RENDERED: August 1, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000304-MR

K.M., BY HIS NEXT FRIEND B.M., HIS MOTHER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 01-CI-03414

FAYETTE COUNTY PUBLIC SCHOOLS,
HARVIE WILKERSON, CATHY LOUSIGNOTT,
ANGIE TEDDER, LARRY MOORE AND
DR. ROBIN FANKHAUSER — APPELLEES

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON,[1] JUDGES.

BAKER, JUDGE: K.M., by his next friend B.M., his mother, (referred to as K.M.) brings this appeal from a January 23,

[1] Judge Huddleston voted in this matter prior to his retirement effective June 15, 2003.

2002, summary judgment of the Fayette Circuit Court. We reverse and remand.

On December 6, 2000, K.M. was involved in a physical altercation with a teacher at Henry Clay High School, and as a result, was charged with assault.[2] K.M. was also suspended by the principal, and the matter ultimately went before the Fayette County Board of Education (the Board of Education). Pending the Board's decision, K.M. was enrolled in the Fayette County program called "Project Bound." The Board of Education eventually conducted an evidentiary hearing regarding the incident at issue, and, on August 22, 2001, the Board of Education expelled K.M. from school and denied him educational services for the remainder of the 2001-2002 school year.

K.M. thereupon filed a complaint in the Fayette Circuit Court. Therein, K.M. alleged, *inter alia*, that the Board of Education's decision to expel him was racially motivated and in violation of Kentucky Revised Statute (KRS) Chapter 344 (Kentucky Civil Rights Act) and 42 U.S.C. § 1983 (1996). He sought both monetary damages and injunctive relief. On January 23, 2002, the circuit court entered summary judgment dismissing K.M.'s claims. Ky. R. Civ. P. 56. This appeal follows.

[2] K.M. eventually pled guilty to disorderly conduct in order to resolve the charge against him.

K.M. contends that the circuit court erred by entering summary judgment dismissing his 42 U.S.C. § 1983[3] claim. Specifically, K.M. maintains the circuit court erroneously concluded that the Board of Education is clothed with Eleventh Amendment immunity and, thus, not a "person" under 42 U.S.C. § 1983. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476 (1991). We think that resolution of this issue centers upon a question of law; specifically, is the Board of Education entitled to Eleventh Amendment immunity?

Under 42 U.S.C. § 1983, any "person" who violates the federally protected rights of another may be enjoined and held liable for damages. See 15 Am. Jur. 2d Civil Rights § 88 (2000); see generally, Will v. Michigan Dep't of State Police, 491 U.S.

[3] 42 U.S.C. § 1983 (1996) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

58, 109 S. Ct. 2304, 105 L. Ed. 2d. 45 (1989); Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). It is well established that 42 U.S.C. § 1983 does not override the traditional sovereign immunity of a state and arms of the state as guaranteed by the Eleventh Amendment[4]; consequently, whether a governmental entity is a "person" subject to suit under 42 U.S.C. § 1983 is directly correlated to whether the entity enjoys Eleventh Amendment immunity. See Will, 491 U.S. 58; Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct 2018, 56 L. Ed. 2d 611 (1978); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); see also Gary Knapp, Annotation, Supreme Court's Views As To Who Is "Person" Under Civil Rights Statute (42 USCS § 1983) Providing Private Right Of Action For Violation Of Federal Rights, 105 L. Ed. 2d 721 (1999). Stated differently, any governmental entity imbued with Eleventh Amendment immunity is not a "person" within the meaning of 42 U.S.C. § 1983. See Will, 491 U.S. 58. As the state and arms of the state possess Eleventh Amendment immunity, these governmental entities are not "persons" under 42 U.S.C. § 1983.

[4] U.S. Const. amend. XI reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In concluding the Board of Education was clothed with Eleventh Amendment immunity, the circuit court relied upon Clevinger v. Board of Education of Pike County, Ky., 789 S.W.2d 5 (1990):

> The Plaintiff student also alleges a Fourteenth Amendment due process violation claiming not to have received notice that an expulsion could be without any educational services and also claiming racial discrimination as a result of being expelled purportedly arising under 42 U.S.C. §1983. Based upon the decision of the Supreme Court of Kentucky in Clevinger v. Board of Education of Pike County, Ky., 789 S.W.2d 5 (1990), wherein it was concluded a local school board is an agency of the State and not a "person" for purposes of a suit for monetary damages under §1983, this Court agrees with the Defendants and finds no action for monetary damages is available in state court under §1983 against these Defendants. Consequently, the Plaintiff student's §1983 claim must be dismissed.

Circuit Court's Final Order and Judgment at 2-3.

The Board of Education argues that we must affirm the circuit court's judgment as Clevinger is dispositive. Conversely, K.M. argues that Clevinger directly conflicts with the United States Supreme Court decision in Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)[5] and urges this court to "overrule" Clevinger. While there appears to be a

[5] In Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990), the Court held, in part, that whether an entity is entitled to Eleventh Amendment immunity was a federal question to be decided by application of federal law.

conflict between Howlett and Clevinger[6], we are of the opinion that Clevinger is no longer controlling in light of Yanero v. Davis, Ky., 65 S.W.3d 510 (2001).[7]

In Clevinger, the Kentucky Supreme Court was faced squarely with "[t]he question . . . [of] whether the state sovereign immunity doctrine which protects the School Board is preempted by 42 U.S.C. § 1983 . . . ." Id. at 11. The Court answered the question in the negative. The Court held that the local school board of education was vested with state sovereign immunity and, as a result, was vested also with Eleventh Amendment immunity:

> Thus, because in this Commonwealth a School Board is protected by state sovereign immunity from a suit for money damages for an injury wrongfully inflicted, whether the cause of action is common law or statutory, and because the United States Supreme Court has decided that where such is the case the state sovereign immunity defense will prevail against a 42 U.S.C. § 1983 claim, we reverse the decision of the Court of Appeals and affirm the decision of the trial court dismissing the claim for money damages in this case. In all other respects, the decision is affirmed.

Id. at 12.

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[6] Tolliver v. Harlan County Board of Education, 887 F. Supp. 144 (E.D. Ky. 1995), Creager v. Board of Education of Whitley County, 914 F. Supp. 1457 (E.D. Ky. 1996), and Blackburn v. Floyd County Board of Education, 749 F. Supp. 159 (E.D. Ky. 1990) provide further elucidation of this apparent conflict.

[7] We observe that Yanero v. Davis, Ky., 65 S.W.3d 510 (2001) expressly overruled Cullinan v. Jefferson County, Ky., 418 S.W.2d 407 (1967) which was relied upon, in part, by Clevinger v. Board of Education of Pike County, Ky., 789 S.W.2d 5 (1990).

Since Clevinger, our Supreme Court rendered Yanero. In pertinent part, Yanero held that a local board of education "is entitled to governmental immunity, but not sovereign immunity."[8] Yanero, 65 S.W.3d at 527. We perceive such holding as pivotal. Clevinger clearly premised its decision to recognize the Eleventh Amendment immunity of a local board of education upon the board's possession of sovereign immunity; per Yanero, however, a local board of education is no longer said to possess sovereign immunity. As the board no longer possesses sovereign immunity but only governmental immunity, we think Clevinger is no longer controlling upon whether the Board of Education has Eleventh Amendment immunity and is, therefore, a person under 42 U.S.C. § 1983.

Although we are not bound by the decisions of federal district courts, we view as persuasive the reasoning and holdings of Tolliver v. Harlan County Board of Education, 887 F. Supp. 144 (E.D. Ky. 1995) and Blackburn v. Floyd County Board of Education, 749 F. Supp. 159 (E.D. Ky. 1990). In those cases, the court recognized that whether a Kentucky local board of education was an arm of the state entitled to Eleventh Amendment immunity was to be decided by application of federal law.

[8] It is said that "sovereign immunity refers to the immunity of the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions." 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 10 (2001). See also Yanero, 65 S.W.3d 510.

Ultimately, the court determined that a Kentucky local board of education was **not** an arm of the state entitled to Eleventh Amendment immunity and, as a result, was a "person" under 42 U.S.C. § 1983. In so concluding, the court utilized the following factors for determining whether a governmental entity was an arm of the state for Eleventh Amendment purposes:

> Local law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.

Blackburn, 749 F. Supp. at 161-162 (quoting Hall v. Med. Coll. of Ohio at Toledo, 742 F.2d 299, 302 (6th Cir. 1984)). Essential to the decision that a Kentucky local board of education was not an arm of the state under the Eleventh Amendment were the following factors: (1) the board was not the state or its "alter ego"; (2) the board was a body politic and

corporate with perpetual succession; (3) the board "may sue and be sued, contract, purchase, receive, hold and sell property, and issue bonds, establish curriculum and employment standards"; (4) the board exercised control and management over the school district and addressed primarily "local concerns"; (5) the board possessed "substantial decision-making authority" when addressing local concerns; and (6) the board possessed and utilized the power to levy taxes. Blackburn, 749 F. Supp. at 162–163.

We, similarly, recognize that the issue of whether an entity possesses Eleventh Amendment immunity is to be decided by application of federal law and, thus, hold that a Kentucky local board of education is not an entity protected under the Eleventh Amendment and is a "person" amenable to suit under 42 U.S.C. § 1983. Accordingly, we are of the opinion the circuit court erred as a matter of law by concluding that the Board of Education was not a person within the meaning of 42 U.S.C. § 1983.

Additionally, K.M. maintains the circuit court erred by concluding that the Board of Education was not a "place of public accommodation" under the Kentucky Civil Rights Act (KRS Chapter 344). We, however, are not persuaded that our inquiry should focus upon the Board of Education as the place of public

accommodation; however, we view the place of public accommodation as the high school.

In Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), the Court's discussion of "public accommodation" focused on the place from which respondents were excluded (the City of Boston's St. Patrick Day Parade) rather than the group (South Boston Allied War Veterans Council) responsible for excluding respondents. Similarly, we believe the focus should be on the place from which K.M. was excluded (Henry Clay High School) rather than on the group (the Board of Education) responsible for excluding him. Indeed, K.M. was not denied access to the Board of Education.

We shall therefore determine whether the high school, as opposed to the Board of Education, was a place of public accommodation under the Kentucky Civil Rights Act. In the interest of thoroughness, we shall also address alternatively whether the Board of Education is a "place of public accommodation."

Discrimination in a place of public accommodation is prohibited by KRS 344.120:

> Except as otherwise provided in KRS 344.140 and 344.145, it is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and

> accommodations of a **place of public accommodation**, resort, or amusement, as defined in KRS 344.130, on the ground of disability, **race**, color, religion, or national origin.(emphases added).

A place of public accommodation is defined, in pertinent part, by KRS 344.130:

> As used in this chapter, unless the context requires otherwise, **"place of public accommodation**, resort, or amusement" includes **any place, store, or other establishment**, **either** licensed or unlicensed, which supplies goods or services to the general public **or** which solicits or accepts the patronage or trade of the general public **or which is supported directly or indirectly by government funds**, ...(emphases added).

We interpret KRS 344.130 as creating a two-prong test for determining what constitutes a place of public accommodation. Thereunder, a place of public accommodation is: [1] any place, store, or other establishment; that [2] either (a) supplies goods or services to the general public; (b) solicits or accepts patronage or trade of the general public; or (c) is supported directly or indirectly by government funds.

Utilizing the above two-prong test, we shall now determine whether the high school constitutes a place of public accommodation under KRS 344.130. Under the first prong, we must resolve whether the high school is a "place, store, or other establishment" within the meaning of KRS 344.130.

The interpretation of a statute is a matter of law for the court, and our review is, of course, *de novo*. Floyd County Bd. of Educ. v. Ratliff, Ky., 955 S.W.2d 921 (1997); Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). When interpreting a statute, we are bound to afford words their common meaning unless there appears a contrary intention. Hoy v. Kentucky Indus. Revitalization Auth., Ky., 907 S.W.2d 766 (1995). The term "place" is commonly understood to mean:

> **1.** An area with definite or indefinite boundaries. **2.** An area occupied by or set aside for a specific person or purpose. **3.** A definite location, ...

Webster's II New Riverside University Dictionary 897 (1st ed. 1994). We recognize that the Kentucky Civil Rights Act is remedial legislation and should be interpreted broadly to achieve its goals. See Kentucky Ins. Guar. Ass'n v. Jeffers, Ky., 13 S.W.3d 606 (2000). Here, we think the term "place" should be given its common meaning and interpreted broadly to include "an area with definite. . .boundaries," "an area. . . set aside for a specific . . . purpose," and "a definite location," such as a high school. We believe our interpretation of the term "place" not only comports with but, more importantly, promotes the Kentucky Civil Rights Act's goal of "safeguard[ing] all individuals within the state from discrimination because of . . . race." KRS 344.020(1)(b).

Hence, we are of the opinion that the high school is a “place” under the first prong of KRS 344.130.

Having determined that the high school meets the first prong of the test, we shall now turn to the second prong of KRS 344.130 - whether the high school: (a) supplies goods or services to the general public, (b) solicits or accepts patronage or trade of the general public, or (c) is supported directly or indirectly by government funds. We interpret the above sub-prongs, (a), (b), and (c), as separate and discrete.

It is undisputed that the high school is supported directly and indirectly by government funds. Additionally, we think the high school can be said to supply educational “services to the general public,” thereby satisfying the requirement of sub-prong (a). As such, we are of the opinion that the second prong of KRS 344.130 has been satisfied by government funding and by the supplying of services to the general public by the high school.

Alternatively, we address whether the Board of Education constitutes a place of public accommodation under the two-prong test of KRS 344.130. Under the first prong, we must resolve whether the Board of Education is a “place, store, or other establishment” within the meaning of KRS 344.130.

The term “establishment” is commonly understood to mean:

> **2.a.** A business firm, club, institution, or residence, ... **b.** A place of business, ... **c. An organized group**, as a government, political party, or military force.

Webster's II New Riverside University Dictionary 444 (1st ed. 1994) (emphasis added); see Hoy, 907 S.W.2d 766. As we are bound to give words their common meaning and to broadly interpret the Kentucky Civil Rights Act, we hold that the word "establishment" should be interpreted as including "any organized group," such as a local board of education.[9] See Kentucky Ins. Guar. Ass'n, 13 S.W.3d 606. Hence, we are of the opinion that the Board of Education is an establishment under the first prong of KRS 344.130.

Having determined that the Board of Education is an "establishment," we address the second prong of KRS 344.130 - whether the Board of Education: (a) supplies goods or services to the general public, (b) solicits or accepts patronage or trade of the general public, or (c) is supported directly or indirectly by government funds. It is undisputed that the Board of Education is supported directly and indirectly by government

[9] In Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987), the Court held the Unruh Civil Rights Act did not violate the First Amendment rights of the California Rotary Club by requiring the organization to admit women. In its discussion, the Court observed that the California Court of Appeals held the Rotary Club constituted a "business establishment" under the Act and interpreted the term "establishment" to include "'not only a fixed location but also a permanent commercial force or organization or a permanent settled position. . .'" (citations omitted). Id. at 542.

funds.[10] As such, we are of the opinion that the second prong of KRS 344.130 has been satisfied by government funding of the Board of Education.

In sum, we hold that the high school and the Board of Education constitute places of public accommodation under KRS 344.130. Our ratiocination for this conclusion is that the high school qualifies as a "place. . . which supplies. . . services to the general public. . . or which is supported directly or indirectly by government funds," and that the Board qualifies as an "establishment . . . supported directly [and] indirectly by government funds."[11]

K.M. further argues that the decision of the Board of Education to expel him was arbitrary. Specifically, K.M. maintains the Board of Education's decision was unsupported by the evidence. The circuit court concluded:

> KRS 158.150(2) requires a local board of education to provide an expelled student with educational services in an alternative program or setting "unless the board has made a determination, on the record, supported by clear and convincing evidence, that the expelled student poses a threat to the safety of other students or school staff and cannot be placed into a state-funded agency program." The nature of this allegation by the student Plaintiff amounts

[10] Additionally, we think it could be said that the Board of Education "supplies . . . services to the general public."

[11] We point out that the Kentucky legislature effectively waived any immunity enjoyed by a local board of education upon claims arising under the Kentucky Civil Rights Act (KRS Chapter 344). Ammerman v. Bd. of Educ., Ky., 30 S.W.3d 793 (2000).

> to an appeal to this Court of the expulsion decision. Nevertheless, this Court has reviewed the expulsion hearing video tape and record and finds, based upon such review, there was sufficient evidence to support a determination of the Plaintiff student posing a threat to the safety of school staff and of the unavailability of a state-funded agency program so as to have met the clear and convincing standard.

Circuit Court's Judgment and Order at 3-4.

As an appellate court, we step into the shoes of the circuit court and review the Board of Education's decision for arbitrariness. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, Ky., 379 S.W.2d 450 (1964). Arbitrariness has many facets; relevant to this issue is whether the Board of Education's decision was supported by a sufficient quantum of evidence. Id.

We think compelling evidence exists that K.M. did, in fact, assault a teacher. Further, it reasonably appears that expulsion from a public school is one of several permitted and appropriate remedies to be imposed upon such a finding. K.M., however, alleges that he possesses statistical and/or other evidence proving his expulsion from school was made in a discriminatory manner or under racially motivated circumstances. There having been no discovery in this regard prior to the entry of judgment, neither K.M. nor the Board of Education have had the opportunity to either prove or refute this assertion.

Therefore, we deem it premature to consider whether the Board of Education's decision to expel K.M. was arbitrary.

K.M. also asserts that the circuit court's dismissal of his complaint "without opportunity for discovery" was erroneous. Based upon our disposition of the appeal, we deem this assignment of error as moot.

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

EMBERTON, CHIEF JUDGE, CONCURS IN RESULT ONLY.

HUDDLESTON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
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