from disseminating the e-mails at issue. This action was dismissed by the parties pursuant to Mass. Rule Civ. P. 41(a)(1)(ii) as the "Doe" defendants were not identified or served.

means were the only tools available to obtain basic information. Even those methods were impaired by the inability to communicate with school district employees and ex-employees due to representation issues and witness intimidation.

Perhaps the most unusual obstacle in the process was the pursuit of Levenson when he abruptly left in the middle of the proceedings and resigned as superintendent due to his own misconduct. On August 5, 2008, Levenson left an arbitration session during the lunch break, without explanation, and then resigned two days later. Shortly after this episode, it was revealed that Levenson had prepared and then concealed a purportedly contemporaneous “log of recent events.” The “log” recited facts central to the case which were in sharp contrast to Levenson’s own testimony and the testimony of other witnesses called by Arlington. *See Exhibit B.*⁴ Thereafter, Levenson failed to appear for further examination in connection with his contemporaneous log even after being ordered to appear by the Arbitrator and/or summonsed to do so on two separate occasions (September 10, 2008 and October 7, 2008). Coughlin was forced to file an Application to Enforce Subpoena and Compel Attendance at AAA Hearing in the Suffolk Superior Court. *See Exhibit C and D.*⁵ Levenson did finally appear “voluntarily” on October 30, 2008, two weeks before the Court (Spurlock, J) ordered him to appear pursuant to the Application to Enforce Subpoena. *See Exhibit E, Ruling of Judge Spurlock.*

The arbitration process was further delayed by the Arbitrator’s inability to compel witnesses to testify. For example, Attorney Miller who conducted the investigation

⁴ Exhibit B consists of Levenson’s “log of recent events” (2 pages) and covering letter authored by Attorney Kay Hodge, dated August 8, 2008 (3 pages).

⁵ Exhibit C consists of the Application to Enforce Subpoena and Compel Attendance at AAA Hearing and Exhibit D consists of the Opposition with attached Affidavit of Superintendent Nathan Levenson.

refused to answer certain questions on cross-examination even when ordered to do so by the Arbitrator. The matter was further attenuated by the interposition of scheduling conflicts real and imagined. The defendants strategy here is the same as Levenson's/Arlington's was at the arbitration: to tax the plaintiffs' ability to litigate their claims in any forum and to keep them in a forum where the playing field is not level, *i.e.*, no discovery, no rules of evidence, no sanctions for a witness's refusal to testify and most importantly, no sanctions for misconduct.

Throughout the course of the Coughlin arbitration, Levenson/Arlington refused to produce and subsequently manipulated, destroyed, and altered documents. Partial e-mail strings were produced as incriminating without the context of accompanying text. The complete e-mail string would have demonstrated the deceptive and dishonest nature of the claim made and the arguments advanced. In fact, Levenson/Arlington refused to provide access to the original electronic form of documents that were altered and manipulated.

In the motion to stay this action, the defendants cite copious authority, but fail to mention what should be controlling in these circumstances. They contend that both efficiency and judicial economy would be served by a stay because of the potential preclusive effect of the Arbitrator's findings. Although the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) may apply to arbitration proceedings, none of the conditions of either doctrine are met in this case. *See Chestnut Hill Dev. Corp. v. Otis Elevator Co.*, 739 F.Supp. 692, 697 (D.Mass. 1990); *LaRosa v. United Parcel Service*, 23 F.Supp. 2d. 136, 150 (D.Mass. 1998). Claim preclusion makes

a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action. There are “three conditions that must be met in order to justify an application of the claim preclusion doctrine: (1) a final judgment on the merits in an earlier suit, (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) sufficient identity between the parties in the two suits.” *O’Connell v. Federal Ins. Co.*, 484 F.Supp.2d 223, 225 -226 (D.Mass. 2007) *citing* *Perez v. Volvo Car Corp.*, 247 F.3d 303, 311 (1st Cir.2001).

The doctrine of issue preclusion prevents re-litigation of an issue where the following four-pronged test is met: “(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) the determination of the issue must have been essential to the judgment.” *O’Connell v. Federal Ins. Co.*, 484 F.Supp. 2d at 225-226 (D.Mass. 2007) *citing* *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir.1994). Courts have recognized that “[t]he guiding principle in determining whether to allow defensive use of collateral estoppel is whether the party against whom it is asserted lacked full and fair opportunity to litigate the issue in the first action.” *O’Connell v. Federal Ins. Co.*, *supra*, *citing* *In re Sonus Networks, Inc. Shareholder Deriv. Litig.*, 422 F.Supp.2d 281, 288 (D.Mass.2006).

The elements and proofs required in the causes of action here are completely different in nature and kind than what is involved in the statutory employment arbitration for the wrongful discharge of a teacher and principal. In fact, any determination of the

propriety of Coughlin's and Bouris's termination in arbitration will not be dispositive of a single claim advanced in this litigation.

The prior submission of a claim to arbitration may result in issue preclusion in a judicial proceeding if the arbitration afforded the opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings. *O'Connell v. Federal Ins. Co.*, *supra*, citing *Miles v. Aetna Casualty & Surety Co.*, 412 Mass. 424, 427, 589 N.E.2d 314, 317 (Mass.1992). Here, as described above, the arbitration format is susceptible to manipulation and unfairness as lawyers from the same law firm control the repositories of data and information, represent the witnesses, investigate the allegations, testify at the hearings, refuse to answer questions when ordered to do so at the hearings and conduct the hearings. These same lawyers refuse to provide discovery, and then manipulate the information by using it in a piecemeal and deceptive fashion.

Even in the absence of issue preclusion, a federal litigation may be stayed if the arbitration may have an evidentiary or issue-narrowing effect. *See Sevinor v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 807 F.2d. 16, 20 (1st Cir. 1986). However, here the only effect the arbitration award may have is in the calculation of damages. This matter should not be forestalled for another 3 to 4 years on the uneven playing field of arbitration to avoid a simple mathematical calculation.

To restrict the plaintiffs to a forum where Levenson/Arlington exploits the rules to avoid discovery, facilitate misconduct, and obfuscate the truth is to reward the misconduct and prejudice Coughlin and Bouris by delaying their right to readdress wrongs that are different in nature and kind from the arbitral issues. Here, Coughlin

stayed the course in arbitration only to have the matter vacated.⁶ In doing so, he unearthed misconduct that is but the tip of the iceberg vis-a-vis the former Superintendent, Levenson, and the other defendants. It is that misconduct that gives rise to the claims in this case. The statute of limitations was upon the plaintiffs and a stay pending the outcome of arbitrations, that will be dispositive of none of the issues in this case, will hold this Court and these plaintiffs hostage into the foreseeable future; precisely the defendants' goal.

CONCLUSION

Based on the forgoing, this Court should deny defendants request to stay this litigation pending resolution of the plaintiffs' arbitrations. Judicial economy and efficiency would not be served and there is no potential that the arbitration would have a preclusive effect.

RESPECTFULLY SUBMITTED:
Charles E. Coughlin, Jr. and
Stavroula Bouris,
By their attorneys,

/s/ Frank Mondano
Frank Mondano, Esquire, BBO # 351540
Maria A. Luise, Esquire, BBO # 557353
BALLIRO & MONDANO
63 Atlantic Avenue, Third Floor
Boston, MA 02110
(617) 737-8442

⁶ The plaintiffs contend that the Superior Court decision (Freemont-Smith, J.) made erroneous factual conclusions and assumptions not supportable in the record before it and contrary to the vast body of evidence unknown to it as was developed over 27 days of hearings. The plaintiff's have filed a Motion for Reconsideration and Request for Findings.

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 30th day of March, 2010.

/s/ Frank Mondano

Frank Mondano