UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-4010

(Summary Calendar)

MARILYN PATTON,

Plaintiff-Appellant,

VERSUS

JIMMY ALFORD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(6:90 CV 207)

(December 1, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Plaintiff, Marilyn Patton, a former prison guard at the Texas Department of Criminal Justice ("TDCJ"), filed an action pro se and in forma pauperis against several TDCJ officials. Patton claimed that the defendants discriminated against her on the basis of sex, terminated her without due process, and violated her civil rights

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

under federal and state law by having her falsely arrested and maliciously prosecuted. The district court dismissed Patton's suit for failure to state a claim upon which relief could be granted. Patton appeals, and finding no error, we affirm.[1]

I

Patton, a prison guard at the Coffield Unit of TDCJ, was brought up on disciplinary charges. A disciplinary hearing was held, at which Warden Alford announced his decision to place Patton on probation and to change her working hours to another shift. The shift change would have required Patton to be under the supervision of a man against whom she had a pending lawsuit. Patton claims that everyone at at TDCJ knew about the lawsuit and knew that it would be impossible for her to work for her new supervisor. Patton never again reported to work after receiving Warden Alford's decision, but did file a grievance over the matter.

An unidentified person later reported to Warden Alford that Patton was at her home suffering a drug overdose.[2] Warden Alford called the sheriff's office and reported the incident. Warden Alford then drove to Patton's home and waited in his car as the

---

[1] Patton also requests that this Court grant relief from excessive bail, and that this Court monitor state tort claims that she has filed in state court. Because Patton raises the issue of excessive bail for the first time on appeal, and fails to allege that the TDCJ officials were even responsible for setting bail, we decline to address that issue. *See U.S. V. Garcia-Pillado,* 898 F.2d 36, 39 (5th Cir. 1990) ("`Issues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" (quoting *Self v. Blackburn,* 751 F.2d 789, 793 (5th Cir. 1985))). As for Patton's latter request, we do not to act as a supervisory body over state courts, and therefore will not monitor Patton's state tort claims.

[2] Patton denies that she had suffered a drug overdose.

sheriff's deputies placed Patton under arrest. The deputies took her to a local hospital where vomiting was induced, and then transported Patton to the nearest mental hospital. The next morning, Patton's mother and lawyer had Patton released from the mental institution.

Subsequently, Patton decided to go to the Coffield Unit to check on a sick friend. While she was en route to the prison, an unidentified person called Warden Alford and told him that Patton was on her way to the prison with a car full of explosives.[3] When Patton arrived at the prison gate, Warden Alford and several other officials removed her from the car and handcuffed her. A deputy from the sheriff's department arrived and arrested Patton. Bail was set at $25,000. Patton's mother bailed her out several days later. Patton received a final paycheck from the prison and a notice which informed her that she had voluntarily resigned from her job by not returning to work.

Patton filed suit in district court against Warden Jimmy Alford, Warden Jack Garner, Assistant Warden Dale Caskey, Captain Harlan Summers, and Captain Bernie Bush. Patton claimed that she had been (a) discriminated against on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; (b) deprived of her property interest in employment with TDCJ without due process; (c) falsely arrested,

[3] Patton objected to this characterization in her objections to the magistrate's report. According to Patton, the unidentified caller informed Warden Alford that Patton said she was "putting on commando gear and proceeding to harm or even kill Alford and several other officials."

under 42 U.S.C. § 1983; and (d) falsely arrested and maliciously prosecuted under state law.

The district court referred the action to the United States magistrate for pretrial matters pursuant to 28 U.S.C. § 636(b)(1)(A). The defendants filed a motion to dismiss, under Fed. R. P. 12(b)(6). The magistrate held a hearing on the defendants' motion and subsequently issued a report recommending that the district court dismiss all of Patton's claims. The district court conducted a de novo review of the record and dismissed Patton's complaint for failure to state a claim upon which relief could be granted.

II

Patton appeals alleging that:

(a) the district court erred in dismissing her claim under Title VII;

(b) the district court erred in dismissing her 42 U.S.C. § 1983 claim of denial of due process;

(c) the district court erred in dismissing her 42 U.S.C. § 1983 claim of false arrest;

(d) it was improper for Assistant Attorney General Joe Bridges to appear for the defendants when he had not been admitted to practice before the United States District Court for the Eastern District of Texas; and

III

The district court may dismiss a claim under Fed. R. Civ. P. 12(b)(6) "`only if it appears that no relief could be granted under any set of facts that could be proven with the allegations.'" *Barrientos v. Reliance Standard Life Ins. Co.,* 911 F.2d 1115, 1116 (5th Cir. 1990) (quoting *Baton Rouge Bldg. & Const. Trades Council*

v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986)), *cert. denied,* ___ U.S. ___, 111 S. Ct. 795, 112 L. Ed. 2d 857 (1991). The same rule applies when immunity is pleaded as a defense by a motion to dismiss. *Chrissy F. By Mecley v. Mississippi DPW,* 925 F.2d 844, 846 (5th Cir. 1991); *Holloway v. Walker,* 765 F.2d 517, 519 (5th Cir. 1985), *cert. denied,* 474 U.S. 1037, 106 S. Ct. 605, 88 L. Ed. 2d 583 (1985). We review de novo the district court's dismissal under rule 12(b)(6). *Id.*

A

Patton alleges that the district court erred in dismissing her claim under Title VII for failing to comply with the administrative requirements of 42 U.S.C. § 2000e-5(f)(1) (1988). Under section 2000e-5(f)(1), a complainant must file a claim with the Equal Employment Opportunity Commission ("EEOC") and obtain a right-to-sue letter before the complainant can file suit in district court. *Patterson v. McLean Credit Union,* 491 U.S. 164, 180, 109 S. Ct. 2363, 2374, 105 L. Ed. 2d 132 (1988). Because Patton did not receive a right-to-sue letter from the EEOC prior to filing her complaint in district court, the district court did not err in dismissing Patton's Title VII claim.

B

Patton next alleges that the district court erred in dismissing her section 1983 due process claim. Patton claims that she did not voluntarily resign, but that the TDCJ officials fired

her without due process.[4] The district court dismissed Patton's action on the basis that Patton did not have a clearly established property interest in her job, and the TDCJ officials were therefore protected by qualified immunity from liability.

To prevail on a section 1983 claim, Patton must show that she had a protected property interest in her employment under Texas law, and that that interest was violated without due process of law. *See Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 9, 98 S. Ct. 1554, 1560, 56 L. Ed. 2d 30 (1978) (In determining whether a person has a protected interest under the due process clause, the "underlying substantive interest is created by an `independent source such as state law.'" (citations omitted)); *Shawgo v. Spradlin,* 701 F.2d 470, 475 (5th Cir.) ("Whether a property interest in employment has been created by an enactment or an implied contract must be decided at least initially by a reference to state law," although federal constitutional law determines whether that interest is protected by the due process clause), *cert. denied,* 464 U.S. 965, 104 S. Ct. 404, 78 L. Ed. 2d 345 (1983); *see also Hopkins v. Stice,* 916 F.2d 1029, 1030-31 (5th Cir. 1990).

To recover money damages against public officials in their individual capacity, a plaintiff must show that the public

---

[4] Patton claims that because (1) Warden Alford assigned Patton to work under the supervision of a person against whom she had a pending lawsuit; and (2) everyone, including Warden Alford, knew that Patton could not work under the supervision of that person, Warden Alford was responsible for her not returning to work. Furthermore, Patton claims that TDCJ officials committed various acts))e.g. placing her in a mental institution and having her falsely arrested))to prevent Patton from filing a grievance concerning Warden Alford's decision.

officials violated a "*clearly established* constitutional right of which a reasonable person would have been aware." *Hopkins,* 916 F.2d at 1029 (emphasis added); *see also Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982) (In order to recover from a public official for violating a constitutional right, plaintiff must show that defendant "violate[d] clearly established . . . constitutional rights of which a reasonable person would have known.").

Similarly, in *Hopkins,* a TDC (Texas Department of Corrections, now TDC) employee was suspended, demoted, and put on probation. *Id.* at 1030. Hopkins filed a grievance, which was denied without a hearing. *Id.* As a result, Hopkins filed a lawsuit against a TDC official, claiming that the official had deprived him of his property interest in his position at TDC, in violation of his due process rights. *Id.* We found that Tex. Rev. Civ. Stat. Ann. Art. 6166j (Vernon 1970) was the relevant statute, for determining whether the TDC employee had a protected property interest. *See Hopkins,* 916 F.2d at 1031. Article 6166j provides: "The duty of [the director of TDC] shall extend to the employment and discharge, with the approval of the Board, of such persons as may be necessary for the efficient conduct of the prison system." After examining the language of the statute, we stated that the statute arguably established an at-will employment relationship between the TDC and its employees.[5] See *id.* *We* concluded, therefore, that the

[5] In arriving at its conclusion, this Court stated: "Although Art. 6166j does not expressly create an at-will employment relationship, Texas precedents suggest that it should be interpreted in favor of the state. In

Hopkin's "claimed property interest under state law rested on uncertain law, at best." *Id*. Because Hopkins did not allege facts demonstrating that he had a clearly established property interest in his employment at TDC,[6] we held that the TDC official was protected by qualified immunity. *Id.*

Under the holding of *Hopkins,* Patton did not have a property interest in her employment at TDCJ. Furthermore, Patton has not alleged facts showing that she and TDCJ had agreed that she could be terminated for cause only. Because Patton did not allege facts showing that she had a clearly established property interest in her job, the TDCJ officials were protected by qualified immunity, and we hold that the district court did not err in dismissing Patton's section 1983 claim.

C

Patton further claims that the district court erred in dismissing her false arrest claim against the TDCJ officials. The district court dismissed Patton's claim on the grounds that the TDCJ officials had not acted under color of state law.

To establish a cause of action under 42 U.S.C. § 1983 for false arrest, a plaintiff must show deprivation of a clearly established statutory or constitutional right by a state actor,

---

addition, the Texas legislature enacted Article 6166j at a time when at-will employment was already firmly established in Texas." *Hopkins,* 916 F.2d at 1031 (citations omitted).

[6] Hopkins had also offered oral statements and an employee manual into evidence to show that his employment could only be terminated for cause and, therefore, he had a property interest in his employment. *Hopkins,* 916 F.2d at 1031. This Court held that the oral statements did not clearly rise to the level of an oral contract, and that the employee manual was ambiguous. *See id.*

acting under color of state law. *See Daniel v. Ferguson,* 839 F.2d 1124, 1128-31 (5th Cir. 1988). A person is a state actor where the person is a state official, has acted in concert with or has obtained significant aid from state officials, or has engaged in conduct that is otherwise attributable to the state. *Id.* at 1130 (quoting *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937, 102 S. Ct. 2744, 2753-54, 73 L. Ed. 2d 482 (1982)). "[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken `under color' of state law." *United States v. Classic,* 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368 (1941) (holding that people pursuing private aims and not acting pursuant to state authority are not acting under color of law, even though they are state officials); *see also Monroe v. Pape,* 365 U.S. 167, 184, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492 (1961); *United States v. Tapley,* 945 F.2d 806, 809 (5th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 1960, 118 L. Ed. 2d 562 (1992).

Patton claimed that she was falsely arrested on two separate occasions. Patton alleged that Warden Alford caused her first arrest by calling the sheriff's department and informing them of her alleged drug overdose. Patton stated that Warden Alford also sat across the street from her house in a state vehicle during business hours while the sheriff's deputy entered her house and took her into custody. Patton also alleged that the TDCJ officials caused her second arrest by removing her from her car and handcuffing her until a sheriff's deputy came to arrest her.

We agree with the district court that the TDCJ officials did not act under color of state law because (1) deputies from the sheriff's department, and not the TDCJ officials, arrested Patton; and (2) Patton did not allege nor did she present evidence that the TDCJ officials had the power or authority to have her arrested by the sheriff's deputies. *See Classic,* 313 U.S. at 326, 61 S. Ct. at 1043. Therefore, the district court did not err by dismissing Patton's false arrest claim.

D

Patton urges that we reverse the district court's order of dismissal on the grounds that the appearance of Assistant Attorney General Joe Bridges ("Bridges") for the defendants at the October hearing was improper. Patton states that Bridges was not the attorney of record and had not been admitted to practice in the Eastern District of Texas.[7] Furthermore, Patton claims that the defendants received a more favorable outcome in the case.[8] Although Patton made this argument in her objection to the magistrate's report, the district court did not address it.

---

[7] Local Rule 2(d) for the Eastern District of Texas provides that an attorney who is not admitted to practice in the district must be granted permission to appear by the court before making an appearance. Defendants concede that Bridges had not been admitted to practice in the Eastern District of Texas.

[8] Both the defendants' motion to dismiss and Patton's motion for appointment of counsel were argued before the magistrate at the October hearing. Patton claims that the defendants received a more favorable outcome because their motion to dismiss was decided before her motion for appointment of counsel. The defendants' motion to dismiss was decided on June 4, 1991 and Patton's motion for appointment of counsel was decided on August 14, 1991.

Under 28 U.S.C. § 2111 (1988),[9] a judgment will not be reversed if the error was harmless. We find that the district court's failure to address Patton's objection was harmless error because Patton was not harmed by Bridges' appearance at the October hearing. Bridges' role at the hearing was to argue in favor of the defendants' motion to dismiss, and his argument was confined to the points and authorities contained in the defendants' motion, which had been prepared by the attorney of record. While the defendants' motion to dismiss was decided sooner than Patton's motion for appointment of counsel,[10] Patton has failed to allege facts showing that Bridges' appearance caused the defendants to receive a more favorable *outcome.*

Although the district court erred in not addressing Patton's objection, we find the error harmless.

IV

For the foregoing reasons, we AFFIRM.

---

[9] Section 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects that do not affect the substantial rights of the parties."

[10] *See supra* note 7.