

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8703
Summary Calendar

JOHN HALL THOMAS,

Plaintiff-Appellant,

VERSUS

TEXAS STATE BOARD OF MEDICAL EXAMINERS, ET AL.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-90-CV-500)

(May 4, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge.¹

John Hall Thomas challenges the district court's dismissal of his civil rights suit on summary judgment. We affirm.

Until 1982, Thomas was a licensed physician in Texas. In June 1982, the Texas State Board of Medical Examiners (the "Board") revoked Thomas's license. Thomas appealed the revocation in state court, but the state court later dismissed the action with

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

prejudice on Thomas's motion. Later in 1982, Thomas was indicted by a federal grand jury for illegal drug activity. Thomas pled guilty to one count of prescribing Preludin, a Schedule II non-narcotic, not in the usual course of medical practice; he was sentenced to five years imprisonment. This court affirmed Thomas's conviction.

In 1984, Thomas filed suit in federal district court against the Board, alleging that the Board and each of its members had a vendetta against him. Thomas alleged that the Board violated his right to procedural due process by giving him inadequate notice of the Board's hearing, conducting an inadequate hearing, and failing to conform to the requirements of the Texas Administrative Procedure Act. **Thomas v. Texas State Bd. of Medical Examiners**, 807 F.2d 453, 454 (5th Cir. 1987). Thomas also complained that the Board violated his Fourth Amendment rights by seizing certain documents that Thomas was not allowed to use during cross-examination at the hearing. Thomas also complained that the Board violated his First Amendment rights by asking him religious questions at the hearing and violated his Fifth Amendment rights by using writings from the state triplicate prescription program against him. Thomas finally alleged that TEX. REV. CIV. STAT. art. 4495b §§ 4.02, 4.05 (Vernon Supp. 1986) were unconstitutional. **Id.** This court reversed the district court's decision to abstain from deciding the case and remanded the case for further proceedings, expressing no opinion on the merits of Thomas's claims. **Id.** at 457. On remand, Thomas voluntarily dismissed the suit.

Thomas later applied to the Board for reinstatement, and in June 1988, the Board denied his request. In June 1990, Thomas filed suit in district court against the Board and the Board members who sat in 1982 and 1988 individually, alleging that the Board and the named members violated 42 U.S.C. §§ 1983 and 1985 by investigating him from 1974-1982 with the intent of injuring him and damaging his reputation. Thomas further alleged that the Board discriminated against him because of his religious beliefs and because most of his patients were black. Thomas also complained that the Board violated several of his constitutional rights during the 1982 revocation hearing. Concerning Thomas's bid for reinstatement in June 1988, Thomas alleged that Dr. Brindley, the Executive Director of the Board, advised him that he was ineligible to reapply for reinstatement as long there was litigation between Thomas and the Board. Thomas also alleged that the Board treated him differently from other applicants because of religious and political bias and that he had a property right in receiving a medical license for which he had trained. Finally, Thomas alleged that the Board conspired with federal officials to frame him. Thomas requested the district court to declare the revocation of his medical license void, and award \$40,161,660 in actual damages, and twice that amount in exemplary damages.

The defendants filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6). The district court treated the motion to dismiss as a motion for summary judgment and granted the motion, dismissing fourteen of the defendants, on grounds that Thomas's claims against

them were barred by the Texas statute of limitations. The remaining defendants filed a motion for summary judgment, which the district court also granted.

II.

For reasons stated in the district court's thorough order of November 23, 1992, the members of the Board who were sued in their official capacities were entitled to Eleventh Amendment immunity. For reasons stated by the district court in its order, we also agree that the claims asserted against the Board members based on their alleged mishandling of the 1982 revocation hearing are barred by the statute of limitations.

B.

Thomas's remaining claims arise from the 1988 reinstatement hearing. Thomas argues that his due process and equal protection rights were violated at that hearing. "Summary judgment is reviewed de novo, under the same standards the district court applies to determine whether summary judgment is appropriate." **Amburgey v. Corhart Refractories Corp.**, 936 F.2d 805, 809 (5th Cir. 1991).

When a defendant asserts a qualified immunity defense, "the first inquiry . . . is whether the plaintiff `allege[d] the violation of a clearly established constitutional right.'" **Duckett v. City of Cedar Park**, 950 F.2d 272, 276-77 (5th Cir. 1992) (quoting **Siegert v. Gilley**, 500 U.S. 226, ___, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991)). If there is no constitutional injury, it is "unnecessary to address the issue of qualified

immunity." **Quives v. Campbell**, 934 F.2d 668, 671 (5th Cir. 1991).

In reviewing a case similar to Thomas's, which was also brought against the Texas State Board of Medical Examiners, this court stated that it:

cannot overemphasize the limited role of federal courts in reviewing decisions such as this which are made by an agency of the state exercising its police powers as mandated by the Constitution. It is the duty of the Texas Board of Medical Examiners to protect the public from individuals who may endanger public health and safety through their practice of medicine. A federal court has no business intruding upon the substantive decisions of a public institution by substituting its judgment for that of the public body. This is especially true in cases where the public safety is so clearly at risk as it is here Clearly doctors are in a better position to judge whether . . . a member of their profession should be allowed to continue to practice in the profession.

Ramirez v. Ahn, 843 F.2d 864, 869 (5th Cir.), **cert. denied**, 489 U.S. 1085 (1989). However, these interests do not preclude a federal court's examination of whether Thomas was deprived of his federal constitutional right to procedural due process. **Id.** Procedural due process interests are implicated when there exists a liberty or property interest which has been interfered with by the State and when the procedures attendant upon that deprivation were constitutionally insufficient. **Kentucky Dept. of Corrections v. Thompson**, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). Constitutionally protected property interests are determined by reference to state law. **Logan v. Zimmerman Brush Co.**, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

Texas law declares that "the practice of medicine is a privilege and not a natural right of individuals" TEX. REV.

CIV. STAT. art. 4495b § 1.02(1) (Vernon Supp. 1994). Thomas nevertheless contends that he has a property interest in a medical license even when revoked. We disagree. Thomas does not have "a reasonable, continued expectation of entitlement to a previously acquired benefit." **Ramirez**, 843 F.2d at 867. His license was revoked in 1982 and his arguments relate only to the reinstatement hearing in 1988. The district court correctly found that Thomas stated no claim predicated on violation of Thomas's due process rights.

Thomas also contends that the Board violated his First Amendment and substantive due process rights by punishing him for seeking to withdraw the guilty plea that resulted in his conviction in federal district court. The record reflects that the Board focused on six factors relevant to Thomas's application for reinstatement: (1) whether Thomas regretted the behavior that resulted in his criminal conviction, (2) whether Thomas accepted responsibility for the behavior that resulted in his conviction and the revocation of his license, (4) whether Thomas had accumulated any continuing medical education hours, (5) Thomas's psychiatric health, and (6) whether Thomas would continue to prescribe Preludin to a population with a high percentage of hypertension. After hearing Thomas's testimony regarding those issues, the Board denied Thomas's request for reinstatement and informed Thomas that he could reapply the following year. Thomas's attempt to withdraw his guilty plea was not mentioned during the reinstatement hearing, and Thomas has made no other showing of the existence of a genuine

issue concerning his attempt to withdraw his guilty plea. Thomas therefore has failed to "set forth specific facts showing the existence of a genuine issue for trial on this claim." **Deters**, 5 F.3d at 123.

Thomas argues next that the district court erred in granting summary judgment on his equal protection claim. A claimant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination. **McCleskey v. Kemp**, 481 U.S. 279, 292, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). A violation of equal protection occurs only when the governmental action in question "classif[ies] or distinguish[es] between two or more relevant persons or groups." **Brennan v. Stewart**, 834 F.2d 1248, 1257 (5th Cir. 1988). "Discriminatory purpose . . . implies more than [an] awareness of consequences[.] . . . It implies that the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for **the purpose** of causing its adverse effect on an identifiable group[.]" **Lavernia v. Lynaugh**, 845 F.2d 493, 496 (5th Cir. 1988) (internal quotations and citations omitted).

Thomas argues that his equal protection rights were violated because he was treated differently than Donald W. Hopkins, M.D., another doctor whose license was revoked as a result of a felony drug conviction. The Board granted Dr. Hopkins's application for reinstatement in 1988. The district court found that Dr. Hopkins was not similarly situated to Thomas, noting that "the only similarity between Thomas and the doctor he provides as an example

is that they both pleaded guilty to a felony drug charge." Thomas contends that this finding was erroneous and points to the fact that the Board required Hopkins to participate in continuing medical education and psychiatric evaluation in order to be reinstated. Thomas argues that the Board was also concerned with his willingness to participate in continuing medical education and his psychiatric health, but did not reinstate him.

The record demonstrates that, even if the Board was concerned with Hopkins's psychiatric health and medical education, the Board was also concerned with Thomas's degree of remorse for his criminal conduct and Thomas's degree of comfort with prescribing large quantities of Preludin to patients with hypertension. The summary judgment materials indicate that Thomas and Hopkins were not similarly situated. The Equal Protection clause should not be used to interfere with the Board's case-by-case discretionary judgment and thereby "substitut[e] its judgment for that of the public body." **See Ramirez**, 843 F.2d at 869.

For the reasons stated above, the judgment of the district court is

AFFIRMED.