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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001673-MR

CRITTENDEN COUNTY
BOARD OF EDUCATION — APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, SPECIAL JUDGE
ACTION NO. 05-CI-00009

FREDERICKA HARGIS — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Crittenden County Board of Education appeals from an order of the Crittenden Circuit Court denying its motion for summary judgment based on the affirmative defense of governmental immunity. The Board argues it is entitled to absolute governmental immunity from all state and federal claims

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

because it is an arm of the Commonwealth and it is not a "person" subject to suit under 42 United States Code (U.S.C.) §1983. We affirm in part, reverse in part, and remand.

The Board appointed Fredericka Hargis as superintendant of the Crittenden County School District on March 29, 2000. The initial contract provided Hargis with a four year term as superintendent as authorized by Kentucky Revised Statutes (KRS) 160.350. On October 14, 2003, the Board appointed Hargis to another four year term as superintendant.

In January 2004, an anonymous letter surfaced in Crittenden County, which disparaged both the School District and Hargis. The Board informally expressed a desire to simply ignore the letter because the anonymity of the letter gave it little import. However, as the contents of the letter began to spread throughout the county, Hargis continued to pursue the possibility of identifying the author(s). On February 19, 2004, Hargis overheard patrons at a beauty parlor discussing the letter. After initially leaving the parlor, Hargis returned to collect the license plate numbers of the various automobiles in the parking lot. Two women approached Hargis' vehicle and knocked on the window. Words were exchanged and Hargis drove off running over the foot of Tracy Rozwalka. Rozwalka filed a criminal complaint against Hargis and Hargis was charged with wanton endangerment in the first degree, a felony offense.

The Board called a special meeting on February 24, 2004, and voted to institute charges for the removal of Hargis as superintendent. The Board elected to

suspend Hargis, with pay, while the removal process unfolded. Pursuant to KRS 160.350(3), the Board forwarded a copy of its action and the charges against Hargis to the Commissioner of Education as well as to Hargis' counsel. By letter dated March 1, 2004, the Board forwarded the charges against Hargis to the Kentucky Education Professional Standards Board (EPSB). Hargis received notice that she would be afforded an opportunity to file a rebuttal to the information the Board provided to EPSB.

On March 24, 2004, the Commissioner gave his approval for the Board to proceed with the removal action against Hargis. Upon Hargis' request, the Board agreed to hold the removal proceedings in abeyance until the resolution of the criminal charges. The Board, however, voted to suspend her pay during the requested abeyance. On July 28, 2004, Hargis entered a guilty plea pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970), on a lesser charge of wanton endangerment in the second degree. On August 11, 2004, the EPSB informed Hargis that it had determined there was a sufficient basis to institute a full investigation into her alleged misconduct.

Despite accepting employment with the Jefferson County School District effective July 1, 2004, Hargis exercised her right to a full due process hearing on the removal charges. The hearing commenced on October 18, 2004, and the parties agreed to reschedule the hearing for December 13, 2004. At the December hearing, the parties agreed to forgo a conventional adversarial

proceeding and decided to submit written evidence in the form of affidavits and other documents for consideration.

On December 20, 2004, Hargis filed a complaint for declaration of rights in Franklin Circuit Court naming the Kentucky Department of Education, Gene Wilhoit in his individual capacity and as Commissioner of Education, and the Crittenden County Board of Education. On December 22, 2004, the Board voted four members to zero to remove Hargis from her position as superintendent. On April 19, 2005, the Franklin Circuit Court entered an order dismissing the complaint for declaration of rights. No appeal was taken from this order.

On January 19, 2005, Hargis filed a complaint against the Board in Crittenden Circuit Court alleging various due process violations, tort, and contract claims relating to the removal proceedings against her. In the meantime, on August 21, 2006, Hargis and EPSB entered an agreed order wherein Hargis' superintendent license was revoked for five years retroactive to July 28, 2004, and other various certificates were subjected to probationary conditions for a three year period. Following lengthy discovery, the Board filed a motion for summary judgment premised on absolute governmental immunity from state and federal claims. On September 11, 2009, the trial court entered an order denying the motion for summary judgment without discussion or analysis. This appeal followed.

The Board argues it is entitled to sovereign immunity from all state and federal claims because it is an arm of the Commonwealth and it is not a "person" subject to suit under 42 United States Code (U.S.C.) §1983.

At the outset, we note the decision of the Supreme Court of Kentucky in *Breathitt County Bd. of Education v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009), authorizes the consideration of interlocutory appeals from the denial of a motion for summary judgment based on the assertion of governmental immunity. The Court explained the doctrine of governmental immunity as follows:

> an agency of the state government enjoys what is termed "governmental immunity" from civil damages actions. Governmental immunity, as explained in *Yanero*, is a public policy, derived from the doctrine of sovereign immunity, which is premised on the notion "that courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy." Given this underpinning, governmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, i.e., public acts integral in some way to state government. Id. The immunity does not extend, however, to agency acts which serve merely proprietary ends, i.e., non-integral undertakings of a sort private persons or businesses might engage in for profit. Under these rules, we have held that:
>
> "[a] board of education is an agency of state government and is cloaked with governmental immunity; thus, it can only be sued in a judicial court for damages caused by its tortious performance of a proprietary function, but not its tortious performance of a governmental function, unless the General Assembly has waived its immunity by statute."

Id. Governmental immunity extends to claims brought under the Kentucky Constitution. *Wood v. Bd. of Education of Danville,* 412 S.W.2d 877, 879 (Ky. 1967). When an agency acts as an arm of the central state government and is supported by funds from the state treasury, it performs a governmental function. *Autry v. Western Kentucky University,* 219 S.W.3d 713, 717 (Ky. 2007)(citing *Yanero v. Davis,* 65 S.W.3d 510, (Ky. 2001)). KRS 160.350(3) provides for the removal of school superintendents:

> A superintendent of schools may be removed for cause by a vote of four-fifths (4/5) of the membership of a board of education and upon approval by the commissioner of education. However, if the dismissal of the superintendent has been recommended by a highly skilled certified educator pursuant to KRS 158.6455 and the action is approved by the commissioner of education, the board shall terminate the superintendent's contract. Written notice setting out the charges for removal shall be spread on the minutes of the board and given to the superintendent. The board shall seek approval by the commissioner of education for removing the superintendent. The commissioner of education shall investigate the accuracy of the charges made, evaluate the superintendent's overall performance during the superintendent's appointment, and consider the educational performance of the students in the district. Within thirty (30) days of notification, the commissioner of education shall either approve or reject the board's request.

Under the authority cited above, we conclude that Board was performing a governmental function throughout the entirety of the removal process, and was, therefore, entitled to governmental immunity from Hargis' state tort and constitutional claims against it. The Board is clearly an arm of state

government. *Prater, supra.* "[T]he relationship between the DOE (Department of Education) and a local board of education is not one of common-law agency created by the agreement and consent of private persons or business entities but is a statutory relationship devised by the General Assembly to ensure the accomplishment of its constitutional duty to provide for an efficient system of common schools." *Williams v. Kentucky Dept. of Educ.,* 113 S.W.3d 145, 152 (Ky. 2003). KRS 160.350 authorizes boards of education to appoint and remove superintendents. Superintendents of schools are officers of the Commonwealth. Com. v. Burnett, 237 Ky. 473, 35 S.W.2d 857, 859 (1931). We find that the removal of a school superintendent pursuant to statute is an integral governmental function and that the Board was entitled to governmental immunity. Therefore, the trial court erred by denying the Board's motion for summary judgment on the state law claims.

Hargis argues that governmental immunity does not apply to contract claims. However, we need not reach this question because Hargis conceded she had no cause of action based on breach of contract at a hearing before the trial court on September 11, 2009. The discussion between Hargis' counsel and the trial court:

> Counsel: Thank you, Judge. Each- I'd like the Court to know that I understand that there is no breach of contract claim. I don't believe there is…
>
> Counsel: Okay. First and foremost, there was a several page argument about breach of contract. I did not respond to it in my response because I don't believe there

are damages under Kentucky law for breach of contract. So that should- if we're checking them off one by one, I think that was a pretty easy one to clear up.

Court: Okay. So then on- as far as the breach of contract, you feel, under Kentucky law, there's no damages?

Counsel: Correct…

Court: So are we in agreement, then, as far as the breach- in other words- and then depending on the Court's ruling in the event it would- does go to trial, then, obviously, these are not- the breach of contract would not get to the jury, because parties are recognizing and agreeing that that is not a cause of action; is that correct?

Counsel: Correct. All of the facts and circumstances and a lot of the other arguments intertwine.

Court: Right.

Counsel: But as far as the suit for just straight breach of contract, no. There's- I don't think there's a way to collect damages from a breach of contract claim.

Court: Okay.

Court: So then, as far as breach of contract and as far as damages, that would not be a question- that would not be-

Counsel: Just those two together.

Court: Yeah.

Counsel: Yes.

Kentucky law is clear that "[t]here is no question but that the plaintiff may abandon his cause of action by announcing in open court his intention and

purpose, or by his acts or omissions." *City of Hazard v. Duff*, 295 Ky. 628, 175 S.W.2d 146, 149 (1943). Similarly, this Court held that a party had abandoned a claim by failing to advance the claim for damages and by omitting the claim from the trial brief. *McCloud v. City of Cadiz*, 548 S.W.2d 158, 161 (Ky.App. 1977).

Therefore, we need not address the issue of whether governmental immunity applies to contract claims because Hargis abandoned her breach of contract claim before the trial court.

Next, the Board argues it is entitled to governmental immunity from federal claims because it is not a "person" under 42 U.S.C. § 1983. We disagree.

Although the Board's argument is well-reasoned and persuasive, this court is constrained by the holding of the Supreme Court of Kentucky in *Jefferson County Fiscal Court v. Peerce,* 132 S.W.3d 824 (Ky. 2004). In interpreting the U.S. Supreme Court case of *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), the Court held that "state treatment of sovereign immunity is not relevant to a determination of whether a party is immune from 1983 liability because only federal jurisprudence is controlling on this issue. *Id.* at 836. Therefore, after noting that there exists long-standing Kentucky precedent holding that local boards of educations constitute an arm of the state, the *Peerce* court read *Howlett* to require a holding that 11th amendment protections are not available to political subdivisions such as counties and municipalities. Although the *Peerce* case involved a Fiscal Court, it was implicit in the holding that the same reasoning would apply to a school board. Federal courts have consistently held that local

boards of education are not entitled to immunity from 42 U.S.C. 1983. See, e.g., *Adkins v. Bd. of Educ., of Magoffin County*, Ky., 982 F.2d 952 (6th Cir. 1993); *Ghassomians v. Ashland Indep. Sch. Dist*., 55 F.Supp.2d 675 (E.D.Ky. 1998); *Doe v. Knox County Bd. of Educ*., 918 F.Supp. 181 (E.D.Ky. 1996); *Tolliver v. Harlan County Bd. of Educ*., 887 F.Supp. 144 (E.D.Ky. 1995); *Blackburn v. Floyd County Bd. of Educ*., 749 F.Supp. 159 (E.D.Ky. 1990). Therefore, based upon the authority cited above, we conclude that the trial court properly denied the Board's motion for summary judgment based on governmental immunity from the federal claims.

Accordingly, the order of the Crittenden Circuit Court is affirmed in part, reversed in part, and remanded with directions to enter summary judgment in favor of the Crittenden County Board of Education on the state law claims against it on the basis on sovereign immunity and to continue with proceedings consistent with this opinion.

COMBS, JUDGE, CONCURS AND FILES SEPARATE OPINION.

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

COMBS, JUDGE, CONCURRING: I concur with the analysis of the majority opinion and write separately to address the concerns raised in the dissent.

The dissent properly notes the dearth of specificity in the complaint. However, the dissent also notes with some degree of incredulity that the Board failed to argue this point, effectively waiving that deficiency.

Consequently, I agree with the majority opinion that it is the proper function of the trial court to explore in more detail the merits or deficiencies of the grounds alleged in the complaint. We are dealing with a denial of a motion for summary judgment – not from a judgment on the merits following a trial. Therefore, I would allow this matter to proceed pursuant to the holdings in *Peerce*, supra, and *Howlett*, supra.

DIXON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree with the majority opinion in its reversal regarding all state tort and contract claims made by Hargis, I must dissent with regard to any alleged federal claim. While both parties argue over whether the Board is a "person" under federal law, neither adequately address Hargis' complete failure to remotely allege any federal cause of action in her Complaint. The Board inexplicably merely notes in passing "Hargis' failure in her Complaint to identify any federal claim or cause of action," prior to launching into a lengthy analysis as to why it is immune from suit for damages under 42 U.S.C. § 1983.

It is elementary that a complaint must contain a plain statement of the claim showing that the pleader is entitled to relief. CR 8.01. While the complaint need only give fair notice of a cause of action and the relief sought, it must nevertheless disclose a cause of action. *Security Trust Co. v. Dabney*, 372 S.W.2d 401 (Ky. 1963). To state a viable claim under 42 U.S.C. § 1983, a complaint must allege two essential elements: (1) the plaintiff was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States; and (2) the

deprivation was caused by a person while acting under the color of state law. *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448, 452 (6th Cir. 2002). However, 42 U.S.C. § 1983 is not self-executing, and is not itself a source of substantive legal rights. Section 1983 provides a method or remedy for vindicating substantive federal rights conferred elsewhere in federal law. *Albright v. Oliver*, 510 U.W. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *Adair v. Charter County of Wayne*, 452 F.3d 482, 492 (6th Cir. 2006); *Upsher*, 285 F.3d at 452.

Thus, a plaintiff is required to plead specific legal grounds for asserting a claim under 42 U.S.C. § 1983 based on a source of substantive federal law. Here Hargis' complaint makes only a conclusory statement that the Board's actions were "arbitrary and capricious" along with a reference to its denial of "Due Process" without more. There is no reference to the Constitution or an amendment or any federal law. The complaint utterly fails to address the nature of the federal rights abridged or due process violated. Moreover, Hargis fails to address whether this alleged violation is of state or federal due process, or both.

Consequently, because I believe Hargis has failed to properly state a federal claim upon which relief can be granted, I would reverse the trial courts' denial of the Board's motion for summary judgment *in toto*.

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