IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50632
(Summary Calendar)

DAVID FRANKLIN SCHULTZ, Ph.D.,

Plaintiff-Appellee,

versus

TEXAS STATE BOARD OF EXAMINERS
OF PSYCHOLOGISTS, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(A-94-CA-282)

(June 9, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendants-Appellants appeal from the district court's order denying their Fed. R. Civ. P. 12(b)(1) motion to dismiss the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

42 U.S.C. § 1983 case filed by Plaintiff-Appellee David Franklin Schultz, and requiring limited discovery to determine the propriety of the defense of qualified immunity. For the reasons set forth below, we vacate the order of the district court and remand to allow Schultz to re-plead.

I

FACTS AND PROCEEDINGS

Schultz, a Ph.D., filed the instant civil rights suit in Texas state court against the Texas State Board of Examiners of Psychologists (the Board) and nine individual members of the Board (collectively, Defendants). He alleged that after he completed all statutory requirements for issuance of a license to practice psychologySQspecifically, completing two years supervised experience in the field of psychological services and passing an oral examinationSQthe Board unlawfully refused to grant his application for a license, instead deciding to hold his application in abeyance pending final adjudication of a complaint filed against him. This action, Schultz contended, violated his right to due process. Defendants removed the case to federal district court.

Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), asserting the defense of qualified immunity. In response, Schultz argued that he had pleaded specific facts sufficient to avoid dismissal based on the asserted defense of qualified immunity, i.e., that the Defendants had intentionally violated clearly established statutory law, had failed to give him notice of the grounds for refusing his application, and had acted

in excess of their authority.

After conducting a hearing, the district court entered an order denying Defendants' motion to dismiss and granting the parties ninety days to complete discovery to determine the factual basis for the Board's delay in the granting of Schultz's license. Defendants filed a notice of appeal from the court's order.

The district court subsequently entered an amended order to "more clearly state[]" its rulings. The court explained that it had not denied Defendants' motion to dismiss with respect to the qualified immunity defenses of the individual members of the Board, but had only postponed ruling on the issue. The court stated that, given Schultz's allegation that Defendants had provided no information with regard to their method of or reasons for determining that his license should be held in abeyance, "limited discovery" was necessary to determine "the thoughts, knowledge, or conduct of the [Board members] at the time they decided to deny or postpone the issuance of [Schultz's] license," because "the conduct and state of mind of these individual defendants is [sic] critical to the qualified immunity issue." The court also stated that Schultz was entitled to an explanation of Defendants' initial refusal to grant him a license. The district court allowed the parties ninety days to complete the discovery, and Defendants filed a new notice of appeal from the district court's amended order.

II

ANALYSIS

Defendants argue that the district court erred by reserving

its ruling on their motion to dismiss on grounds of qualified immunity until Schultz completed limited discovery. They continue to insist that they are immune from suit based on qualified immunity.

Although Schultz agrees with Defendants that the district court's order compelling discovery is an appealable interlocutory order, jurisdiction is not consensual. We must examine the basis of our jurisdiction on our own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987).

Ordinarily, discovery orders are interlocutory and not appealable under the final judgment rule of 28 U.S.C. § 1291. Gaines v. Davis, 928 F.2d 705, 706 (5th Cir. 1991). As an extension of the rule of Mitchell v. Forsyth, 472 U.S. 511 (1985), however, allowing immediate appeal from orders denying qualified immunity under the collateral order doctrine, in cases in which qualified immunity is raised as a defense, "immediate appeal is available for discovery orders which are either avoidable or overly broad." Gaines, 928 F.2d at 707 (citing Lion Boulos v. Wilson, 834 F.2d 504, 507-08 (5th Cir. 1987)).

In Lion Boulos, we dismissed for lack of jurisdiction when a defendant attempted to appeal an order of the district court compelling limited discovery before ruling on a claim of qualified immunity. 834 F.2d at 505. The district court had ruled that it was unable to decide the threshold question of qualified immunity without some discovery and listed the necessary discovery in its order. Id. at 506. The defendant appealed, arguing that the

district court could not order discovery before ruling on the immunity defense. Id.

We identified two categories of discovery in the qualified immunity context. Id. at 507. First, discovery designed to flesh out the merits of a plaintiff's claim, or discovery permitted when the defendant is clearly entitled to immunity, would fall within the category that is avoidable or overly broad, so that an order allowing such discovery would be immediately appealable. Id. In contrast, when (1) the defendant's immunity claim turns at least partially on a factual question, (2) the district court is unable to decide the immunity issue without further clarification of the facts, and (3) the order is narrowly tailored to uncover only those facts necessary to rule on the immunity claim, the discovery order would not be immediately appealable. Id. at 507-08. We concluded that the discovery order in Lion Boulos was not appealable because (1) the district court needed the results of limited discovery to rule on the qualified immunity defense, and (2) the court narrowly tailored its order to uncover only those facts necessary to rule on the immunity defense. Id. at 508-09.

Discovery under Lion Boulos may not proceed, however, until the district court "first finds that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." Wicks v. Mississippi State Employment Servs., 41 F.3d 991, 994 (5th Cir.), petition for cert. filed (U.S. Apr. 3, 1995) (No. 94-1616). To overcome the immunity defense, Schultz's complaint must allege facts that, if proven, would demonstrate that

the Defendants violated clearly established statutory or constitutional rights. See id. at 995.

If Schultz's complaint does not meet this standard, the district court must rule on the motion to dismiss before any discovery is allowed. Id. "The allowance of discovery without this threshold showing is immediately appealable as a denial of the true measure of protection of qualified immunity." Id. Only if the complaint alleges facts sufficient to overcome the defense of qualified immunity may the district court proceed under Lion Boulos to allow the discovery necessary to clarify those facts on which the immunity defense turns. Id.

We must therefore determine whether the allegations in Schultz's complaint are sufficient to negate Defendants' asserted defense of qualified immunity. See id. To do so we conduct a two-step analysis. Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994). In the first step we determine whether Schultz has alleged a violation of a clearly established constitutional right. Id. We use "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). In the second step we determine "whether the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). The reasonableness of the conduct must be assessed in light of the law as it existed at the time of the conduct in question. Harper, 21 F.3d at 601.

Schultz alleged in his complaint that after he completed all statutory requirements for issuance of a license to practice

psychology, the Board unlawfully refused to grant his application for a license, instead deciding to hold his application in abeyance pending final adjudication of a complaint filed against him, thereby violating his right to due process. An applicant has a protectable interest in not being arbitrarily or discriminatorily denied the opportunity to practice his profession. Phillips v. Vandygriff, 724 F.2d 490, 493 (5th Cir.), cert. denied, 469 U.S. 821 (1984). Schultz has thus alleged a violation of a clearly established constitutional right. See Harper, 21 F.3d at 600.

We must next determine whether Defendants' conduct was objectively reasonable. See Spann, 987 F.2d at 1114. Schultz acknowledged in his complaint that the Board stated that it was holding his application in abeyance pending final adjudication of a complaint filed against him, pursuant to the Board's own administrative rule. Schultz contends, however, that the Board did not have the discretion to adopt this administrative rule.

Under the Texas Psychologists' Certification and Licensing Act (the Act), the Board has the authority to investigate and to dispose of complaints filed with the Board. Tex. Rev. Civ. Stat. Ann. art. 4512c §§ 1-2, 25A-25B (West 1989). The Act also provides that "[i]n addition to the powers and duties granted the Board by other provisions of this Act, the Board may make all rules, not inconsistent with the Constitution and laws of this state, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it." Id. at § 8(a).

Given these provisions, Schultz cannot show that the conduct

of the Defendants was objectively unreasonable. Schultz has thus failed to allege facts sufficient to overcome Defendant's asserted defense of qualified immunity. The discovery order is therefore improper and immediately appealable as a denial of the benefits of the qualified immunity defense. See Wicks, 41 F.3d at 996. We need not address whether the immunity defense sufficiently turned on a factual issue requiring discovery under Lion Boulos. Id. at 996-97. We therefore vacate the court's order and remand this case so that Schultz can be given an opportunity to plead his case properly before dismissal is considered. Id.

VACATED and REMANDED.