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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000556-MR

MICHAEL G. STATHIS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 98-CI-04033

UNIVERSITY OF KENTUCKY; UNIVERSITY OF KENTUCKY COLLEGE OF MEDICINE; SUE FOSSON, INDIVIDUALLY AND AS ASSISTANT DEAN FOR STUDENT AFFAIRS, UNIVERSITY OF KENTUCKY CHANDLER MEDICAL CENTER; EMERY WILSON, INDIVIDUALLY, AND AS DEAN, UNIVERSITY OF KENTUCKY CHANDLER MEDICAL CENTER — APPELLEES

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** ** ** ** **

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: Michael G. Stathis appeals from orders of the Fayette Circuit Court granting summary judgment to the

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

defendants in this proceeding in which the appellant alleges causes of action based upon race, gender, and disability discrimination and breach of contract. Stathis raises issues of denial of due process of law at the administrative level. Additionally, he claims that he was denied adequate discovery by the trial court. We reverse and remand as to the contract claim only, and affirm as to the remaining issues.

HISTORY

Stathis enrolled in the University of Kentucky Medical School in 1994 and completed his first and second years of study with distinction. In the fall of 1997 Stathis began his third year of Medical School.

During his endeavors as a student, various allegations of hostile and improper conduct were made against Stathis. On November 12, 1997, Stathis had a verbal altercation with a fellow medical student, Sharon Steele. Steele, and witnesses to the altercation, perceived some of the comments made by Stathis as threats of physical harm against her. Medical School administrators were concerned that Stathis had threatened a colleague in a clinical environment. Stathis was suspended from his clinical activities pending investigation as to whether he posed a danger to patients, the public, colleagues, or others in the college environment, and could continue to function in a medical setting.

On February 11, 1998, Stathis was informed that because of the November 12, 1997, incident; the results of the investigation; and other factors that had become known, he was being charged with violations of the Health Sciences Student Professional Behavior Code (HSSPBC). Specifically, he was charged with violation of the following standards: (1) any condition or behavior which may endanger clients, patients, or the public, including failure to carry out the appropriate or assigned duties where lack of doing so may endanger the health or well-being of a patient or client; (2) obtaining any fee by fraud or misrepresentation;[2] and (3) having been previously removed or suspended from a clinical setting by appropriate administrative authority for unprofessional conduct.

Stathis elected a hearing on the charges, which was held on April 8, 1998. The Hearing Committee determined that Stathis did "physically threaten a fellow student while engaged in clinical activities" in violation of the HSSPBC. The Committee found this to be a serious violation and concluded:

> We believe that Mr. Stathis' threatening behavior was extreme and disproportionate to any aggravating stimulus, that threats continued to be voiced after the threatened student had left the vicinity, and that there was no credible explanation for the behavior. Mr. Stathis continues to minimize the seriousness of this behavior. Based on the review of all the written documents and

[2] Prior to the hearing on the violations, Stathis was exonerated of this charge.

> witnesses, the committee also determined that the incident of November 12 was not an isolated incident, and that Mr. Stathis has exhibited inappropriate hostile behavior on several occasions. A review of the psychiatric report suggests that this type of behavior is not easily treated, even should Mr. Stathis reconsider his expressed unwillingness to consider treatment. After reviewing the total evidence presented, considering the seriousness of the offense, and weighing the College's responsibility to ensure a safe and non-threatening educational and clinical environment for staff, students, faculty, and patients, the committee unanimously recommends as a sanction Mr. Stathis termination as a student in the College of Medicine without possibility of readmission to that College.

By letter dated April 22, 1998, the Dean of the Medical School informed Stathis that he was accepting the Committee's recommendation of termination of enrollment. Stathis exercised his right of appeal to Dr. James Holsinger, Chancellor, who upheld the decision of the Dean.

THE INSTANT LITIGATION

On November 12, 1998, Stathis filed a Complaint in Fayette Circuit Court alleging gender and racial discrimination. He also alleged breach of contract. The Complaint was later amended to include discrimination based upon disability or perceived disability. Stathis additionally claimed denial of procedural due process at the administrative level. Stathis prayed the injunctive remedy of reinstatement. Stathis also sought monetary damages for loss of income resulting from his

expulsion, compensatory damages for humiliation, embarrassment, and mental and physical anguish, and punitive damages.

Named as defendants were the University of Kentucky; the University of Kentucky College of Medicine; Emery Wilson, Individually and as Dean, University of Kentucky Chandler Medical Center; and Sue Fosson, Individually and as Assistant Dean for Student Affairs, University of Kentucky Chandler Medical Center.

On April 7, 1999, the trial court summarily rejected his claim of denial of due process and dismissed his claim for breach of contract.[3] On February 26, 2004, the circuit court granted the University and the College of Medicine summary judgment on Stathis' remaining claims of discrimination. His termination from the College of Medicine was upheld. This appeal followed.

DUE PROCESS VIOLATIONS

Stathis contends that the circuit court erred in rejecting his claim that he had been deprived of due process of law. Specifically, he contends that he was improperly denied a predeprivation hearing prior to his suspension; that he was denied the opportunity to meaningfully confront and cross-examine adverse witnesses at the post-suspension hearing; that

[3] The circuit court also dismissed Stathis' claims against Fosson and Wilson in their individual capacities as to the discrimination counts. Stathis raises no issues on appeal regarding these dismissals.

he was denied adequate notice of issues to be heard at the administrative hearing; and that he was denied an impartial decision maker at the administrative hearing.

Section 2 of our Constitution provides that this Commonwealth shall be free of arbitrary state action. With respect to adjudications, whether judicial or administrative, this guarantee is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures. Smith v. O'Dea, 939 S.W.2d 353, 357 (Ky.App. 1997). Under Kentucky law no less than under federal law, the concept of procedural due process is flexible. Id. We accordingly believe that Federal authorities in the area of school disciplinary cases are relevant to our discussion.

The United States Supreme Court has made clear that "a school is an academic institution, not a courtroom or administrative hearing room" and due process is a flexible concept therein. Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 89, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). In Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), the Supreme Court held that due process requires, in connection with the suspension of a student from public school for disciplinary reasons, "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation

of the evidence the authorities have and an opportunity to present his side of the story." Id., 419 U.S. at 581, 95 S.Ct. at 740. All that Goss requires is an "informal give-and-take" between the student and the administrative body dismissing him that would, at least, give the student "the opportunity to characterize his conduct and put it in what he deems the proper context." Id., 419 U.S. at 584, 95 S.Ct. at 741.

This case was, of course, a disciplinary proceeding. It seems to us that Stathis was given reasonable notice of the charges against him and the opportunity to respond to those charges. Further, he was afforded a hearing on the charges, and while not permitted to cross-examine witnesses, he was presented with the opportunity to submit questions to the witnesses in advance of the hearing, and those questions were, in fact, so submitted. As such, we cannot conclude, in this regard, that due process was lacking.

Stathis also contends that the hearing was not conducted by an impartial tribunal. However, he has failed to present affirmative evidence demonstrating that the Hearing Committee was prejudiced against his interests such that he did not receive a fair hearing on the charges. See Nicholson v. Judicial Retirement and Removal Commission, 562 S.W.2d 306, 309 (Ky. 1978). (Observing that “[t]he case law, both federal and state, generally rejects the idea that the combination (of)

judging (and) investigating functions is a denial of due process . . .").

Lastly, Stathis alleges that he was denied due process because he was not provided with a presuspension hearing. He has failed to cite us to preservation of this issue. It is elementary that a reviewing court will not consider for the first time an issue not raised in the trial court. Caslin v. General Elec. Co., 608 S.W.2d 69, 70 (Ky.App. 1980). As such, this issue is not preserved for our review.

In summary, we find no merit in Stathis' various claims that he was denied due process in the procedures culminating in his dismissal from Medical School.

LIMITATION OF DISCOVERY

Stathis contends that the circuit court erred in denying his motion for additional discovery and in ruling on the defendants' motions for summary judgment when discovery had not been completed.

He filed a motion to compel the production of the student records of four former minority medical students who attended the medical school during the same period as Stathis. Stathis sought the entire record of each student.

On April 25, 2001, the circuit court entered an order directing the University and the Medical School to produce the students' records insofar as they related to any discipline,

conduct, or behavioral issues while a student at the College of Medicine.

On December 8, 2003, Stathis filed a motion requesting that the circuit court reconsider its April 25, 2001, order so as to require the disclosure of the full record of each of the four students.

The circuit court apparently did not rule on the motion prior to granting summary judgment on the remaining claims in its order of February 26, 2004. Following the circuit court's order granting summary judgment, it appears that Stathis did not thereafter raise the issue of the trial court's failure to rule on his outstanding motion. "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." Skaggs v. Assad, By and Through Assad, 712 S.W.2d 947, 950 (Ky. 1986); Forester v. Forester, 979 S.W.2d 928, 931 (Ky.App. 1998). Hence, we do not believe that Stathis has properly preserved this issue for appellate review. Nevertheless, we will briefly address, in general, the circuit court's initial limitation on discovery of the records of the four minority students identified by Stathis.

Generally, control of discovery is a matter of judicial discretion. See Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796 (Ky. 2000); Morrow v. Brown, Todd & Heyburn, 957

S.W.2d 722 (Ky. 1997). Kentucky Rules of Civil Procedure (CR) 26.02, Scope of discovery, provides, in part:

> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is well settled that discovery rules are to be liberally construed so as to provide both parties with relevant information fundamental to proper litigation. Primm v. Isaac, 127 S.W.3d 630, 634 (Ky. 2004).

We are of the opinion that the circuit court did not abuse its discretion by limiting discovery to the four minority students' records. The discovery order required disclosure of the records insofar as they related to any discipline, conduct, or behavioral issues while students at the College of Medicine; all records for the four students concerning faculty evaluations occurring during the 16 week pediatrics/OB/GYN rotation occurring in the fall semester of 1997; and all records pertaining to Sharon Steele relating to her involvement in the

November 12, 1997, incident with Stathis. There was excepted only medical treatment and/or mental-health/counseling-related records, information of a highly personal nature. As to this excepted material, Stathis has failed to demonstrate its cruciality to his various claims.

We are of the opinion that the circuit court's order provided Stathis with the opportunity to pursue his theory that these minority students were treated more favorably than he for similar conduct. We particularly note that all records of Sharon Steele relating to the November 12, 1997, order were required to be disclosed. We find no abuse of discretion in the circuit court's limitation on discovery.

RACIAL DISCRIMINATION

Stathis next contends that the circuit court erred in granting summary judgment in favor of the appellees on his claim of racial discrimination.

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Palmer v. International Ass'n of Machinists, 882 S.W.2d 117, 120 (Ky. 1994); Stewart v. University of Louisville, 65 S.W.3d 536, 540 (Ky.App. 2001); CR 56.03. The movant bears the initial burden of convincing the court by evidence of record

that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991); see also City of Florence, Kentucky v. Chipman, 38 S.W.3d 387, 390 (Ky. 2001). The court must view the record in the light most favorable to the non-movant and resolve all doubts in his favor. Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002); Lipsteuer v. CSX Transportation, Inc., 37 S.W.3d 732, 736 (Ky. 2000). "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999); see also Murphy v. Second Street Corp., 48 S.W.3d 571, 573 (Ky.App. 2001). As an appellate court, we need not defer to the trial court's decision on summary judgment and will review the issue *de novo* as only legal questions are involved. Hallahan v. The Courier Journal, 138 S.W.3d 699, 704-705 (Ky.App. 2004).

Stathis is a white male alleging reverse racial discrimination. An analysis of the effect of a claim of reverse discrimination under the Kentucky Civil Rights Act (KCRA) is

governed by the allocation of the burden of proof in a reverse discrimination claim brought under Title VII of the Federal Civil Rights Act. Jefferson County v. Zaring, 91 S.W.3d 583, 590 (Ky. 2002). Thus, federal authorities interpreting the Federal Civil Rights Act are applicable.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), was a Title VII action brought by an African-American employee who claimed that he had been subjected to employment discrimination because of his race. While McDonnell Douglas was an employment discrimination case, we believe its basic framework is analogous to the situation presented in the present reverse discrimination claim, and we will accordingly pattern our discussion upon its structure.

In McDonnell Douglas, the United States Supreme Court established "the proper order and nature of proof in actions under Title VII," 411 U.S. at 793-94, 93 S.Ct. at 1820, and established the following tripartite analysis:

> First, the plaintiff must establish a prima facie case of discrimination. Second, if the plaintiff carries his initial burden, the burden shifts to the defendant to "articulate some legitimate nondiscriminatory reason" for the challenged workplace decision. Third, if the defendant carries this burden, the plaintiff has an opportunity to prove that the legitimate reasons the defendant offered were merely a pretext for discrimination.

Notari v. Denver Water Dept., 971 F.2d 585, 588 (10th Cir.1992), (*citing* McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824).

"Although intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000), (*quoting* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981)). The defendant's "burden is one of production, not persuasion." 530 U.S. at 142, 120 S.Ct. at 2106 (emphasis added).

In a typical discrimination case, as part of his burden of establishing a prima facie case the plaintiff must show that he belongs to a racial minority. McDonnell Douglas, supra, 411 U.S. at 802, 93 S.Ct. at 1824. In a reverse discrimination case, the McDonnell Douglas framework must be appropriately adjusted. First, because the plaintiffs are "white male[s], [they] clearly do[ ] not satisfy prong one" of the prima facie tests. Mills v. Health Care Serv. Corp., 171 F.3d 450, 454 (7th Cir. 1999). "[I]f strictly applied, the prima facie test would eliminate all reverse discrimination suits." Id. at 454. See also Iadimarco v. Runyon, 190 F.3d 151, 158 (3d Cir. 1999) ("Obviously, a White plaintiff can not

establish 'membership in a minority group' in the same way a Black plaintiff can."). Thus, "it is appropriate to adjust the prima facie case to reflect the reverse discrimination context of a lawsuit because the presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group." Notari v. Denver Water Dept., 971 F.2d at 589 (10th Cir. 1992). As such, in reverse discrimination cases, the test has been modified to state that "a prima facie case of 'reverse discrimination' is established upon a showing that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985).

Applying the test established in Thistledown Racing Club that "a prima facie case of 'reverse discrimination' is established upon a showing that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority," we believe that the reverse discrimination claim must fail.

In developing his case of racial discrimination, Stathis relies primarily upon the records of four minority students. However, Stathis' conduct is clearly distinguishable from the conduct of each of those students. Only in the case of

one male minority student were threats of violence involved; however, in that case the student accepted responsibility for his conduct and expressed contrition over the incident. Stathis has failed to mitigate the conduct alleged against him with an acknowledgment of wrong on his part, nor has he expressed contrition concerning his conduct.

In summary, we do not believe that Stathis has made a prima facie case of racial discrimination by demonstrating that the Medical School is the unusual institution which discriminates against the racial majority. Summary judgment was appropriate.

GENDER DISCRIMINATION

Stathis contends that the circuit court erred in granting summary judgment in favor of the defendants on his claim of gender discrimination.

As previously noted, federal authorities are applicable in interpreting a claim of discrimination under the Kentucky Civil Rights Act. Jefferson County v. Zaring, 91 S.W.3d 583, 590 (Ky. 2002). A prima facie case for gender discrimination requires a showing of disparate treatment between the plaintiff and a person of the opposite gender whose situation was "nearly identical." As stated in Leadbetter v. Gilley, 385 F.3d 683, 691 (6th Cir. 2004), an employment case,

"[i]n order for two or more employees to be considered similarly-situated for purposes of creating an inference of disparate treatment in a [reverse discrimination case], the plaintiff must prove that all of the relevant aspects of his employment situation are 'nearly identical' to those of the [female employee] who he alleges [was] treated more favorably." Id. The similarities between the plaintiff and the female employee must exist "in all relevant aspects of their respective employment circumstances." Id.

Stathis bases his discrimination claims upon the records of four minority students. Of the four, only the fellow student involved in the November 12, 1997, incident, Sharon Steele, is a female.

Analogizing Leadbetter to the present student reverse discrimination case, again, Steele's conduct is distinguishable from Stathis' conduct. Steele did not make physical threats against Stathis, and Steele expressed contrition over the incident. As such, Steele's situation was not "nearly identical" to Stathis' situation, and, accordingly, he has failed to make a prima facie case of gender discrimination. Accordingly, summary judgment on this claim was proper.

DISABILITY DISCRIMINATION

Stathis contends that the circuit court erred by granting summary judgment to the appellants on his claim of discrimination based upon disability.

Given the similar language and the stated purpose of KRS Chapter 344 to embody the federal civil rights statutes, including the Americans with Disabilities Act (ADA), this court may look to federal case law in interpreting the Kentucky Civil Rights Act with respect to Stathis' claim of disability discrimination under KRS 344.040. Hallahan v. The Courier Journal, 138 S.W.3d 699, 705-706 (Ky.App. 2004); KRS 344.020(1)(a).

Under KRS 344.010(4), a "disability" is defined as:

> (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
>
> (b) A record of such an impairment; or
>
> (c) Being regarded as having such an impairment.

See also 42 U.S.C. § 12102(2).

Whether the plaintiff has impairment and whether the conduct affected by the impairment is a major life activity under the statute are legal questions. See Doebele v. Sprint/United Management Co., 342 F.3d 1117, 1129 (10th Cir. 2003). The ultimate determination of whether the impairment substantially limits the major life activity generally is a

factual issue for the jury, but it may be resolved upon summary judgment under the appropriate circumstances. Id. at 1130 n. 5. See also Bristol v. Board of County Commissioners of the County of Clear Creek, 281 F.3d 1148, 1157-60 (10th Cir. 2002).

Stathis bases his claim for discrimination upon his allegations that the Medical School required him to undergo two medical evaluations; that the Medical School based its decision to terminate him upon its perception that Stathis was a danger to himself and others; and that the Medical School perceived that he had a mental impairment. Stathis alleges that Dean Nora, Dean Wilson, and the Hearing Committee believed that, despite the evaluations to the contrary, Stathis was a danger to others and based their decision to terminate his medical education on their perception of his mental condition. Stathis argues that despite this perception, the Medical School did nothing to provide any accommodation to him or provide any alternative except permanent termination from medical school.

In Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 197, 122 S.Ct. 681, 691, 151 L.Ed.2d 615 (2002), the Supreme Court defined "major life activities" other than working as "those activities that are of central importance to daily life." The Court also held that to be substantially limiting, impairment must do more than interfere with the activity in a minor way or for a temporary period. "[A]n individual must have

an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term." 534 U.S. at 198, 122 S.Ct. at 691.

Stathis has failed to satisfy the "regarded as" prong. To begin with, Stathis has not identified a relevant "major life activity." These activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2001). "Major life activities" go to the core of a person's ability to function. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 122 S.Ct. 681, 691, 151 L.Ed.2d 615 (2002).

Stathis has failed to set forth evidence in the record that the University, the Medical School, or their personnel viewed Stathis as suffering from a disability which limits a major life activity. While the evidence demonstrates that he was perceived as suffering from a behavioral problem which threatened the educational and clinical environment at the Medical School, we deem this as being clearly insufficient to demonstrate that Stathis suffered, or was perceived as suffering, from a disability which limited a major life activity.

The record does not demonstrate that Stathis was perceived as having a level of mental disability such that he

was regarded as being substantially limited in a major life activity of central importance to daily life. Rather, he was regarded as having a quick temper and as using poor judgment in the November 12, 1997, incident by making threats toward a fellow student. Upon the record, we do not believe there are genuine issues of material fact regarding Stathis' disability claim. On this claim we are of the opinion that summary judgment was appropriate.

BREACH OF IMPLIED CONTRACT

Stathis contends the circuit court erred by granting summary judgment to the appellees on his breach of contract claim.[4] The court granted summary judgment on this claim in its order of April 7, 1999, on the basis KRS 45A.245 (a section of Kentucky's Model Procurement Code) requires any claim against the Commonwealth or its agencies to be brought in Franklin Circuit Court. KRS 45A.245(1) provides as follows:

> Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity,

[4] We construe Stathis' breach of contract claim as being against the University and the College of Medicine only, and not applicable to Fosson and Wilson in either their official or individual capacities. Hence we do not address this claim as applicable to these individuals.

> except the defense of governmental immunity, shall be preserved to the Commonwealth. (Emphasis added.)

As KRS 45A.245 applies only to written contracts, we believe the court incorrectly concluded that the statute required Stathis' claim of breach of implied contract with the Medical School be venued in Franklin Circuit Court. KRS 45A.245 has no application. Stathis claims breach of a student/university implied contract. He seeks the remedies of monetary damages and reinstatement. CR 18.01. Of course, the monetary damage claim is barred by sovereign immunity. Department of Corrections v. Furr, 23 S.W.3d 615, 619 (Ky. 2000) (Agencies of the Commonwealth are subject only to administrative sanctions, and may not be sued for monetary damages in Circuit Court). His claim of reinstatement, however, remains viable.

Our Supreme Court has noted that the relationship between a private college and its students can be characterized as contractual in nature. Centre College v. Trzop, 127 S.W.3d 562, 568 (Ky. 2003). We can discern no reason why the same rule cannot be applied to public universities, and are of the opinion that indeed an implied contract existed between Stathis and the University and/or College of Medicine in this case. See, e.g., Healy v. Larsson, 323 N.Y.S.2d 625, 626 (N.Y. 1971). The rights and obligations of the parties as contained in the University's bulletins, circulars and regulations made available to the

student become a part of the implied contract. Vought v. Teachers College, Columbia University, 511 N.Y.S.2d 880, 881 (N.Y. 1987).

The implicit terms of the implied contract are that the University will act in good faith toward the student and the student will fulfill the University's academic requirements and comply with its ethical, procedural, and other standards. Tripp v. Long Island University, 48 F.Supp. 220, 224 (1999). However, a contract between an educational institution and a student is only enforceable so long as the student complies with the college's rules and regulations. Trzop, at 127 S.W.2d 568 (*citing* Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11 (Ky.App. 1979)).

It is elementary that a contract is not breached unless the non-performance is substantial or material. Fay E. Sams Money Purchase Pension Plan v. Jansen, 3 S.W.3d 753, 757 (Ky.App. 1999). Upon conflicting evidence it is a question of fact as to which party breached the contract. Schmidt v. Schmidt, 343 S.W.2d 817, 819 (Ky. 1961).

Under their implied contract, at minimum it was to be understood that if Stathis paid his tuition, achieved the requisite academic standards, and complied with the requisite rules of conduct and decorum, then the University would permit him to complete his medical studies and award him a degree.

The crucial incident which resulted in Stathis' dismissal from the medical school was the November 12, 1997, incident on the OB/GYN floor involving an altercation between Stathis and Sharon Steele. While the Hearing Committee credited testimony adverse to Stathis and rejected his version of events, as we are reviewing this issue in the context of summary judgment, we must view the evidence in the light most favorable to him. According to Stathis, Sharon Steele approached him and asked him if he had taken care of one of his patients. When Stathis answered no, Steele began to insult him and criticize him, calling him "stupid" and "lazy." Stathis told Steele that his care of his patients was none of her business. Stathis walked away from Sharon Steele, but Steele pursued Stathis and began to berate him again. Stathis concedes that both he and Steele argued and raised their voices. Indeed, Stathis realized that this was not appropriate in the hospital setting, told Steele that he was not going to continue, and told her that if she wanted to "they could finish it outside." By this, however, Stathis contends that he meant only that they should continue their argument outside, not engage in a physical confrontation. Stathis denies that he at any time made any comment threatening Sharon Steele with physical harm.

Accepting Stathis' version of the November 12, 1997, incident, as we must pursuant to Steelvest, we believe a fact-

finder might reasonable believe that his conduct did not rise to the level such that he breached the conduct code of the Medical School and, accordingly, did not breach the contract between the parties. If Stathis was not in breach of the parties' contract, it follows that the College of Medicine was in default for dismissing him from enrollment.

As there are genuine issues of material fact concerning the events of November 12, 1997, and, correspondingly, who first breached the contract between the parties, summary judgment was not appropriate.

SUMMARY

We affirm the Fayette Circuit Court upon all issues presented in this appeal with the exception of the issue pertaining to breach of contract and Stathis' claim of reinstatement.

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with most of the majority opinion, but I respectfully dissent from the majority's conclusion insofar as

it directs remand of the case to the trial court for further proceedings on the issue of whether Stathis breached the conduct code of the Medical School. By virtue of the disciplinary hearing held by the Medical School, that determination has already been made.

My view is that "[j]udicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious." Nawaz v. State University of New York University at Buffalo School of Dental Medicine, 295 A.D.2d 944, 944, 744 N.Y.S.2d 590, 591 (2002); see Nickerson v. University of Alaska Anchorage, 975 P.2d 46, 50 n. 1 (Alaska 1999); 15A Am. Jur. 2d Colleges and Universities § 30 (2000) (recognizing that matriculation and payment of fee creates contract subject to conditions that no student will be arbitrarily expelled and that student will submit to reasonable rules and regulations, and recognizing that university authorities' exercise of discretion in expelling student for violation of a reasonable rule or regulation will not be interfered with by the courts absent a showing of bad faith or some extraneous motive).

Similar to the approach taken by courts in other states, I would restrict the courts' review to the substantial evidence standard of review applicable to the decisions of administrative agencies. As stated in Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 578-579 (Ky. 2002):

> "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found." *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n,* Ky., 437 S.W.2d 775, 778 (1969). The administrative agency's findings will be upheld even though there exists evidence to the contrary in the record. *Kentucky Comm'n on Human Rights v. Fraser,* Ky., 625 S.W.2d 852, 856 (1981). Substantial evidence is defined as "evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons]." *Owens-Corning Fiberglas Corp. v. Golightly,* Ky., 976 S.W.2d 409, 414 (1998). We must also determine whether the decision of the administrative agency was arbitrary or clearly erroneous, which is defined as "unsupported by substantial evidence." *Danville-Boyle County Planning and Zoning Comm'n v. Prall,* Ky., 840 S.W.2d 205, 208 (1992). "If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." *Taylor v. Coblin,* Ky., 461 S.W.2d 78, 80 (1970).

While Stathis' version of the altercation differed from that of the other witnesses, my view is that the testimony

of the other witnesses constituted substantial evidence to support the College of Medicine's decision that Stathis had breached the HSSPBC, and therefore the College of Medicine was justified in terminating its contract with him. I would affirm the Fayette Circuit Court in all respects.

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