

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10312

MACK M. VINES,

Plaintiff-Appellant,

versus

CITY OF DALLAS, TX, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-1337-P)

(April 11, 1995)

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:¹

Mack M. Vines, former Police Chief for Dallas, Texas, appeals the dismissal of his federal and state law claims against the City and City Manager. We **AFFIRM**.

I.

In July 1990, City Manager Jan Hart appointed a panel to conduct hearings to determine whether any procedural errors had occurred during the investigation and termination of a police officer who had shot and killed an unarmed individual. The City subpoenaed city employees, including Police Chief Vines, to appear

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

and give sworn testimony before the panel, and required the witnesses, including Vines, to sign an "Administrative Investigation Warning" prior to testifying. The Warning, quoted *infra*, provided certain parameters for the testimony.

Vines testified before the panel on August 1 and 2, 1990. In its August 3 report to Hart at the conclusion of the hearing, the panel expressed concerns that there had been a deliberate attempt by one or more individuals to subvert its findings, and stated that this had been presented to Hart, the City Manager, for further investigation.

Hart referred the panel's concerns to the District Attorney for Dallas County, who conducted an investigation and presented the results to the Dallas County Grand Jury. On September 12, the grand jury indicted Vines on one count of misdemeanor perjury; and later that day, Hart held a press conference and announced that Vines had been indicted and was being fired as Chief of Police. Ultimately, Vines was acquitted on the perjury charge.

In mid-1991, Vines' state court action against the City and Hart, individually and in her official capacity as City Manager, was removed to federal court; and, after summary judgment and a stay of discovery were sought, Vines filed an amended complaint in May 1992, asserting (1) federal (42 U.S.C. § 1983) claims for deprivation of property and liberty interests without due process of law, and for bad faith prosecution, and (2) state claims for breach of contract and for malicious prosecution.

Upon the defendants moving to dismiss the federal bad faith prosecution claim, and filing a supplemental summary judgment motion, Vines was granted until July 1, 1992, to respond on summary judgment. Later, the magistrate judge limited discovery to deposing Hart on qualified immunity.

Vines was allowed to delay responding on summary judgment until after deposing Hart. The deposition was conducted that July, but Hart refused to answer certain questions by Vines' counsel. Vines moved to compel; but, the magistrate judge denied the motion, stating that Hart was entitled first to resolution of qualified immunity. Vines applied for review of the magistrate judge's ruling, asserting that additional discovery was necessary in order to respond on summary judgment. That same day, he filed a response in opposition to summary judgment on Hart's qualified immunity claim, objections to the defendants' summary judgment evidence, and an affidavit by counsel stating that Hart's refusal to answer deposition questions made it impossible for Vines to contradict the allegations in her affidavit.²

Nearly a year and a half later, the district court (1) granted summary judgment for Hart, on the basis of qualified immunity, on the federal due process claims; (2) granted the defendants' motion

² In his response, Vines stated that, because the magistrate judge had allowed discovery only on qualified immunity, he was responding only to that issue, and would respond later to the other summary judgment issues. The defendants assert in their brief that Vines could not limit his response. We disagree. Moreover, we note that, in their reply to Vines' response in opposition to summary judgment, the defendants stated that Vines' response to the other issues had been "deferred" until after a ruling on qualified immunity.

to dismiss the federal bad faith prosecution claim; and (3) dismissed, *sua sponte*, the federal due process claims against the City, and the state law claims against both defendants. **Vines v. City of Dallas, TX**, 851 F. Supp. 254 (N.D. Tex. 1994).

II.

Vines contends that the district court applied an incorrect legal standard in dismissing his claims, erred in granting summary judgment for Hart based on qualified immunity, and should have allowed additional discovery from Hart on qualified immunity.

Our review of a Fed. R. Civ. P. 12(b)(6) dismissal of a complaint for failure to state a claim upon which relief can be granted is *de novo*. **Fernandez-Montes v. Allied Pilots Ass'n**, 987 F.2d 278, 284 (5th Cir. 1993).

When considering a motion to dismiss for failure to state a claim, the district court must take the factual allegations of the complaint as true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff. However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. Unless it appears beyond a doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief, the complaint should not be dismissed for failure to state a claim, and leave to amend should be liberally granted.

Id. at 284-85 (internal quotation marks and citations omitted; emphasis in original).

For a summary judgment, our review is also *de novo*; we apply the standard applied by the district court. *E.g.*, **FDIC v. Ernst & Young**, 967 F.2d 166, 169 (5th Cir. 1992). Summary judgment is appropriate if the record discloses "that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P. 56(c).

In considering qualified immunity, "[w]e must first determine whether the plaintiff has `allege[d] the violation of a clearly established constitutional right.'" **Spann v. Rainey**, 987 F.2d 1110, 1114 (5th Cir. 1993) (quoting **Siegert v. Gilley**, 500 U.S. 226, 111 S. Ct. 1789, 1793 (1991)). "If he has, we then decide whether the defendant's conduct was objectively reasonable...." **Id.** (citing **Salas v. Carpenter**, 980 F.2d 299, 305-06 (5th Cir. 1992)). "[T]he objective reasonableness of an official's conduct must be measured with reference to the law as it existed at the time of the conduct in question." **Pfanstiel v. City of Marion**, 918 F.2d 1178, 1185 (5th Cir. 1990).

A.

We consider first Vines' claims for breach of contract, malicious prosecution (state and federal), and deprivation of property without due process of law. Pursuant to Rule 12(b)(6), the district court dismissed these claims against the City, and the breach of contract and malicious prosecution claims against Hart; and, based on qualified immunity, it granted summary judgment for Hart on the property deprivation claim.³

³ Of course, because our review of the dismissal is *de novo*, we may affirm it on any ground supported by the record, even if the district court applied an incorrect standard (a matter which we do not address). See, e.g., **Little v. Liquid Air Corp.**, 37 F.3d 1069, 1079 n.26 (5th Cir. 1994) (en banc).

Although Vines asserts generally in his opening brief that the district court applied an incorrect standard in dismissing his claims under Rule 12(b)(6), he contends, for the first time in his

The Administrative Investigation Warning provided:

This panel is conducting an inquiry into allegations concerning the manner in which the investigation was conducted in the Patrick LeMaire case. This inquiry is of an administrative nature. You have been subpoenaed to answer questions on this subject. Your failure or refusal to respond to such questions may subject you to disciplinary action, including discharge from employment with the City of Dallas. Your testimony as well as any information or evidence which is gained through your testimony cannot be used against you in any criminal proceeding. Your testimony will be given under oath and any untruthful testimony may subject you to disciplinary action, including discharge from the City of Dallas employment.

For his breach of contract claim, Vines alleged that the Warning (which he attached to his complaint) was a contract which the defendants breached by referring the perjury charges to the District Attorney. For his malicious prosecution claims (state and federal), Vines alleged that Hart's referral, in her capacity as a municipal policymaker for the City, of the perjury charges to the District Attorney was "in direct violation of the ... Warning", and was done maliciously and without probable cause. Finally, for his property deprivation claim, Vines alleged that, by bringing criminal proceedings against him in violation of the Warning, the defendants deprived him of a property right granted to him in the Warning.

reply brief, that the court erred by dismissing *sua sponte* and without notice his state law and § 1983 claims against the City, and by taking judicial notice of documents outside the record. Needless to say, we will not consider issues raised for the first time in a reply brief. ***United Paperworkers Int'l Union v. Champion Int'l Corp.***, 908 F.2d 1252, 1255 (5th Cir. 1990).

Thus, these claims rest upon Vines' assertion that the Warning is a contract which not only prohibited any criminal prosecution based on his testimony before the panel, but also prohibited Hart and the City from referring the perjury charge to the District Attorney without first conducting internal disciplinary proceedings. Assuming *arguendo* that the Warning is an enforceable contract, it is unambiguous, and does not contain the promises relied upon by Vines to support his claims for breach of contract, malicious prosecution, and property deprivation. See, e.g., **Thrift v. Hubbard**, 44 F.3d 348, 357 & n.19 (5th Cir. 1995) (applying Texas law; "[w]hether a contract is ambiguous is a question of law" which we review *de novo*). We agree with the district court that, although the Warning grants certain benefits to Vines (*i.e.*, the promise that he will not be criminally prosecuted for any past conduct revealed during his testimony before the panel), it does not immunize him from prosecution for untruthful testimony before the panel. Moreover, although the Warning provides that untruthful testimony "may" subject Vines to disciplinary action, including discharge, it does not provide that those are the only sanctions which might be imposed against Vines for testifying untruthfully, nor does it promise that those sanctions will be applied in lieu of, or prior to, any criminal investigation or prosecution for perjury.

In sum, Vines has failed to state a claim upon which relief can be granted for breach of contract, malicious prosecution, or the deprivation of property without due process of law, because

those claims are based on his erroneous interpretation of the Warning. Therefore, the district court did not err in dismissing the breach of contract and malicious prosecution claims against both defendants, and the property deprivation claim against the City. And, for the same reasons, summary judgment for Hart on Vines' property deprivation claim against her was correct, because the claim fails to survive the first prong of qualified immunity analysis -- it does not allege the violation of a constitutional right. See **Spann**, 987 F.2d at 1114.

B.

Vines alleged that he was deprived, without due process of law, of a liberty interest in his employment, because the defendants did not give him an opportunity to clear his name prior to both the referral of the perjury charges to the District Attorney, and the news conference during which Hart announced his indictment and termination. The district court dismissed this claim against the City pursuant to Rule 12(b)(6), and granted Hart summary judgment, based on qualified immunity, on the ground that Vines was given the opportunity to request a name-clearing hearing but failed to do so.

"[D]ischarge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name". **Rosenstein v. City of Dallas, TX**, 876 F.2d 392, 395 (5th Cir. 1989), *reinstated in relevant part*, 901 F.2d 61 (5th Cir. 1990) (en banc), *cert. denied*,

498 U.S. 855 (1990). "[P]ublic officials do not act improperly in publicly disclosing charges against discharged employees, but they must *thereafter* afford procedural due process to the person charged". *Id.* (emphasis added). "To succeed on this § 1983 claim for the denial of a name-clearing hearing, the employee must prove the following: that he was discharged, that defamatory charges were made against him in connection with the discharge, that the charges were false, that no meaningful public hearing was conducted pre-discharge, that the charges were made public, that he requested a hearing in which to clear his name, and that the request was denied." *Id.* at 395-96 (footnotes omitted).

Vines did not allege that he requested a name-clearing hearing after the press conference at which Hart made the allegedly stigmatizing remarks. Instead, he alleged that he was not given sufficient notice that he was going to be terminated in order to request a hearing before termination. We agree with the district court that, under the circumstances of this case, Vines was not entitled to a name-clearing hearing prior to termination. It is well-settled that "the infliction of a stigma on a person's reputation by a state official, without more, does not infringe upon a protected liberty interest". *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995) (citing *Paul v. Davis*, 424 U.S. 693, 710-11 (1976)). Nor is discharge from employment, without more, sufficient to implicate a liberty interest. *Rosenstein*, 876 F.2d at 396 n.3.

To state such a liberty deprivation claim, the employee must allege, *inter alia*, that false, stigmatizing charges, of "the type that might seriously damage the employee's standing and association in the community, that blacken his good name or impair his employment opportunities", *id.* at 396 & n.3, were made public in connection with the termination of his employment. *Id.*; **Arrington v. County of Dallas**, 970 F.2d 1441, 1447 (5th Cir. 1992). Obviously, until such time as the stigmatizing charges have been made public, the employee's name has not been impugned, and thus there is no need for a hearing in which to "clear" his name. Because Vines' termination and the publication of the allegedly stigmatizing charges occurred simultaneously, Vines' claimed right to a name-clearing hearing was not triggered prior to his termination. And, because he did not allege that he requested a name-clearing hearing after his termination and the publication of the allegedly stigmatizing charges, which is an essential element of a § 1983 liberty deprivation claim, see **Rosenstein**, 876 F.2d at 395-96, the district court did not err in dismissing his claim against the City.

With respect to Vines' liberty deprivation claim against Hart, the summary judgment evidence includes Vines' responses to requests for admission, in which he admitted both that he received a letter from the City attorney advising him that a name-clearing hearing would be scheduled if he requested one, and that he failed to make such a request. Based on these admissions, which negate an essential element of his claim, Vines' liberty deprivation claim

against Hart fails the first prong of the qualified immunity analysis. See **Siegert**, 500 U.S. at 232. Accordingly, the district court did not err by granting summary judgment for Hart on this claim.

C.

Finally, Vines contends that the district court erred by failing to allow him to conduct additional discovery on Hart's qualified immunity defense. "We review the district court's decision to preclude further discovery prior to granting summary judgment for abuse of discretion". **Krim v. BancTexas Group, Inc.**, 989 F.2d 1435, 1441 (5th Cir. 1993) (citations omitted).

To obtain a continuance of a motion for summary judgment in order to obtain further discovery, a party must indicate to the court by some statement, preferably in writing (but not necessarily in the form of an affidavit), why he needs additional discovery and how the additional discovery will create a genuine issue of material fact. The nonmoving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts.

Id. at 1442 (internal quotation marks and citation omitted; emphasis in original).

Based on qualified immunity, Hart was awarded summary judgment on the property and liberty deprivation claims. As discussed, summary judgment was appropriate on the property deprivation claim, because Vines failed to allege the violation of a constitutional right. That prong of the qualified immunity analysis presents a "purely legal question". **Siegert**, 500 U.S. at 232. Accordingly, the discovery Vines sought as to Hart's motives and state of mind in taking the actions against him could not have changed that

result. And, as for the liberty deprivation claim, additional discovery would not alter Vines' admission that he did not request a name-clearing hearing, which, as stated, is an essential element for such a claim. Accordingly, the district court did not abuse its discretion by refusing to allow additional discovery.

III.

For the foregoing reasons, the judgment is

AFFIRMED.