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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000574-MR

PATRICIA BENTLEY, INDIVIDUALLY
AND AS PARENT OF MELISSA HARP, A
MINOR APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CI-01738

TRINITY CHRISTIAN ACADEMY;
AND JAMES ARMISTEAD,
INDIVIDUALLY AND AS
HEADMASTER OF TRINITY
CHRISTIAN ACADEMY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND MOORE, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

DIXON, JUDGE: Appellant, Patricia Bentley, individually and as parent of Melissa Harp[2] (collectively "Harp"), appeals from an order of the Fayette Circuit Court granting summary judgment in favor of Appellees, Trinity Christian Academy ("TCA"), and James Armistead, in both his individual capacity and as Headmaster of TCA. Finding no error, we affirm.

TCA is a small private Christian high school located in Lexington, Kentucky. Harp applied and was accepted to be a sophomore at TCA in the Fall of the 2003-2004 school year. Students are accepted to TCA based upon a renewable one-year agreement or contract. Bentley, Harp's mother, signed the "Statement of Agreement" with the school on October 11, 2003. Harp did well her first year and was asked to return for her junior year. However, on April 25, 2005, Harp was asked to leave TCA. Although the parties disagree as to whether Harp was suspended or expelled,[3] she was permitted to take her final exams and received credit for the year's classes. However, Harp's contract was not renewed for her senior year.

TCA claims that Harp was suspended after she developed a negative attitude toward school and "continually missed or was tardy to class" on days tests were given. Apparently, in February and March of 2005, Harp and Bentley met with Armistead to discuss the issue. Armistead maintains that during these meetings, Harp was aggressive and belligerent. Harp's alleged discipline problem

[2] At the time the complaint was filed in April 2006, Harp was still a minor. However, she reached the age of majority in May 2006.

[3] Because we find that the distinction is irrelevant herein, we will refer to such as a dismissal.

culminated in a final incident in April 2005, when several students reported that Harp had been talking about and engaging in inappropriate sexual conduct with another female student, L.E.

On April 25, 2005, after interviewing several students and meeting with L.E., Armistead discussed the situation with Harp and Bentley. Armistead contends that Harp's version of the alleged incident did not match L.E.'s story. Further, Armistead claims that Harp was disrespectful and would neither take responsibility for her actions nor acknowledge that such was disruptive to other students. At the conclusion of the meeting, Armistead determined that it would be in TCA's best interest if Harp was suspended for the remainder of the school year because she had not complied with the guidelines set forth in TCA's handbook.[4]

On April 21, 2006, Harp filed a complaint in the Fayette Circuit Court claiming denial of due process, breach of contract, libel and slander, and invasion of privacy. In October 2007, TCA filed a motion for summary judgment. Following a hearing, the trial court entered an order on February 1, 2008, granting summary judgment in favor of TCA and Armistead, dismissing all claims. Following the denial of their motion to alter, amend or vacate, Appellants appealed to this Court. Additional facts are set forth as necessary.

Harp argues that she was entitled to due process prior to her dismissal from TCA. While acknowledging that the law pertaining to due process in private schools differs significantly from that in public schools, Harp relies on a sentence

[4] Harp was actually given the option of withdrawing from TCA so that a disciplinary action would not appear on her transcript.

in TCA's handbook that states, "All students are entitled to enjoy the basic rights of citizenship recognized and protected by law for a person of their age and maturity." Thus, Harp contends that the right to due process is a basic right of citizenship and she was entitled to the same protections afforded public school students. We disagree.

In *Centre College v. Trzop*, 127 S.W.3d 562, 567 (Ky. 2003), the Kentucky Supreme Court ruled that a private institution is not required to afford a student the same due process as if it were a public school or any other "state actor." Therein, a Centre College student, Peter Trzop, was dismissed from the school after being found in possession of a survival knife, which was a violation of the college's student handbook. Trzop thereafter filed a complaint in the circuit court asserting both constitutional and contractual due process claims. On appeal, the Court held:

> Centre College is a private institution of higher learning. As such, it is not constrained to the same rules and standards as public schools or institutions. Historically, Kentucky courts have been reluctant to restrain the rights of private colleges to discipline, regulate, or impose restrictions upon their students. *See Kentucky Military Inst. v. Bramblet*, 158 Ky. 205, 164 S.W. 808, 809-810 (1914); *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204, 206 (1913); *Lexington Theological Seminary v. Vance,* Ky.App., 596 S.W.2d 11 (1979).
>
> In addition, 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). Furthermore, even when a

> private college specifically agrees to provide due process, it does not necessarily subject itself to the entire panoply of due process requirements that would be applicable at a state-sponsored education institution. *Jansen v. Emory Univ*., 440 F.Supp. 1060, 1062 (N.D. Ga. 1977), *aff'd*., 579 F.2d 45 (5th Cir.1978). *See also, Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir.1983); *Life Chiropractic College, Inc. v. Fuchs*, 176 Ga.App. 606, 337 S.E.2d 45, 48 (1985).
> . . . .
>
> The relationship between a private college and its students can be characterized as contractual in nature. Therefore, students who are disciplined are entitled only to those procedural safeguards which the school specifically agrees to provide. *Psi Upsilon v. University of Pa.*, 404 Pa. Super. 604, 591 A.2d 755, 758 (1991), (*quoting Boehm v. University of Pa. School of Veterinary Medicine*, 392 Pa. Super. 502, 573 A.2d 575 (1990)). *See also Holert v. University of Chicago*, 751 F.Supp. 1294, 1301 (N.D.ILL. 1990).

In its "contract" with Harp, TCA never guaranteed the right to due process. In fact, TCA's student handbook provides that "[m]ajor discipline problems are defined as those which cause substantial disruption of the educational process at TCA or those which endanger the safety and well-being of another. They could be grounds for suspension or expulsion even for a first offense." In addition, when Bentley signed the TCA contract she expressly agreed that:

> 4. I understand the school reserves the right to suspend or dismiss any student who:
>
> a. has a scholastic or conduct record which is not in keeping with the best interest of the school
>
> b. develops a negative attitude toward the Christian philosophy of the school

c. is found to be in possession of or using drugs, alcoholic beverages, or tobacco products.

Even if we were to construe the TCA's handbook as guaranteeing the same due process protections as provided in public schools, Harp still would not prevail on this claim. The United States Supreme Court in *Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975), noted that even in a public school setting, "due process" means "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." Thus, all that is required is an informal exchange where the student is provided the opportunity to characterize his conduct and explain the circumstances of such.

In this case, Bentley and Harp met with Armistead on the morning of April 25, 2005, and were informed of the allegations that had been made concerning Harp's conduct. Harp does not dispute that she was given the opportunity to respond and defend her actions. We would point out that Armistead testified during his deposition that he did not go into the meeting with the intention of dismissing Harp. Rather, it was only after hearing Harp's version of events and again witnessing her "belligerent and disruptive" behavior during the meeting that he concluded it was in the school's best interest if Harp did not return to TCA.[5] Therefore, because the parties did meet and discuss the situation, we conclude that neither Harp's constitutional nor contractual due process protections were violated by her dismissal from TCA.

[5] L.E. was also dismissed from TCA.

Harp also claims that TCA and Armistead breached the contract by failing to follow the five-step disciplinary process and failing to document in writing any prior discipline issues as set out in the handbook. TCA responds that it was, in fact, Harp who violated the contract with her disruptive conduct and attendance issues.

In his deposition, Armistead conceded that he did not follow the five-step process or document any prior problems with Harp. He stated, however, that the parties had met on several occasions regarding a behavioral problem Harp was having with a teacher and her repeated tardiness to that teacher's class. Harp does not dispute that these meetings occurred. Further, under the section pertaining to major offenses, it is clear that TCA retained the discretion to expel or suspend a student who committed a major offense, even if it was a first offense. Clearly, in such a situation, the prior written documentation and five-step process would not apply.

More importantly, we must conclude that Harp failed to avail herself of the required remedy if she believed that Armistead breached the contract. The handbook contains a grievance procedure whereby an aggrieved student/parent can appeal the Headmaster's decision to the school board. To invoke the grievance procedure, the handbook states:

> 1. When the parents or teacher disagrees [sic] with the Principal/Headmaster's ruling, they **shall notify the Principal/Headmaster in writing** that a meeting with the Executive Committee of the School Board is being requested. Areas of disagreement shall be stated. The

> Principal/Headmaster shall notify the Board Chairman of the request and also send a copy of the parent's letter to the Chairman. (Emphasis added).

Bentley acknowledged that although she telephoned the school board chairman to tell him that she disagreed with Armistead's decision, she never notified TCA or Armistead in writing to request a meeting with the Executive Committee. "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*, 127 S.W.3d at 568. *See also Lexington Theological Seminary Co.,* 596 S.W.2d at 14. As such, we agree that summary judgment on Harp's breach of contract issue was proper.

Harp next claims that she presented sufficient evidence of libel and slander to withstand the motion for summary judgment. Harp contends that Armistead's allegations that she was engaging in inappropriate sexual conduct with another female student were false, and that he defamed her by interviewing students during his investigation and then sending an e-mail to the school board following her dismissal from TCA. We disagree.

Appellant cites to the decision in *Stringer v. Wal-Mart Stores*, 151 S.W.3d 781, 793 (Ky. 2004), wherein our Supreme Court held:

> "Defamation by writing and by contemporary means analogous to writing . . . is libel. Defamation communicated orally is slander." [2 Dan B. Dobbs, THE LAW OF TORTS, § 401 at 1120 (2001). *See also McCall v. Courier-Journal & Louisville Times Co*., Ky., 623 S.W.2d 882, 884.] Generally-speaking, however, the "gist" of both torts is "the injury to the reputation of a

person in public esteem" [*Fordson Coal Co. v. Carter*, 269 Ky. 805, 108 S.W.2d 1007, 1008 (1937)] and thus prima facie cases for both torts require proof of:

1. defamatory language

2. about the plaintiff

3. which is published and

4. which causes injury to reputation. [*Columbia Sussex Corp., Inc. v. Hay*, Ky.App., 627 S.W.2d 270, 273 (1981)].

The *Stringer* Court, however, recognized a series of qualified or conditional privileges. "[W]here 'the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice.'" *Stringer*, 151 S.W.3d at 796 (quoting *Baker v. Clark*, 186 Ky. 816, 218 S.W. 280, 285 (1920)). *See also Baskett v. Crossfield*, 190 Ky. 751, 228 S.W. 673, 675 (1921) ("Where a party makes a communication and such a communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest and is made to another having a corresponding interest, the communication is privileged if made in good faith."). The *Stringer* Court concluded that "[w]hen a qualified privilege is established, the presumption of malice disappears, and thus 'false and defamatory statements will not give rise to a cause of action unless maliciously uttered.'" *Stringer*, 151 S.W.3d at 797 (quoting *Stewart v. Williams*, 309 Ky. 706, 218 S.W.2d 948, 950 (1949)).

Turning to the instant case, we fail to perceive how Armistead's interviews with the students could possibly be characterized as slander. The allegations of Harp's improper conduct were reported by the students. Armistead did nothing more than question them as to the details of what they had heard or observed of the alleged incidents. No one claims that Armistead divulged any information or opinions about Harp to the students. Furthermore, pursuant to the student handbook, Harp agreed that: "Administrators and teachers have the right to question students regarding their conduct or the conduct of others." There is simply no evidence in the record that any person present during the student interviews slandered Harp.

We likewise reach the same conclusion with regard to Armistead's e-mail to the school board following Harp's dismissal from TCA. Contrary to Harp's claim, at no point in the e-mail does Armistead render an opinion as to Harp's conduct or refer to her as a lesbian. And while Harp characterizes Armistead's statements as false, the information in the e-mail was nothing more than a recitation of the student's allegations, Armistead's investigation, and the subsequent action he took following his meeting with Harp and Bentley. There is certainly no evidence of malice towards Harp contained therein. We believe that the trial court properly characterized the e-mail as an internal reporting memo that Armistead was likely under a duty to send to the board. Thus, we find that Armistead's e-mail falls within the purview of a qualified privileged communication. *Stringer,* 151 S.W.3d 781.

Finally, Harp argues that she presented sufficient evidence to support her claim for invasion of privacy based upon a 2006 letter sent by Armistead to parents of TCA students. The letter provided in part:

> Our attorneys have asked that I contact the parents of each student to obtain permission from you to discuss with you and/or your child any knowledge you may have of Melissa Harp during the period from 2004-2005 while she attended TCA, including information as to her conduct, relationships with students, teachers, and Mr. Armistead and her suspension near the end of 2005.

The letter did not contain any details as to Harp's dismissal. Moreover, parents and students were specifically informed that they were not obligated to speak with anyone about the matter. Nevertheless, Harp claims that the letter gave unreasonable publicity to her private life and placed her in a false light before others. We disagree.

In *McCall v. Courier-Journal and Louisville Times Co*., 623 S.W.2d 882, 887 (Ky. 1981), *cert. denied*, *Courier-Journal v. McCall*, 456 U.S. 975, 102 S.Ct. 2239, L.Ed.2d 849 (1982), the Kentucky Supreme Court adopted the principles for invasion of privacy as enunciated in the Restatement (Second) of Torts § 652A:

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another . . . ; or

> (b) appropriation of the other's name or likeness . . . ; or
>
> (c) unreasonable publicity given to the other's private life . . . ; or
>
> (d) publicity that unreasonably places the other in a false light before the public . . . .

The 2006 letter was sent to parents after Harp filed her complaint in the trial court. Without question, that complaint, which was public record, contained more detailed information than was included in the letter. Further, both Bentley and Harp admitted to communicating information about Harp's dismissal: Harp by publishing it on her My Space page, and Bentley through her discussions with numerous TCA parents. "[T]he right to privacy ceases upon the publication of the facts by the individual or with his consent." *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 970 (1927). Clearly, neither had an expectation of privacy with regard to the matter. *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Accordingly, summary judgment was proper on the invasion of privacy claim.

For the reasons set forth herein, the order of the Fayette Circuit Court granting summary judgment in favor of Trinity Christian Academy and James Armistead is affirmed.

ALL CONCUR.

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