

RENDERED: AUGUST 29, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**MODIFIED: SEPTEMBER 26, 2008; 2:00 P.M.**

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2005-CA-002459-MR

MICHAEL A. HARMON  
AND EDDIE PHILLIPS

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 01-CI-01029

COMMONWEALTH OF KENTUCKY;  
JUSTICE CABINET, DEPARTMENT  
OF JUVENILE JUSTICE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

ACREE, JUDGE: Two teachers (Appellants) brought this action originally against the Hardin County Board of Education, the Kentucky Educational Collaborative

for State Agency Children (KECSAC), and the Commonwealth of Kentucky Justice Cabinet, Department of Juvenile Justice (DJJ), challenging a reduction in their compensation as violative of, *inter alia*, Kentucky Revised Statutes (KRS) 158.135(6), 158.060(3) and 505 Kentucky Administrative Regulation (KAR) 1:080. The Hardin Circuit Court dismissed all claims on motions for summary judgment of KECSAC and the Board, and allegedly acting, *sua sponte*, as to the DJJ, thereby dismissing the entire complaint. Having settled with KECSAC and the Board, the Appellants bring this appeal claiming that it was error for the Hardin Circuit Court to dismiss their claims against the DJJ. Because we conclude that the doctrine of sovereign immunity bars the Appellants' claims against the DJJ, we affirm the Hardin Circuit Court's disposition of the case.

### ***FACTS***

The Appellants, Michael A. Harmon and Eddie Phillips, were teachers employed by the Hardin County Board of Education. In July of 2001, the DJJ contracted with the Board of Education to educate youth in the care and custody of the Department. In their capacity as employees of the Hardin County School System, the Appellants were assigned to the Extended Summer Services (ESS) program to teach summer classes at the Lincoln Village Youth Development Center and the Hardin County Day Treatment Center, two facilities operated by the DJJ in Hardin County.

Until and for many years prior to July of 2001, the Appellants were employed by the Board of Education on the basis of an annual 230-day work

schedule derived from a 185-day “standard” school year, plus 45 days of work in the ESS program. During the course of a 230-day annual work schedule, they were paid an equal daily rate of pay in accordance with the Board of Education’s salary schedule. In a letter dated May 7, 2001, the Board informed the Appellants that the 230-day work schedule would be discontinued in favor of a 185-day work schedule. The letter further indicated that rather than being assigned to the ESS program, the Appellants would be eligible to apply for ESS positions which would now have their own pay schedule. In conjunction with the schedule change, the ESS program was reduced from 6 to 5 hour daily periods of instruction, resulting in an overall reduction in the Appellants’ summer take-home pay and retirement benefits. Under the new plan, however, presumptively to counteract the effects of the ESS program’s period of instruction reduction, the base salary for the new 185-day standard schedule was increased by 4%.

The Appellants brought suit against the Board, KECSAC, and the DJJ claiming that the new 185-day schedule and the reduced hours ESS program resulted in both a reduction of annual compensation and of future retirement benefits, and therefore constituted violations of, KRS 158.135(6), 158.060(3) and 505 KAR 1:080.<sup>1</sup>

### ***PROCEDURAL HISTORY***

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<sup>1</sup> The original action also charged the defendants with violating KRS 161.760(1), 157.350(3) and 505 KAR 1:080 §2(3)(e). On appeal, the DJJ’s alleged statutory violations are limited by the Appellant to KRS 158.135(6), 158.060(3) and 505 KAR 1:080.

At the trial court level, in response to motions for summary judgment by the Board and KECSAC, the circuit court dismissed all the claims against each of the defendants, including the claims against the DJJ. Having since settled with the Board of Education and KECSAC, the Appellants now appeal the dismissal of their claims against the DJJ claiming that because they were third-party beneficiaries to the contractual agreement between the Hardin Board of Education and the DJJ, they are entitled to damages for losses realized stemming from the DJJ's alleged violations of KRS 158.135(6), 158.060(3) and 505 KAR 1:080.

### ***STANDARD OF REVIEW***

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

### ***ANALYSIS***

The Appellants contend that the trial court improperly dismissed their claims against the DJJ alleging that the trial court was without authority to dismiss the claim since there was no motion for summary judgment by the Department pending at the time of dismissal. Thus, the trial court's *sua sponte* dismissal was

improper. The Appellants further contend that judgment should have been entered on the merits of the claims against the Department for violating KRS 158.135(6), 158.060(3), and 505 KAR 1:080, when it agreed to abide by the terms of the new schedule instituted by the Board of Education. Setting aside whether the Department's actions constituted a violation of the cited statutory law, we perceive an overarching problem with the Appellants' fundamental claim. In our view, the doctrine of sovereign immunity shelters the DJJ from any liability to the Appellant for its actions in carrying out its governmental duties of educating youth in its care and custody.

### ***Sovereign Immunity***

Sovereign immunity is a concept from old English common law “that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). The rationale for this concept is grounded in the separation of powers doctrine that courts “should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government . . . , because such actions furnish an inadequate crucible for testing the merits of social, political, or economic policy.” *Id.* at 519. In Kentucky, the doctrine of sovereign immunity has been adopted by section 231 of the Constitution of Kentucky which provides for immunity from suits “brought against the Commonwealth.” KY. CONST. § 231.

Although the defense of sovereign immunity usually arises from tort claims, it is well settled that the doctrine of sovereign immunity applies to actions in both tort and contract, thus making the Commonwealth immune from suits for breach of contract. *University of Louisville v. Martin*, 574 S.W.2d 676 (Ky. App. 1978); *see also Foley Construction v. Ward*, 375 S.W.2d 392 (Ky. 1964). In addition to breach of contract and tort claims, our Supreme Court has held that section 231 of the Kentucky Constitution and the doctrine of sovereign immunity also foreclose against the state or one of its agencies “claims of violation of statutes.” *Ammerman v. Board of Educ., of Nicholas County*, 30 S.W.3d 793 (Ky. 2000).

In the case of *Ammerman v. Board of Educ., of Nicholas County*, teachers brought an action against the Board of Education of Nicholas County alleging breach of contract, various tort claims, violation of statutes protecting teachers, and sexual harassment in violation of the Kentucky Civil Rights Act. The Court made a factual finding that the school board’s response to the teachers’ claims of sexual harassment was wholly inadequate. Despite the finding that sexual harassment indeed occurred and that the School Board’s response was woefully insufficient, the Court held that the Board of Education of Nicholas County was protected under the doctrine of sovereign immunity from claims of tort, breach of contract and non-civil rights statutory violations in connection with allegations of sexual harassment. *Ammerman*, at 797.

Here, the Appellants' claims are for damages for losses realized as a result of the Department's alleged violations of 505 KAR 1:080; KRS 158.060(3); and KRS 158.135(6).

As a division of the Commonwealth of Kentucky Justice Cabinet, an extension of the executive branch of government, the DJJ is a state agency. As such, the doctrine of sovereign immunity applies and, without an express waiver of sovereign immunity, protects the Commonwealth from liability without regard to whether the new 185-day schedule and adherence to it by the Department constituted a statutory violation. Thus, the Appellants' claims are barred by the doctrine of sovereign immunity.

### ***The Trial Court Acting Sua Sponte***

The Appellants argue that the trial court was without authority to dismiss their claims against the DJJ, *sua sponte*, given that the Department had made no motion for summary judgment when the decision was made. On either of alternative grounds, we hold that the circuit court's actions were not improper.

Although clearly discouraged, a trial court's dismissal of a plaintiff's claims against the defendant, *sua sponte*, is permissible where there is no undue prejudice to the plaintiff. *Fourroux v. City of Shepherdsville*, 148 S.W.3d 303 (Ky. App. 2004). Whether the trial court's actions resulted in undue prejudice against the plaintiff turns on whether the following minimal procedures of due process are met:

(1) allow service of the complaint upon the defendant; (2) notify all parties of its intent to dismiss the complaint; (3) give the plaintiff a chance to either amend his complaint or respond to the reasons stated by the [trial] court in its notice of intended sua sponte dismissal; (4) give the defendant a chance to respond or file an answer or motions; and (5) if the claim is dismissed, state its reasons for the dismissal.

*Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education*, 850 S.W.2d 340, 341 (Ky.App. 1993) citing *Gall v. Scroggy*, 725 S.W.2d 867 (Ky.App. 1987).

In *Storer Communications*, the plaintiff filed suit alleging that a gross receipts utility tax violated its constitutional rights. The trial court, without a motion for dismissal or summary judgment by any party, without briefs or arguments on the issues, entered an order granting its judgment for the defendant on the merits. On appeal, holding that none of the procedures outlined in *Gall v. Scroggy*, had been complied with, this court found that the trial court's *sua sponte* dismissal violated the plaintiff's due process rights.

We believe the case, *sub judice*, is distinguishable from *Storer Communications*. Here, there was a complaint and an amended complaint which, in turn, elicited responses from the three original defendants. Subsequently, the DJJ filed a motion to dismiss, and the Board and KECSAC filed motions for summary judgment, to which the court granted the Appellants an opportunity to respond and argue. The trial court subsequently granted partial summary judgment, dismissing three of the claims, leaving the remaining claims for further adjudication after more briefing and argument, thus giving the Appellants further



opportunity to respond to the pending motions for dismissal and summary judgment. This also served as notice to the Appellants that without providing more than they had to that point, the motions for summary judgment were likely to be granted. Five months after the order granting partial summary judgment, and after even more responses and replies to the motions, the trial court entered summary judgment on the remainder of the claims and dismissed the entirety of the complaint.

In both the partial summary judgment and the summary judgment, the court engaged in detailed, well-thought-out legal analysis, considering both sides of each of the issues in turn, and drawing logical conclusions. It is apparent that the trial court concluded that since the claims against the Board had been dismissed, those same claims, to the extent they related to the DJJ, were also dismissed. After all, the judgment of the trial court was that the Board's decision to modify the school schedule did not constitute a statutory violation. Logically, then, the Department's adherence to the Board's decision could not constitute a statutory violation either. Therefore, it was proper to assume that since the claims against the Board were dismissed, consequently the claims against the Department were also dismissed, *sub silencio*, and so the trial court properly dismissed the complaint in its entirety. We find that the Appellants' due process rights were not violated, nor were the Appellants unduly prejudiced, by the trial court's decision. We therefore uphold the trial court's *sua sponte* dismissal of the Appellants' claims against the DJJ.

In the alternative, upon further examination of the record, there is evidence that the court's granting summary judgment and dismissing the complaint may not have been *sua sponte* after all. The Kentucky Supreme Court held in, *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995), that Court rules "contemplate a relationship between a motion to dismiss for failure to state a claim and motion for summary judgment, and contemplate that a motion for judgment on pleadings may be treated as motion for summary judgment." *Id.* at 338.

In *Hoke*, the plaintiff alleged negligence against the defendant for injuries sustained during a tennis match. Following depositions and interrogatories, the defendant moved to dismiss for failure to state a claim. The Jefferson Circuit Court treated the motion to dismiss as a motion for summary judgment and dismissed the plaintiff's action with prejudice. The Kentucky Supreme Court held that the trial court did not act improperly in treating the motion to dismiss for failure to state a claim as a motion for summary judgment, when three months elapsed between defendant's motion and filing of trial court's memorandum and order, both parties filed memoranda arguing evidence during that period, and plaintiff did not seek to present additional evidence. *Id.*

Here, the original case was dismissed on December 2, 2001, after which the trial court allowed the Appellants to file an amended complaint. On January 7, 2002, the DJJ filed its second motion to dismiss (the first having been filed under the original complaint), to which the Appellants responded. On January 24, 2002, the Appellants filed a memorandum in response to the

Department's motion to dismiss. On February 7, 2002, the DJJ filed a reply to the Appellants' response memorandum. The trial judge never ruled on the Department's motion to dismiss. On November 14, 2005, the court adjudged that the motions for summary judgment were granted and that the Appellants' complaints were dismissed with prejudice. This ruling effectively treated the Department's pending motion to dismiss as a motion for summary judgment. We, like the Supreme Court in *Hoke*, "regard it as of little moment that the trial court failed to clearly distinguish between motions to dismiss for failure to state a claim and motions for summary judgment." *Hoke*, 914 S.W.2d at 338. During the course of the three-and-a-half years between the time the motion to dismiss was filed and the motions for summary judgment were granted, the Appellants were given ample time and opportunity to prove to the court that they had presented a case which revealed the existence of disputed material facts. Much of that time was dedicated to motions, exchanges, and discovery between the Board and the Appellants as the Appellants' fundamental claim was against the Board, and as examined *supra*, without a claim against the Board, there could be no claim against the DJJ. Therefore, by dismissing the entirety of the complaint, the trial court properly converted the Department's motion for dismissal into a motion for summary judgment. Consequently, we uphold the trial court's disposition of this matter whether it constituted a *sua sponte* dismissal of the Appellants' claims, or whether the trial court merely converted the Department's motions to dismiss into a motion for summary judgment. The result is the same.

## *Sovereign Immunity and Equitable Relief*

In response to the question of sovereign immunity, the Appellants claim that their seeking equitable relief to compel the DJJ to conform with statutory law is beyond the reach of sovereign immunity. Although the Appellants cite authority that offers examples in which claims of equitable relief have been made by teachers against their employing school district and supervisory officials, they provide no authority for an equitable relief exception to the bar of sovereign immunity which provides protection against claims of statutory violation by the state or its agencies. Moreover, we do not believe that there exists authority to contradict the holding, in *Ammerman, supra*, that claims of non-civil rights statutory violations against the state and its agencies are barred by sovereign immunity.

### **CONCLUSION**

Based on the foregoing, the judgment of the Hardin Circuit Court is affirmed.

COMBS, CHIEF JUDGE, AND THOMPSON, JUDGE, CONCUR  
IN RESULT ONLY.

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