

UNITED STATES
EASTERN DISTRICT OF KENTUCKY

CIVIL ACTION NO. 86-167

ERVIN B. PACK,

VS: REPORT AND RECOMMENDATION

FRED NEWPORT, ET AL.,

INTRODUCTION

The above-styled action was filed in this Court on [redacted] by Ervin B. Pack, a former employee of the defendant. Currently pending is a motion to dismiss the complaint and Recommendation.

The plaintiff alleges that the defendant violated his rights under the Due Process Clause of the United States Constitution and the procedures set out in Chapter 161 of the Kentucky Revised Statutes.

Pack had apparently been the principal of Wheelwright High School since 1983,¹ but was temporarily reassigned to work as a elementary school physical education teacher as a result of his "mishandling" of a bomb threat at the school. However, a letter he received in May, 1985, indicated that "his tenure status as a teacher in the Floyd County School District was in doubt. . . (and) since he was not certified to teach physical education, his position as physical education

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PIKEVILLE

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PLAINTIFF,

VS:

REPORT AND RECOMMENDATION

FRED NEWPORT, ET AL.,

DEFENDANTS.

INTRODUCTION

The above-styled action was brought pursuant to 42 U.S.C. Section 1983 by Ervin B. Pack, a former employee of the Floyd County Board of Education. Currently pending is a motion to dismiss, which will be the subject of this Report and Recommendation.

FACTS

The plaintiff alleges that he was discharged from his position in violation of his rights under the Due Process Clause of the United States Constitution and the procedures set out in Chapter 161 of the Kentucky Revised Statutes. ✓

Pack had apparently been the principal of Wheelwright High School since 1983,¹ but was temporarily reassigned to work as a elementary school physical education teacher as a result of his "mishandling" of a bomb threat at the school. However, a letter he received in May, 1985, indicated that "his tenure status as a teacher in the Floyd County School District was in doubt. . . (and) since he was not certified to teach physical education, his position as physical education

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teacher was going to be eliminated (and he might) not be employed in any teaching position".

An audit of Wheelright's funds completed that same month allegedly revealed that about \$10,000 was missing. The shortage was apparently blamed upon the plaintiff, who received a letter about May 16, 1985⁵ instructing him to appear before the June 12, 1985 Board of Education meeting to "present his side of the issue that exists as a result of [the] . . . audit. . .". The audit issue was not considered at the meeting, although personnel actions were--in fact, all personnel similarly summonsed to appear in connection with the audits of various schools were rehired except the plaintiff.²

The School Board then convened an executive session on June 26, 1985 to consider the issue of the audits. Thereafter, it returned to open meeting and made a pronouncement to the effect that "said central account treasurer and principal has acted illegally and unethically in failing to follow accepted and approved accounting in Kentucky School Systems. . .and has not been rehired by this Board for the 1985-1986 School year."

The defendants have now filed a motion to dismiss, raising several issues.

SOVEREIGN IMMUNITY

A suit by a private party which, for past acts or omissions, seeks to impose legal or equitable liability payable from state funds, is barred in a federal court by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974). However, municipalities, counties and other political subdivisions (e.g., public school districts) do not partake of the state's Eleventh Amendment immunity. Hall v. Medical College of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984), citing Mt.

²This included the person in charge of the day-to-day collections of the monies at Wheelright.

Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

Thus, the defendants' argument that the Floyd County Board of Education is entitled to sovereign immunity is without merit.

QUALIFIED IMMUNITY

The the conception animating the qualified immunity doctrine as set forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982), is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences'." Mitchell v. Forsyth, _____ U.S. _____ (1985). Thus, unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery; even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. Id.

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Further, even if these principles were not applicable, the qualified immunity in Wood v. Strickland, 420 U. S. 308 (1973) and its progeny insulate school board officials from liability only in their individual capacities and only for money damages, but never had any effect on their liability in their official capacities. Littlejohn v. Rose, 768 F.2d 765, 773 (6th Cir. 1985).

It appears, however, in examining the plaintiff's allegations that he has sufficiently stated a cause of action sufficient to withstand the motion to dismiss.

Why?
See yellow sheet:
①

LIABILITY OF SUPERINTENDENT

The defendants argue that the Superintendent, Pete Grigsby, was not liable since he had only the authority to make recommendations with regard to personnel actions and could not have made the decision not to rehire the plaintiff.

Liability of a school superintendent under section 1983 necessarily turns on some type of personal involvement in the case. Kuhlmeier v. Hazelwood School District, 578 F. Supp. 1286, 1293 (E.D. Mo. 1984). Further, at least one court has held that when the express language of a state statute vests with the school board the power to hire, fire or renew a teacher's contract, and the superintendent has no statutory power or authority to either employ or to dismiss the plaintiff, there was no cause of action stated against the superintendent who merely made a recommendation on the subject to the school board. Vanderzanden v. Lowell School District No. 71, 369 F. Supp. 67, 74-75 (~~D. C. Ore. 1973~~) (D. Or. 1973).

The pertinent portions of the Kentucky Revised Statutes provide:

160.370 Executive agent of board; superintendent, duties as

The superintendent shall be the executive agent of the board that appoints him and shall meet with the board except when his own tenure, salary, or the administration of his office is under consideration. As executive officer of the board, the superintendent shall see that the laws relating to the schools, the bylaws, rules and regulations of the state board for elementary and secondary education, and the regulations and policies of the district board of education are carried into effect. . . He shall be the professional adviser of the board in all matters. . .

160.380 School employes; superintendent to recommend; qualifications; when employed

All appointments, promotions and transfers of principals, supervisors, teachers and other public school employes shall be made only upon the recommendation of the superintendent of schools, subject to the approval of the board. If the board of education cannot agree with the superintendent as to any legally qualified person recommended by the superintendent, the board of education may appeal to the state board for elementary and secondary education to review the case and the decision of the state board for elementary and secondary education shall be final. . .

161.790 Termination of contract by board; causes for; procedure; suspension pending trial; appeal

(1) The contract of a teacher shall remain in force during good behavior and efficient and competent service by the teacher and shall not be terminated except for any of the following causes:

..Immoral character or conduct unbecoming a teacher..

(d) Inefficiency, incompetency, or neglect of duty, when a written statement identifying the problems or difficulties has been furnished the teacher or teachers involved. . .

(2)(a) Charges on the above causes shall be supported by written records of teacher performance by the superintendent. . .

(3) No contract shall be terminated except upon recommendation of the superintendent and unless the teacher is furnished with a written statement, specifying in detail the charge or charges against said teacher, signed by the chairman and secretary of the board of education and naming a date and place at which the teacher may appear before the board of education and answer said charge or charges. . .

(4) Upon receipt of the teacher's notice of intention to appear and answer such charges, the board of education shall issue such subpoenas as shall be necessary for the determination of the issues involved. The issue shall be heard at the time and place set and the hearing shall be public or private at the discretion of the teacher. Both parties may be represented by counsel and may require the presence of witnesses upon subpoena. Each witness shall be required to take oath or affirmation before an officer of the board of education. . . Upon completion of both sides of the case the board of education may by a majority vote dismiss the teacher or may defer its action for not more than five days.

(5) The board of education may, on recommendation of the superintendent, suspend a teacher pending final action to terminate his contract if, in its judgment, the character of the charges warrants such action. . .

Given the fact that the essential charge that the plaintiff makes is a failure to follow proper procedure in firing him, it appears that the Superintendent was sufficiently personally involved to warrant denying the motion to dismiss on this basis.

STATUTE OF LIMITATIONS

The plaintiff has alleged that, in addition to the procedural due process claims, the defendant has violated state law--namely KRS 161.790. While the issue of whether that Kentucky law has been violated may potentially be considered as a pendent claim, Crawley v. Board of Education of Marion County, Kentucky, 658 F.2d 450 (6th Cir. 1981), the defendant asserts that this claim is barred by the

statute of limitations set forth in the following portion of the statute:

(6) The teacher shall have a right to make an appeal both as to law and as to fact to the circuit court. If said appeal is not made within thirty days after dismissal, then the decision of the board of education shall be final. Such appeal shall be an original action in said court and shall be commenced by the filing of a petition against such board of education, in which petition the facts shall be alleged upon which the teachers relies for a reversal or modification of the order of termination of contract.

The plaintiff admits that the above-styled action was not filed until more than one year after he was notified that--unlike the others being investigated--no recommendation had been made to rehire him. Further, the decision regarding the audit was made less than two weeks later, and the end-result of that decision was announced in public session. While the plaintiff may well be correct in his assertion that the defendants totally failed to comply with the statute, and that it might have been more difficult to determine what his rights were, it does not excuse the long delay herein involved.

Thus, the defendants are entitled to dismissal of the state law claims.

PUNITIVE DAMAGES

The defendant contends that punitive damages may not be awarded against the board, under the authority of City of Newport v. Fact Concerts, 453 U.S. 247 (1981). In that case, the Court held that municipalities are immune from punitive damages under section 1983, but made no statements as to whether this principle should be extended to school districts.

Although the defendants have cited no case in support of their position, it appears that the weight of authority may well be to the effect that school districts are covered by the decision. ^{See, e.g.,} Okeson v. Tolley School District, 570 F. Supp. 408, 411 (N.D. N.D. 1983), rev'd on other grounds, 760 F.2d 864 (8th Cir. 1985), rev'd on rehearing, 766 F.2d 378 (8th Cir. 1985). ^{nevertheless,}

~~However~~, subsequent to the pertinent Supreme Court decision, the Sixth Circuit Court of Appeals affirmed the awarding of punitive damages against a

school district in a 1983 action. Stachura v. Truskowski, 763 F.2d 211 (6th Cir. 1983), aff'd on other grounds sub nom, Memphis Community School District v. Stachura, ___ U.S. ____ (1986).

It appears, therefore, that punitive damages are potentially available against the Board, notwithstanding the City of Newport case.

RECOMMENDATION

Based on the foregoing discussion, it is RECOMMENDED that the motion to dismiss be denied, on all grounds except for the argument raised with regard to the pendent state claims.

Objections to this Report and Recommendation must be filed within ten days of the date of same, or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd _____ U.S. _____ (1984); Fed. R. Civ. P. 72.

This the _____ day of December, 1986.

JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

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This the _____ day of December, 1986.

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UNITED STATES MAGISTRATE