

No. 06-2329

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Upon *de novo* review, *see, e.g., Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 855 (6th Cir. 2003), we conclude that dismissal of Kammeraad's action was proper on the ground that the MDEQ is not a "person" that can be sued under § 1983. Accordingly, we need not decide whether Eleventh Amendment immunity or the doctrine of claim preclusion also required dismissal.

Section 1983 creates a cause of action against any "person" who, while acting under color of state law, deprives another person of rights secured by the United States Constitution. 42 U.S.C. § 1983. Neither a state nor an agency that acts as an arm of the state is a "person" within the meaning of the statute. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-71 (1989).

The Supreme Court has considered several factors in determining whether an entity is an arm of the state (rather than a political subdivision): "(1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government." *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (en banc) (citations omitted), *cert. denied*, 126 S. Ct. 1584 (2006).

Consideration of these factors establishes that the MDEQ is an arm of the state. The governor of the state of Michigan created the MDEQ "as a principal department within the Executive Branch" of the state government. Mich. Comp. Laws § 324.99903(1). As such, the MDEQ's actions might subject the state to liability — even if, as Kammeraad claims, the MDEQ collects over \$4 million annually in underground storage tank registration fees. *See Ernst*, 427 F.3d at 362. The director of the MDEQ is appointed by the governor and serves "at the pleasure of the Governor." *Id.* § 324.99903(2). The functions of the MDEQ — protection of air and water quality, for example — were formerly within the purview of another state agency, the Michigan Department of Natural Resources. *See id.* § 324.99903(3), (4), (5), (6). These are traditionally functions of state rather than local government.

Contrary to Kammeraad's argument, the Supreme Court did not hold in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that state agencies are "persons" for purposes

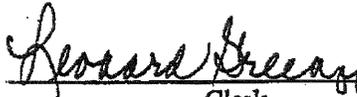
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of § 1983; it held that “municipalities and other *local* government units” are “persons” within the meaning of the statute. *Monell*, 436 U.S. at 690 (emphasis added). Kammeraad is also incorrect in arguing that a state agency may be considered a “person” when it is sued for injunctive, rather than monetary, relief. State *officials* are considered “persons” when sued for injunctive relief, *see Will*, 491 U.S. at 71 n.10, but Kammeraad did not name any officials as defendants. Finally, the fact that a Michigan statute defines “person” to include state agencies, *see Mich. Comp. Laws* § 4.416(1), does not alter the federal case law interpreting § 1983.

Because the MDEQ is not a “person” that can be sued under § 1983, the challenged judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT


Clerk