UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1408
Summary Calendar

ROY L. MCCLUNG, JR. and CAROL JEAN MCCLUNG,

Plaintiffs-Appellants,

VERSUS

DAVID W. HAJEK, ET AL.,

Defendants,

DAVID W. HAJEK,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(7:90-CV-120-K)

(March 1, 1994)

Before THORNBERRY, DAVIS, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:[*]

Appellants Roy and Carol McClung filed this § 1983 suit against numerous public officials regarding the termination of McClung's employment. The defendants all filed motions to dismiss

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pursuant to Fed. R. Civ. P. 12(b)(6). The motion was eventually granted in favor of all defendants. The McClungs appeal only the dismissal concerning Judge David W. Hajek. We affirm in part and reverse and remand in part for the following reasons.

Facts and Prior Proceedings

At the time of his termination, Mr. McClung was the Chief Adult and Juvenile Probation Officer of the 50th Judicial District of Texas. Judge Hajek is a district judge in the 50th Judicial District in Texas, and he, along with the County Judges of the surrounding counties within the 50th Judicial District, compose the Juvenile Probation Board. Pursuant to Texas Human Resources Code §§ 15.0007 and 15.0008, Judge Hajek terminated McClung's employment, and the Juvenile Probation Board ratified this termination on August 15, 1990.

After McClung filed suit, all defendants filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The district court dismissed the claims as to all defendants except Judge Hajek. The McClungs did not appeal from this dismissal. The district court subsequently granted Judge Hajek's motion to dismiss based in part on his assertion of qualified immunity. The McClungs appeal from this dismissal.

Discussion

Dismissal under Rule 12 (b)(6) is appropriate when, accepting all well pleaded facts as true and viewing them in the light most favorable to the plaintiff, the plaintiff could prove no set of

facts that would entitle him to relief. **Walter v. Torres**, 917 F.2d 1379, 1383 (5th Cir. 1990). We review **de novo** a district court's dismissal on the pleadings. **Walker v. South Central Bell Telephone Co.,** 904 F.2d 275 (5th Cir. 1990). In examining a claim of qualified immunity by a defendant, the first step is to ascertain whether the plaintiff has alleged a violation of a clearly established constitutional right. **Siegert v. Gilley**, 111 S.Ct. 1789, 1793 (1991). The second step is to "decide whether the defendant's conduct was objectively reasonable." **Spann v. Rainey**, 977 F.2d 1110, 1114 (5th Cir. 1993). In their First Amended Complaint, the McClungs allege that Judge Hajek, while acting in his official administrative capacity, under color of state law, and with the requisite state action, violated their constitutional rights in a variety of ways which are discussed below.

A. Due Process Claim

Mr. McClung contends that he was terminated without due process of law and that he had both liberty and property interests in his employment. His contention is without merit. State law controls whether he has any such interests in his employment. **Board of Regents v. Roth**, 92 S.Ct. 2701 (1972). Under Texas law, a public employee, if employed "at will," has no vested right in his employment. **See Burt v. City of Burkburnett**, 800 S.W.2d 625, 626 (Tex. Ct. App. 1990). McClung was an "at-will" employee of the Juvenile Board. Tex. Hum. Res. Code Ann. § 152.0007(1), 152.008(b) (West 1990).

Because McClung was an "at-will" employee of the Juvenile Board, he does not have any protected liberty or property interest which would entitle him to due process protection. **See Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Serv.**, 925 F.2d 866, 877 (5th Cir.), **cert. denied**, 112 S.Ct. 193 (1991). Therefore, he has not alleged the violation of an established constitutional right, and the district court's dismissal of this claim was proper.

B. First Amendment Claim

Mr. McClung claims that he was terminated because he was involved in a "highly divisive political situation involving Baylor County Sheriff Jerry Barton." McClung states that he was terminated by Judge Hajek because he assisted the state district attorney in obtaining the signature of an individual on a petition to remove Barton, who was Judge Hajek's "political ally and friend".

Dismissals of public employees based on political affiliation or freedom of association violate the First Amendment. **Coughlin v. Lee**, 946 F.2d 1152, 1158 (5th Cir. 1991). Accepting McClung's allegations as true and viewing them in the light most favorable to McClung, he has alleged the violation of a constitutional right and under these facts, Judge Hajek's actions appear to be objectively unreasonable. Therefore, the district court erred in dismissing this claim.[1]

[1] We emphasize that we are not expressing an opinion concerning the viability of McClung's claims. We only express that McClung has pleaded facts sufficient to state a violation of a

constitutional right.

C. Malicious-Prosecution Claim

Mr. McClung alleges that Hajek instituted a malicious criminal prosecution against him. McClung admits that he was indicted on December 13, 1990, but stops short of mentioning whether he was convicted or not. The district court found that McClung was convicted, and as such, could not maintain a suit for malicious prosecution. **See Brummett v. Camble**, 946 F.2d 1178, 1183 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 2323 (1992) (favorable termination of prosecution is element necessary to establish malicious prosecution). The district court's finding of McClung's conviction came from outside McClung's complaint, and is thus improper for a Rule 12(b) (6) dismissal. **Ware v. Associated Milk Producers, Inc.,** 614 F.2d 413, 415 (5th Cir. 1980). Ordinarily, when matters outside the pleadings are considered, a motion for dismissal based on failure to state a claim is converted into a motion for summary judgment, which is disposed of as required by Fed. R. Civ. P. 56. **See** Fed. R. Civ. P. 12(b)(6). Even when granted **sua sponte**, summary judgment is governed by Rule 56's requirement of ten days notice and an opportunity to respond. **See**, **Powell v. United States,** 849 F.2d 1576, 1577 (5th Cir. 1988).

The district court relied on matters outside the pleadings, thereby effectively converting the motion for dismissal based on failure to state a claim into a motion for summary judgment. Thus, the Rule 56 requirements for an additional ten days notice and an opportunity to respond came into play. The McClung's have not had an opportunity to respond as required by Rule 56. Therefore, the

malicious prosecution claim is remanded for further proceedings consistent with Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 56.

D. State-Law Claims

McClung has asserted supplemental state-law causes of action for conversion and the intentional infliction of emotional distress. Because we remand the First Amendment and malicious prosecution claims to the district court for further proceedings, we also remand the state-law claims to the district court to exercise its discretion contingent on the future disposition of the remanded federal claims.

E. Other Claims

McClung also alleges other facts that he believes rise to the level of a constitutional violation. We disagree and find no merit in McClung's claims regarding alleged involuntary servitude, failure to assault, and improper payment of probation department funds.

Conclusion

Based on the foregoing, we reverse the district court's dismissal of the McClung's First Amendment and malicious prosecution claims and remand for further proceedings on these issues. The state-law claims are also remanded. In all other respects, the decision of the district court is affirmed.

REVERSED AND REMANDED IN PART;
AFFIRMED IN PART.