PW
- 42 USC §1983
- ~~No~~ damages from state agencies
- expectancy of employment ≠ protected interest
- no c/a for negligent acts
- qualified immunity

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Michael Rene Howell,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 88-0799-R
	)	
Cheaspeake Probation Office, et al.,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court for resolution subsequent to the defendants' motion for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure after a bench trial of the plaintiff's claim of illegal deprivation of his constitutionally protected rights. Pursuant to Rules 41(b) and 52(a), after consideration of the evidence introduced by the plaintiff at trial and resolution of any conflicts of evidence that arose during the plaintiff's case, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This action, alleging that the defendants deprived the plaintiff of his constitutionally protected rights in releasing information regarding his juvenile record, was brought under the Civil Rights Act of 1871, codified as amended at 42 U.S.C. Section 1983.

2. The plaintiff, Michael Rene Howell, is a former inmate in the Virginia Department of Corrections who was, at the time relevant to this litigation, on supervised parole.

3. Defendants Department of Corrections and the Virginia State Parole Board are agencies of the Commonwealth of Virginia created by Virginia statutory law. Defendants Chesapeake Probation Office and Probation and Parole District 2 are subordinate components of the Virginia Department of Corrections, and are also state governmental agencies created by statute.

4. Defendant David Tinkler is the Chief Probation and Parole Officer for District 2, Virginia Department of Corrections, which includes the City of Norfolk. Defendant Joe Jackson is an Adult Probation and Parole Officer for District 2, Virginia Department of Corrections, and is a subordinate of defendant Tinkler. Defendant Maury Brickhouse is a supervisor, First District Juvenile Domestic Relations Court Services Unit, Virginia Department of Corrections, Chesapeake, Virginia. Defendant Carole Sims is a Juvenile Probation Officer, First District Juvenile Domestic Court Services Unit, and works under defendant Brickhouse's supervision.

5. In 1979, when Howell was 17-years-old, he was convicted in the Norfolk Juvenile and Domestic Relations Court on two counts of sodomy with another juvenile while both were incarcerated in the Norfolk City Jail. See Attachment, Defendant's Exhibit 6.

6. In 1981, Howell was convicted as an adult on two counts of grand larceny in the Circuit Court of the City of

Norfolk and was sentenced to ten years confinement. As an incident of Howell's larceny conviction, a presentence report was prepared by the Virginia Department of Corrections, Probation and Parole District 2 that contained a list of Howell's juvenile record, including his sodomy conviction. See Defendant's Exhibit 6. At the time of the events leading to this suit, Howell was on parole for his larceny conviction and was under the supervision of Department of Corrections Probation and Parole District 23, which encompasses the City of Virginia Beach.

7. In January, 1988, after his term of incarceration had ended, Howell applied for a job working with youths at the New Dominion School. Howell Testimony; Plaintiff's Exhibit 7. In order to get the recommendations necessary to complete his employment application, Howell began working as a volunteer through the Department of Corrections, First District Juvenile and Domestic Relations Court, Chesapeake, Virginia. See Volunteer Application, Defendant's Exhibit 1. Howell did volunteer work with youth groups in various programs, including the "Youth Straight" program where he discussed his problems as a youth as a means of encouraging juveniles to obey the law and avoid lives of crime. Howell's work in these programs was remarkable, and he received awards for his service. See Plaintiff's Exhibits 5 and 6.

8. Howell was then approved by Lori Van Horn, the volunteer program coordinator, and William Cuthriell, her supervisor and the director of the volunteer program, to work with a juvenile named Glen Dunshee though the one-to-one

counseling program. Both Van Horn and Cuthriell were under the supervision of defendant Brickhouse. Shortly thereafter, Howell was taken off the one-to-one counseling program when Van Horn received a volunteer reference form from Randy Plante, Howell's probation officer, in which Plante stated he "would not recommend Mr. Howell for this service. My reasons cannot be disclosed due to confidentiality factors." Defendant's Exhibit 3 (emphasis in original); Van Horn Testimony.

9. Although Van Horn and Cuthriell wrote a letter to Dunshee's mother on May 17, 1988 stating that they could not endorse Howell as a one-to-one counselor, Defendant's Exhibit 4, Howell unofficially continued his relationship with Dunshee, including aiding Dunshee in obtaining treatment for his alcohol abuse problem in June 1988. In August 1988, Howell learned of what he considered a a potentially dangerous situation at Dunshee's home and offered to let Dunshee stay at his house. Howell Testimony.

10. Some time prior to August 31, 1989 but during the term of his parole supervision, Howell moved from Virginia Beach to Norfolk. As part of a transfer investigation requested by Plante, Howell's parole officer in District 23 (Virginia Beach), defendant Jackson of District 2 (Norfolk) reviewed Howell's file (including his presentence report with its listing of Howell's sodomy conviction) and visited his home on August 31, 1989 to verify his address and employment information. Although Howell was not there, Dunshee answered the door at Howell's house. After Jackson identified himself as a parole and probation

officer, Dunshee said he was staying at Howell's house due to problems in his own home. Dunshee also told Jackson that Howell was going to get custody of Dunshee at a hearing to be held in Juvenile and Domestic Relations Court in Chesapeake the next day. Because he was aware of Howell's prior sodomy conviction as a juvenile, Jackson asked Dunshee if he knew that Howell haed been convicted of homosexual assault. Dunshee responded that Howell had not made any sexual advances toward him. Jackson Testimony.

11. Upon returning to his office, Jackson called defendant Sims, who was Dunshee's juvenile probation officer. Jackson informed Sims of Howell's prior sodomy convictions and, upon Sims request, delivered to Sims copies of several pages of Howell's presentence report and other documents from Howell's file. After discussing the situation with her supervisor, defendant Brickhouse, Sims filed a copy of the documents she received from Jackson with the Juvenile and Domestic Relations Court on September 1, 1989, at Dunshee's hearing. Sims also showed a copy of Howell's juvenile record to Dunshee's stepfather. After reviewing Howell's record, the Chesapeake Juvenile and Domestic Relations Court removed Dunshee from Howell's house.

12. Also on September 1, 1989, Jackson called Lori Van Horn of the volunteer program and told her that Howell had been convicted of sodomy and should not be working with Dunshee. Jackson and Van Horn Testimony.

13. Howell would be a strong candidate for a job at the New Dominion School but for the fact that he cannot get recommendations from Cuthriell and the volunteer program. Part

of the reason that Cuthreill cannot recommend Howell to work with youths on a one-to-one basis is his knowledge of Howell's sodomy convictions. Accepted Proffer of Yates Testimony.

CONCLUSIONS OF LAW

1. This action is brought under 42 U.S.C. Section 1983, which provides in pertinent part that any person who, under color of state law, deprives another of rights secured by the Constitution shall be liable to the party injured.

2. Jurisdiction is vested in this Court pursuant to 28 U.S.C. Section 1343(3).

3. Under the law of the Eleventh Amendment, a plaintiff cannot recover damages from a state or its agencies. See Edelman v. Jordan, 415 U.S. 651, 663 (1974) (the Eleventh Amendment limits a federal court's remedial power to prospective injunctive relief and bars retroactive awards that require payment from the state treasury); Toledo, Peoria & Western R.R. v. Illinois Dep't of Transp., 744 F.2d 1296, 1298-99 (7th Cir. 1984) (state agencies are not "persons" for purposes of Section 1983), cert. denied, 470 U.S. 1051 (1985); Trotman v. Palisades Interstate Park Comm'n, 557 F.2d 35, 38 (2d Cir. 1977) (when Section 1983 liability of an agency will be paid from state treasury funds, the Eleventh Amendment's doctrine of sovereign immunity bars recovery); Medicenters of Va., Inc. v. Commonwealth of Va., 373 F. Supp. 305, 306 (E.D. Va. 1974) (Virginia Department of Health is an "arm of the state" and is, therefore, protected by the doctrine of sovereign immunity).

4. A plaintiff can get around the bar of the Eleventh Amendment if he can show consent by the state to being sued or an explicit authorization of suit by Congress. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Because the plaintiff here has not shown consent by the state of Virginia to suits of this sort and because Section 1983 is not an express override of state sovereign immunity by Congress, the agencies joined as defendants that are funded by the state of Virginia are not subject to liability under Section 1983. See Quern v. Jordan, 440 U.S. 332, 345 (1979). Thus, defendants Chesapeake Probation Office, Virginia State Parole Board, Virginia Department of Corrections, and Probation and Parole District 2 are not proper defendants to this action.

5. In order to state a claim under Section 1983, a plaintiff must first show that an interest protected by the Constitution or laws of the United States is at stake. The plaintiff here alleged that the defendants' actions deprived him of his Fourteenth Amendment liberty interest in pursuing his chosen line of work (i.e., his potential job at the New Dominion School). There is no support in the caselaw for the proposition that an individual's desire to keep unsavory or stigmatizing aspects of his juvenile criminal record from potential employers, wards or their guardians rises to the level of a constitutionally protected interest. See Paul v. Davis, 424 U.S. 693, 712-13 (1976) (no liberty or privacy interest in reputation or constitutional protection from stigmatization); cf. Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding that protected privacy

rights are limited to those "fundamental" or "implicit in the concept of an ordered society").

6. Furthermore, there is no recognized liberty interest in an expectancy of prospective employment. Although there is, in some cases, a protected interest in continuing employment, this case involves a mere expectancy of possible future employment so no protected interest is in issue. Compare Board of Regents v. Roth, 408 U.S. 564 (1972) (no protected interest/due process rights when teacher was not rehired for second year) with Perry v. Sinderman, 408 U.S. 593 (1972) (due process right to a hearing when teacher with ten years experience in state system who was not rehired showed existence of a de facto tenure system).

7. Also, even if a protected interest existed in this case, the plaintiff has not even alleged, much less made any showing of, anything greater than negligent dissemination of the records, and there is no cause of action under Section 1983 for negligent deprivation of protected interests. Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (due process rights not implicated by negligent acts of officials causing unintended losses of life, liberty or property). While the interests the plaintiff asserts may be protected by Virginia's criminal statutes or libel law, they do not rise to the level required for a 1983 cause of action.

8. As government officials, defendants Tinkler, Jackson, Brickhouse, and Sims have a qualified immunity from Section 1983 liability, which means that they are immune from liability if a

reasonable official in their position could have believed their actions to be lawful. See Anderson v. Creighton, 107 S. Ct. 3034 (1987). Given the dubious nature of the plaintiff's asserted constitutional rights and the potential for danger (and even liability) that would have existed if they did not warn others of Howell's criminal record, the defendants could have reasonably believed (and did in fact believe) that their actions were lawful, necessary, and did not abridge the plaintiff's constitutional rights. In fact, in allowing several of the defendants to testify at length as adverse witnesses during proof of his case, the plaintiff inadvertently proved the defendants' qualified immunity defense for them before the defense even began its presentation of its own evidence. Thus, the Court finds that the actions of these defendants were protected by the doctrine of qualified immunity and that this defense was proven during the trial.

8. Having found no violation of 42 U.S.C. Section 1983 by the defendants in this case, the Court hereby ENTERS JUDGEMENT in favor of all of the defendants in this case and against plaintiff Howell.

It is so ORDERED.

Let the Clerk send a copy of these Findings of Fact and Conclusion of Law to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE