

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2606

Summary Calendar

DARLENE STEGEMILLER,

Plaintiff-Appellee,

v.

DIANE WILSON, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91 1690)

(January 13, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Diane Wilson, Shirley Davis, Jan Easley, Pauline Randolph, and Jane Maines appeal the magistrate's denial of their motion for summary judgment on grounds of qualified immunity. We reverse the judgment of the magistrate and remand.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On December 3, 1990, Darlene Stegemiller, an former employee of the County Clerk's office in Fort Bend County, Texas, filed suit in Texas state court in Fort Bend County against Diane Wilson, the County Clerk of Fort Bend County, and four supervisors in the Fort Bend County Clerk's office--Shirley Davis, Jan Easley, Pauline Randolph, and Jane Maines (hereinafter collectively "defendants"). Stegemiller alleged, inter alia, violations of 42 U.S.C. § 1983.

The case was then removed to the United States District Court for the Southern District of Texas, pursuant to 28 U.S.C. § 1441. All parties consented to trial before a magistrate judge, and on December 10, 1992, the district court referred this case to the magistrate.

Stegemiller was employed by Fort Bend County in the County Clerk's office from June 1985 until November 14, 1990. In her complaint, she alleges that the defendants violated her civil rights under § 1983. She asserts that because she refused to attend a "mandatory" Christmas party in December 1989 for religious reasons, her employment was eventually terminated. She thus maintains that this termination was in violation of the First Amendment to the United States Constitution.

Stegemiller also alleges that the defendants violated her civil rights by terminating her employment in violation of article 6252a-16a of Texas Revised Civil Statutes (the Whistleblower Act). She contends that in August 1989, she

reported to defendant Wilson that several employees were fraudulently collecting salary for hours they had not worked. Because of this "whistleblowing," she argues, the defendants developed and implemented a pattern of harassment that resulted in her employment termination.

The defendants moved for summary judgment inter alia on grounds of qualified immunity, arguing that Stegemiller had failed to set forth a cognizable federal claim as the basis for her § 1983 cause of action. On July 8, 1993, the magistrate denied the defendants qualified immunity. The defendants then filed a timely notice of appeal.

II.

A district court's denial of a claim of qualified immunity is appealable, pursuant to 28 U.S.C. § 1291, to the extent that denial turns on an issue of law. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992); Enlow v. Tishomingo County, Miss., 962 F.2d 501, 508 (5th Cir. 1992). The determination of a defendant's claim to qualified immunity is a threshold question which must be resolved inasmuch as it determines a defendant's immunity from suit rather than merely immunity from damages. See Siegert v. Gilley, 111 S. Ct. 1789, 1793-94 (1991); Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982); Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), petition for cert. filed (U.S. Dec. 8, 1993) (No. 93-7016). To make such a determination, a court must first

ascertain whether the plaintiff has sufficiently asserted the violation of a federal right. Siegert, 111 S. Ct. at 1793; Brewer, 3 F.3d at 820; Salas, 980 F.2d at 305. If the plaintiff has asserted the violation of a federal 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; Salas, 980 F.2d at 305-06. Our review is plenary, accepting the facts in the light most favorable to the nonmoving party. Salas, 980 F.2d at 304.

III.

Because § 1983 does not itself create any substantive rights, to establish liability under § 1983 a complainant must demonstrate that defendant officials, acting under color of state law, deprived the complainant of a right secured by the Constitution or laws of the United States. Stegemiller has asserted two bases for her § 1983 claim: (1) that her employment was terminated as a result of the defendants' discrimination against her because of her religious beliefs, in violation of the First Amendment, and (2) that her employment was terminated as a result of her having reported wage collection improprieties committed by her colleagues to their supervisor, defendant Wilson, in violation of Texas' Whistleblowers Act. The magistrate denied the defendants' assertion of qualified immunity

on these bases, and the defendants contend that the magistrate erred in doing so. We agree.

First, although Stegemiller contends that she was terminated as a result of religious discrimination, she does not set forth a claim of constitutional deprivation. By her own admission, Stegemiller asserts in her complaint that she timely appealed her "termination" from employment in the County Clerk's office to the Fort Bend County Commissioner's Court and that she was thereafter given employment in the county's Information Services Department. Her appeal before the County Commissioner's Court and her subsequent placement with the Information Services Department took place before the date on which she was removed from the employment roster in the County Clerk's office. She has continuously been employed, and in fact still is employed, by Fort Bend County, and she has not alleged that her placement with the Information Services Department was in any way a demotion. Therefore, she was never effectively terminated from employment with Fort Bend County but merely transferred from one county department to another. As such, her religious-discrimination claim does not rise to the level of a constitutional deprivation and cannot serve as a basis for her § 1983 cause of action. Cf. Maples v. Martin, 858 F.2d 1546, 1550 (11th Cir. 1988) (determining that a transfer of a public employee which did not reduce the employee's salary or benefits did not result in a constitutional injury); Alton v. Hurst, 734 F.2d 1240, 1244 (7th Cir.) (deciding that personnel disputes are best left to internal

procedures established by employers and employees and that the plaintiff's reassignment to other duties within the governmental department did not form the basis of a § 1983 claim), cert. denied, 469 U.S. 982 (1984).

Second, Stegemiller's claim that the defendants violated Texas' Whistleblowers Act cannot serve as a basis for her § 1983 cause of action. The Whistleblowers Act creates only the basis for a state law cause of action, i.e., it provides a remedy for public employees against their governmental employers for unlawful employment practices.¹ See Texas Dep't of Human Servs. v. Hinds, 860 S.W.2d 893, 897 (Tex. App.--El Paso 1993, writ requested); Texas Dep't of Human Servs. v. Green, 855 S.W.2d 136, 142-43 (Tex. App.--Austin 1993, writ requested). Although the Whistleblowers Act might provide Stegemiller with a claim for the violation of state law, only a violation of federal law can serve as the basis for a § 1983 cause of action.

In summary, Stegemiller has failed to set forth a cognizable § 1983 claim.

IV.

For the foregoing reasons, we REVERSE the judgment of the magistrate judge. We REMAND for consideration of whether all

¹ We also note that the Whistleblowers Act does not provide a private cause of action against an individual supervisor or other employee of a governmental unit. See Texas Dep't of Human Servs. v. Hinds, 860 S.W.2d 893, 897 (Tex. App.--El Paso 1993, writ requested); Texas Dep't of Human Servs. v. Green, 855 S.W.2d 136, 142-43 (Tex. App.--Austin 1993, writ requested).

remaining claims (which appear to us to be exclusively state law claims) should be remanded to state court.

REVERSED and REMANDED.