UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

RICHARD W. LEWIS, Ph.D.,

Plaintiff,

v.

ELIZABETH RICHITT, RICHARD WEIHER, DAVID ANTONUCCIO, LOUIS MORTILLARO, DENNIS ORTWEIN, CHRISTA PETERSON, STATE OF NEVADA BOARD OF PSYCHOLOGICAL EXAMINERS, LINDA DUFF, TYRONE DUFF,

Defendants.

CV-N-99-0386-ECR-RAM

O R D E R

I. Background

This case is based upon the compliant filed against Dr. Lewis by Mr. Tyrone Duff arising out of Dr. Lewis's testimony at Mr. Duff's child custody hearings. Dr. Lewis claims that various members of the Nevada Board of Psychological Examiners and members of the Nevada Attorney General's office conspired together to induce Mr. Duff to file his complaint, which Dr. Lewis claims was false. This conspiracy is alleged to have violated Dr. Lewis's

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civil rights under 42 U.S.C. § 1983. The remaining defendants filed a motion for summary judgment (#177) claiming that Dr. Lewis could not demonstrate any constitutional deprivation, and, therefore, could not state a claim under section 1983. Dr. Lewis opposed (#205) and the defendants replied (#206).

II DISCUSSION

A. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. Northwest Motorcycle Ass'n v. U.S. Department of Agriculture, 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. Fed. R. Civ. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form--namely, depositions, admissions, interrogatory answers, and affidavits--only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. Fed. R. Civ. P. 56(c); Beyene v. Coleman Security Services, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgement is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). As to materiality,

only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

B. Section 1983

Section 1983 creates a cause of action against a person who, acting under the color of state law, deprives another of rights guaranteed under the Constitution. 42 U.S.C. § 1983. Section 1983 does not create any substantive rights, rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. The primary inquiry in a section 1983 analysis is whether the plaintiff has articulated a Constitutional right giving rise to a claim under this statute. Baker v. McCollan, 443 U.S. 137, 140 (1979). Therefore, a conspiracy, even if established by a plaintiff, will not give rise to section 1983 liability unless the plaintiff can show an actual deprivation of constitutional rights. Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989).

C. Due Process

At the start we make a distinction not made by Dr. Lewis between substantive due process and procedural due process.

Substantive due process involves a challenge to a law on the basis that it is fundamentally unfair. Substantive due process is not implicated in this case. Procedural due process is implicated when a plaintiff has a property right or entitlement that the government seeks to take away. In those cases the plaintiff is entitled to notice and some type of hearing before being deprived of his property right or entitlement. In this case, Dr. Lewis was given notice of the board's actions. He was given a formal hearing, and in the end the board did not deprive him of his license, nor limit his practice in any way. Therefore, even if we were to apply the Matthews v. Eldridge, 424 U.S. 319, 335 (1976) balancing test we would conclude that Dr. Lewis could not state a violation of his procedural due process rights.

D. Other Constitutional Violations

Nonetheless, Dr. Lewis claims that his constitutional rights were violated by a conspiracy to have Mr. Duff file a false claim with the board. Dr. Lewis presents the following as the conduct that violated his constitutional violations: (1) improper deliberations among board members; (2) incorrect findings of fact and conclusions of law; (3)a violation of the duty to disclose

conflicts of interest; (4) prior disclosures which violated due process; (5) failure to follow the proper procedures for holding the disciplinary hearing which violated due process; (6) obstructing a witness; (7) discussions between board members and members from the attorney general's office; (8)deprivation of judicial review by trick which violates due process; and (9)the change of the punishment from a private reprimand to a public reprimand without a hearing in violation of due process. None of these examples states a protected constitutional interest.

The defendants have absolute immunity for all actions taken in their quasi-judicial function as board members. Mishler v. Clift, 191 F.3d 998, 1004 (9th Cir. 1999). Therefore, because actions (1)-(7) were actions taken by the defendants in their role as board members involving the claims against Dr. Lewis, those actions cannot be the basis of a constitutional deprivation. All claims based on those actions are barred by absolute immunity.

Dr. Lewis's alleged deprivation of his rights to appeal by trick does not state a constitutional deprivation. Dr. Lewis was not prevented from filing an appeal. His reasons for chosing not to pursue an appeal are irrelevant. The option for appealing was open to Dr. Lewis and he chose not to pursue it.

Finally, Dr. Lewis cannot base his section 1983 on the allegation that the Psychology Board changed his punishment from a

private reprimand to a public reprimand because there is no evidence to support his claim.[1] Pursuant to NRS 641.280 all disciplinary hearings of psychologists are public record. Therefore, Dr. Lewis cannot claim a right to keep private any of the information disclosed at the hearing. Dr. Lewis did not produce any evidence to demonstrate that his private letter of reprimand was made public.

Dr. Lewis cannot state a deprivation of constitutional rights, and, therefore, cannot maintain a section 1983 claim.

In addition to his failure to state a constitutional violation, Dr. Lewis's claims of conspiracy suffer from two timing problems, and a failure of proof.

First, Mr. Duff filed his complaint with the board in 1993. Dr. Lewis alleges that the conspiracy began in 1995 after he asked for payment from the Division of Child and Family services. There is no way that a complaint filed in 1993 could be the basis for a conspiracy that began in 1995.

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[1] Even if we were to consider the evidence attached to Dr. Lewis's opposition we would find that the board did not change the punishment. The evidence conclusively demonstrates that although the board published the results of the disciplinary hearing in the monthly journal the formal punishment of Dr. Lewis was still a private letter of reprimand. Further, the testimony of Deputy Attorney General Moore establishes that because the board hearings are public meetings the results are often published, even if the formal punishment issued by the board is a "private" letter.

The second timing problem is that the only evidence that Dr. Lewis ever asked for payment indicates that payment was requested several months after the disciplinary proceedings were initiated.[2] It is impossible that a demand for payment made after the initiation of an investigation could be the triggering point of an investigation.

Dr. Lewis also claims that even though the complaint was filed in 1993 he was cleared of any wrongdoing soon after that complaint was filed. Therefore, Dr. Lewis claims that part of the conspiracy was the revival of the complaint against him. To begin, this is not the basis for Dr. Lewis's complaint. Dr. Lewis's complaint specifically refers only to a filing of a complaint in 1995, not a revival of a past complaint and Dr. Lewis never moved to amend his complaint to add this new basis for liability.

However, even if we were to consider the newly proposed theory of liability, there is no evidence presented that indicates that the board completed an investigation of Dr. Lewis and found him to be cleared. Dr. Weiher's deposition is not properly authenticated, see Orr v. Bank of America, 285 F.3d 764 (9th Cir.

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[2] Dr. Lewis's affidavit makes a statement that after he requested payment they resurrected the complaint against him. This statement is not admissible evidence because it does not state any specific facts, only a conclusory allegation.

2002), and plaintiff presents no other properly authenticated evidence of being cleared from the initial complaint. Therefore, Dr. Lewis has not produced any admissible evidence that supports his claim of conspiracy.

IT IS, THEREFORE, HEREBY ORDERED THAT, the motion for summary judgment (#177) is **GRANTED**. The clerk shall enter judgment accordingly.

DATED: July 3, 2002.

Edward C. Reed

UNITED STATES DISTRICT JUDGE