

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3966

Summary Calendar

NORBERT KOHNKE, II,
Plaintiff,

JACQUELINE CARR,

Plaintiff-Appellant,

v.

WALTER REED, ET AL.

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 90 4762 G)

(February 25, 1994)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

PER CURIAM:*

Jacqueline Carr filed suit in federal district court against numerous state officials and private entities pursuant to 42 U.S.C. § 1983 and other federal and state statutes. Carr appeals the district court's grant of summary judgment in favor of the

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

defendants on Carr's § 1983 claim. Finding no error, we affirm the judgment of the district court.

I.

On December 1, 1989, Jacqueline Carr, a Louisiana attorney, was convicted of six counts of felony theft in Louisiana state court in St. Tammany Parish, Louisiana. During the jury's deliberation that day, the prosecuting authorities--i.e., Assistant District Attorney Pamela Hershey and Special Prosecutor Patrick J. Berrigan--received information that Carr was attempting to flee the jurisdiction. They learned that plane reservations for Carr--under the name of J. Carrson--and Norbert Kohnke, a close friend and client of Carr's, had been booked on a Delta Airlines (Delta) flight, leaving New Orleans at 7 a.m. the next day for New York.

Jerome DiFranco and Robert Champagne, investigators with the St. Tammany district attorney's office, attempted to verify this information. DiFranco testified at Carr's bail hearing that he had contacted Beverly Minor, an employee with Delta in its Customer Services Department, who confirmed that someone had made bookings under those names on that flight. DiFranco also testified that Champagne then had called the local police department and asked Officer Benny P. Gilardi to retrieve a written copy of this reservation information from Delta. Officer Gilardi did so and faxed the information to the St. Tammany district attorney's office. This faxed document was produced for the court at Carr's bail hearing.

Although Carr's attorney argued that Carr had no knowledge of the plane reservations, he also represented to the court that Kohnke could have made these reservations in hope that there would be "something to celebrate" the next day. The trial court then ordered that Carr's bail be raised to \$250,000, pending sentencing, and that Carr relinquish her passport. Carr was jailed for approximately three hours that day until bail was posted, and on February 5, 1990, she was sentenced to six years in prison.

On December 3, 1990, Carr and Kohnke, proceeding pro se, filed suit in the United States District Court for the Eastern District of Louisiana for damages against Walter Reed, the district attorney for St. Tammany Parish, in his official capacity; Hershey and Berrigan, assistant district attorneys, in their individual and official capacities; DiFranco and Champagne, special investigators for the district attorney's office, in their individual and official capacities; Delta Airlines; and Delta employees Dennis Hogan and Minor.¹ Carr brought suit under 42 U.S.C. § 1983,² alleging that the defendants had violated her rights as guaranteed by the Fourth, Fifth, Eighth, Fourteenth, Fifteenth, and Nineteenth Amendments to the United States Constitution, and various federal and state statutes. She contended that the defendants had entered into a conspiracy to

¹ Other defendants were originally named but were subsequently dismissed by Carr and Kohnke.

² Because Carr alone appeals, we relate only those facts and claims pertinent to Carr's case.

involve her and her client Kohnke in a "fugitive flight scam" and/or had "negligently investigated the fugitive flight information" given to the St. Tammany district attorney's office. As a result of this conspiracy and/or negligent investigation, Carr asserted that she had been falsely imprisoned, maliciously prosecuted, and subjected to an illegal search and seizure and an invasion of privacy. She also asserted that she had lost voting privileges "contrary to the Fifteenth and Nineteenth Amendments" and that her right to travel had been unduly restricted.

The defendants associated with the district attorney's office filed a motion to dismiss or, alternatively, for summary judgment on grounds of absolute or qualified immunity. Delta, along with defendants Hogan and Minor, also filed a motion to dismiss or, alternatively, for summary judgment. After a hearing on these motions held November 6, 1991, the district court granted summary judgment in favor of all of the defendants, dismissing Carr's federal claims with prejudice and her state claims without prejudice. Carr then filed a timely notice of appeal.

II.

We review the district court's grant of summary judgment de novo, applying the same standard as a district court. Brewer v. Wilkinson, 3 F.3d 816, 819 (5th Cir. 1993), petition for cert. filed (Dec. 8, 1993); Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is proper only if the record discloses that there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law. Brewer, 3 F.3d at 819; Harbor Ins. Co. v. Trammel Crow Co., 854 F.2d 94, 98 (5th Cir. 1988) (quoting FED. R. CIV. P. 56(c)), cert. denied, 489 U.S. 1054 (1989). Rule 56(e) of the Federal Rules of Civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [his] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Moreover, in reviewing the record, we are not bound to the grounds articulated by the district court for granting summary judgment, for we may affirm the judgment on other appropriate grounds. Brewer, 3 F.3d at 820.

III.

Carr argues on appeal that the district court erred in granting the defendants summary judgment on her § 1983 claim. She asserts summary judgment in the defendants' favor was inappropriate because

[i]n a symbiotic concert of action among [sic] the government officials, the prosecutors acting as "cops" with the St. Tammany Parish investigators, . . . and a private entity, Delta Air Lines, Inc., through its employees, the conspirators deprived Jacqueline Carr of her liberty. The falsified airline reservations [sic] were made available to the law enforcement officers of St. Tammany Parish, Louisiana, in violation of the Delta Air Lines, Inc. rules and regulations regarding passenger privacy, to incarcerate Jacqueline Carr through state action, fraud and malevolence. The prosecutors and investigators knew the falsified airline reservations were a "scam" and perpetrated the scam on the State District Court to increase Jacqueline Carr's bail bond
. . . .

We disagree.

Assistant District Attorneys Hershey and Berrigan, who conducted the presentation of the State's evidence regarding the plane reservations, are absolutely immune from § 1983 damage claims against them in their individual capacities for actions taken in initiating and pursuing prosecution. Imbler v. Pachtman, 424 U.S. 409, 427-30 (1976); Johnson v. Kegans, 870 F.2d 992, 996 (5th Cir.), cert. denied, 492 U.S. 921 (1989). This immunity shelters prosecutors whether they have acted wantonly, maliciously, or negligently. See Rykers v. Alford, 832 F.2d 895, 897 (5th Cir. 1987) (determining that federal prosecutors enjoyed absolute immunity for acts taken to initiate prosecution for interstate flight, even though charges were later dropped).

Further, Investigators DiFranco and Champagne, as state officials, are qualifiedly immune from § 1983 damage claims against them in their individual capacities for their official actions. To determine whether a defendant official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right. Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991); Brewer, 3 F.3d at 820. If the plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right had been clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Brewer, 3 F.3d at 820. Even

if we assume arguendo that Carr has sufficiently alleged a constitutional violation, Carr has provided no more than conclusory allegations as summary judgment evidence to support her claim that Investigators DiFranco and Champagne were involved in a conspiracy to manufacture the evidence of which they apprised the district attorney's office and the court. See Booker v. Koonce, 2 F.3d 114, 117 (5th Cir. 1993) (explaining that the district court's grant of summary judgment in favor of defendant police officers in a § 1983 action was proper when the plaintiff presented no more than conclusionary allegations in support of his claim that the officers manufactured evidence in order to get a warrant for his arrest). Investigator DiFranco is also absolutely immune from § 1983 damage liability for his testimony at Carr's bail hearing. See Briscoe v. LaHue, 460 U.S. 325, 331-34 (1983). Summary judgment in favor of the investigators was therefore proper.

Additionally, Carr's claim for damages under § 1983 in federal court against Hershey, Berrigan, Reed, DiFranco, and Champagne in their official capacities is barred by the Eleventh Amendment. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (explaining that a suit for damages against a state official in his official capacity is not a suit against the official but rather a suit against the State itself). Under Louisiana law, the district attorney's office "is an office of state, not local government." Diaz v. Allstate, 433 So. 2d 699, 701 (La. 1983). Moreover, inasmuch as Carr's claim is against

Reed in his supervisory capacity, the doctrine of respondeat superior is inapplicable in § 1983 actions. Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990); Bush v. Viterna, 795 F.2d 1203, 1206 (5th Cir. 1986).

Carr also presented no summary judgment evidence establishing a genuine issue that Delta or either of its employees conspired to deprive Carr of any federal right. Although a defendant need not be a state officer to act "under color" of law for § 1983 purposes, the defendant must be a "willful participant in joint activity with the State or its agents." Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981) (internal quotations and citations omitted). In relation to her claim against Delta, the only evidence proffered by Carr was that Delta, through its employee Minor, released reservation information to law enforcement officers in connection with their on-going criminal investigation. That evidence is inadequate to establish Delta's involvement--or Minor's involvement--in a conspiracy. It is also absurd for Carr to claim to have a reasonable expectation of privacy in the reservation information at issue in this case when she has continually denied that the reservation was actually made for her. The district court thus correctly granted summary judgment in favor of Delta and Minor.

Hogan's involvement was limited to testifying at the sentencing hearing in answer to a subpoena duces tecum.³ As a

³ Dennis Hogan is the District Marketing Manager in Delta's sales department. On January 31, 1990, Hogan received a copy of a subpoena duces tecum, issued at the request of Carr's attorney,

witness at that hearing, he is absolutely immune from § 1983 damage liability under Briscoe v. LaHue for his testimony. See 460 U.S. at 331-34. Thus, the district court properly granted Hogan's motion for summary judgment.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

to appear in court on February 5, 1990 at Carr's sentencing hearing, to testify and produce the following documents:

All records of the following: complete, original and/or changes therein for Norbert Kohnke and J. Carrson on Delta Flight 782, December 2, 1989, New Orleans to New York (Delta Locator No. BZ1DTZ), connecting in Atlanta, Georgia, for a reservation made in the name of Norbert Kohnke and J. Carrson; print-out information of the internal reservation information and form of SABRE-DL; SABRE locating number for American Airlines or Sabre Agency; flight history of Delta flight 782 (BZ1DTZ); fax number; originating flight information with American Airlines.

Hogan appeared at the sentencing hearing and on direct examination identified the records which Carr's attorney then introduced into evidence. Hogan was then released from the subpoena and had no further involvement in this matter until he was served with Carr and Kohnke's complaint on January 11, 1991.