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United States District Court, E.D. Louisiana.

DEL A., et al.
v.
Edwin EDWARDS, et al.

CIV. A. No. 86–801. | Dec. 19, 1988.

MEMORANDUM AND ORDER

MINUTE ENTRY

SEAR, District Judge.

***1** Edwin Edwards, who, at the time of filing of this complaint was Governor of the State of Louisiana, has filed two motions in relation to this action. The first is a motion to dismiss for failure to state a claim and a motion for summary judgment and the second is a motion for a protective order quashing the taking of his deposition.

Defendant, Edwards, has advanced three separate grounds for dismissal of the claim against him: first, that he is not liable under a respondeat superior theory; second, that he is entitled to qualified immunity; and, third, that money damages are not available against him. Plaintiffs respond that they are not claiming that Edwards is liable under the doctrine of respondeat superior, that the qualified immunity issue has already been decided by the Fifth Circuit, and that the case defendant relies on in claiming he is not liable for money damages is inapplicable to this case. Defendant's reply brief asserts the following: that this motion challenges the factual sufficiency of plaintiffs' claims and plaintiffs fail to show links in the chain of proximate cause linking specific acts of the governor to the allegations in the complaint; that this court and the Fifth Circuit decided the qualified immunity issue based on the legal sufficiency of the complaint; and that this motion is styled as a motion to dismiss in addition to a motion for summary judgment for the sole purpose that I decide whether plaintiffs have a cause of action for monetary damages based on recent Supreme Court jurisprudence.

On a motion for summary judgment, the moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams,* 836 F.2d 958 (5th Cir.1988). A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). If the movant bears the burden of proof on a claim or defense, he must establish all elements of the claim or defense to prevail on summary judgment. *Western Fire Insurance Co. v. Copeland,* 651 F.Supp. 1051 (S.D.Miss.), *aff'd,*824 F.2d 970 (5th Cir.1987).

Once the movant carries his burden, the burden shifts to the nonmovant to show that movant should not be granted summary judgment. *Putman v. Insurance Co. of North America,* 673 F.Supp. 171 (N.D.Miss.1987), *aff'd,*845 F.2d 1020 (5th Cir.1988). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex,* 106 S.Ct. at 2552–53. The judge must view the evidence through the prism of the substantive evidentiary burden. The question is whether the jury could reasonably find that the plaintiff either did or did not prove his case by the quality and quantity of evidence required by the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Id.*

***2** Because plaintiffs submit that they are not asserting a claim based on respondeat superior, there is no need to discuss this issue. (*See* Plaintiffs' Memorandum in Opposition at page 3.) Section 1983 does not provide a cause of action based on respondeat superior. In *Reimer v. Smith,* 663 F.2d 1316 (5th Cir.1981), the Fifth Circuit held that "section 1983 does not impose liability on a police chief under a vicarious liability or respondeat superior theory".

Plaintiffs allege that they base their claim on the principle that provides that high-level, government officials can be

held liable in damages for the unlawful actions of lower-level employees in cases in which the violations of law by the lower-level employees are so pervasive and systematic that the high-level officials' failure to respond to them constitutes gross negligence or deliberate indifference. *See Hinshaw v. Doffer,* 785 F.2d 1260 (5th Cir.1986).

In the Minute Entry of March 2, 1988 I addressed this theory of liability in finding that:

The plaintiffs have properly alleged that deliberate indifference and gross negligence on the part of the defendants has caused deprivations of their statutory and constitutional rights, *see Doe v. New York City Dept. of Social Services,* 649 F.2d 134 (2d Cir.1981); *Taylor v. Ledbetter,* 818 F.2d 791 (11th Cir.1987); *see also Hinshaw v. Doffer,* 785 F.2d 1260, 1263 (5th Cir.1986) ("supervisory officials ... may be liable when their own action or inaction, including failure to supervise that amounts to gross negligence or deliberate indifference, is a proximate cause of the constitutional violation"; "a failure to supervise gives rise to section 1983 liability ... in those situations in which there is a history of widespread abuse"). The plaintiffs have proffered significant evidence to indicate that there are significant numbers of violations, enough to justify allowing discovery to go forward, and to deny the motion for summary judgment.

Id. at 8–9.

Plaintiffs allege that the claim that defendant Edwards now advances is identical to the claim he advanced in his motion of a year ago which I addressed and rejected; therefore, the doctrine of the law of the case precludes its relitigation.

Defendant argues that this motion "is supported for the first time since the commencement of this litigation with specific factual evidence—the affidavit of the former Governor—and is designed to remove this litigation from the realm of allegations contained in the pleadings to the realm of actual facts and proof". (*See* Defendant's Reply Memorandum at page 5.) In addition, defendant asserts that this motion raises a delegation of administrative responsibilities defense on behalf of the former Governor which was not raised by the prior motion. *Id.*

I believe that the previous motion was based on the legal sufficiency of the complaint. Indeed, the Fifth Circuit did not examine the affidavits that had been filed because the motion challenged only the legal sufficiency of the complaint. Since the present motion tests specific factual deficiencies of proof, the law of the doctrine of the case does not apply.

***3** The next question is whether plaintiffs can recover under the theory that high-level government officials can be held liable for the unlawful actions of lower-level employees in cases in which the violations of law by the lower-level employees are so pervasive and systematic that the high-level officials' failure to respond to them constitutes gross negligence or deliberate indifference. *See Hinshaw,* 785 F.2d at 1260.

That question presupposes that Edwards was a "supervisory official". *See Hinshaw* at p. 1263 (this theory of liability only applies to supervisory officials). Defendant asserts that he was not one of the supervisory personnel. (*See* Defendant's Reply Brief at page 5.) In support of this contention, defendant offers his affidavit stating that he "lawfully delegated the responsibilities of administration of the state program to responsible state officials in good faith", "did not assume and had no responsibility for determining which classified civil servants would be terminated within the Department of Health and Human Resources", and did not determine agency funding levels. Defendant sums up his position as follows:

As the affidavit states, it was the Governor's responsibility to delegate administration of the state programs to responsible state officials. Administration of the state programs includes of necessity supervision of the programs. As to the Governor, the claim is therefore wholly based upon respondeat superior, and the Governor should accordingly be dismissed from the litigation at this juncture. To rule otherwise would make the Governor a kind of overall errors and omissions insurance carrier for all state agencies in his individual capacity.

Defendant's Reply Brief at pages 3–4. This is also the defendant's "delegation of administrative responsibilities defense"

Plaintiffs assert that the only "arguably" relevant fact asserted in defendant's Statement of Material Facts—the assertion that "Defendant did not assume responsibility for the termination of classified civil servants"—is disputed. In plaintiffs' Statement of Material Facts, they assert that "Defendant Edwards has been personally responsible for determining the number of caseworker positions allocated to DHHR".

It is clear that Edwards was responsible for the lawful administration of the Department of Health and Human Resources. That he delegated these responsibilities is also

clear. *See* Edward's affidavit at page 2. Whatever particularized duties he had with respect to the department appear to be in dispute. Neither party has furnished any evidence that establishes whether or not Edwards was a "supervisory official" with respect to the foster care program. The fact that he was responsible for the administration of the Department of Health and Human Resources indicates that he was a supervisory official. Examining the facts in the light most favorable to the nonmovant, I find that Edwards was a "supervisory official".

***4** The Fifth Circuit has set out the standard to be met under a negligent supervision theory. In *Bowen v. Watkins,* 669 F.2d 979 (5th Cir.1982), the court discussed negligent supervision as it applied to members of the city council. The court held that the "City Councilmen would not be liable if they delegated their authority to the Chief of Police and he committed a constitutional tort, unless the delegation itself caused the tort". *Id.* at p. 988. "[T]o impose liability on a supervisory official, section 1983 requires more than a simple ratification of an impermissible act...." *Id.* "To prevail against the City Councilmen, the plaintiffs must show a failure to supervise properly that caused the harm." *Id.* The *Bowen* court found that:

Usually, a failure to supervise gives rise to section 1983 liability only in those situations in which there is a history of widespread abuse. Then knowledge may be imputed to the supervisory official, and he can be found to have caused the later violation by his failure to prevent it.

Id. at p. 988, (citing *Developments in the Law—Sec. 1983 and Federalism,*90 Harv.L.Rev. 1133, 1207 (1977)).

I interpret that holding to mean that an official who delegates his authority will not ordinarily be liable for any constitutional tort unless he was not authorized to delegate in the first place. However, one who delegates is still a "supervisor" and will nonetheless be liable if there is a history of widespread abuse in that area.

Other Fifth Circuit cases have discussed this theory of liability. In *Hinshaw v. Doffer,* 785 F.2d 1260 (5th Cir.1986), which dealt with the liability of a police chief for the actions of some police officers, the court held that the plaintiff had to show:

(1) the police chief failed to supervise or train the officer, (2) a causal connection existed between the failure to supervise or train and the violation of the plaintiff's rights, and (3) such failure to supervise or train amounted to gross negligence or deliberate indifference.

The court found that there was no evidence that the police chief had failed to supervise or that he knew of the police officer's propensity for the use of force. *Id.* at p. 1265. Likewise, in this case, there is no evidence that Edwards failed to supervise or that he knew of any propensity on the part of any delegatees for irresponsibility.

There is no doubt evidence of a "history of widespread abuse". Under the holding in *Bowen,* this would appear to satisfy the causation requirement in that "the knowledge may be imputed to the supervisory official, and he can be found to have caused the later violation by his failure to prevent it". *Bowen,* 669 F.2d at 988. Other courts have relied on *Bowen* for the proposition that "the causal connection may be established where a history of widespread prior abuse puts the official on notice of the need for improved training or supervision". *Wilson v. Attaway,* 757 F.2d 1227 (11th Cir.1985) (citing *Bowen* and *Henzel v. Gerstein,* 608 F.2d 654 (5th Cir.1980). However, none of these courts have ever found a remote supervisory official to be individually liable.

***5** The Fifth Circuit has also discussed the liability of a supervisor in situations where more of a "causal link" was required. In *Thibodeaux v. Arceneaux,* 768 F.2d 737 (5th Cir.1985), the court found that a clerk of court was not liable under Sec. 1983 where one of the deputies caused an unlawful arrest. There the court found that it was a "failure to give a required notice, through a deputy's error, that caused the arrest; that is, any negligence with a causal nexus to the arrest here was in the execution, not the adoption, of office policy". *Id.* at p. 739. On these facts, there was no "affirmative link between the ... inadequacies alleged, and the particular constitutional violation at issue". *Id.* In *Watson v. Interstate Fire and Casualty Co.,* 611 F.2d 120 (5th Cir.1980), the court found that a sheriff was not liable under Sec. 1983 for failure to supervise his deputies properly and to maintain adequate records of those imprisoned since the allegations did not show his involvement "in a pattern of activity designed to deny the plaintiff her constitutional rights".

Another Fifth Circuit case involved a claim against the Governor for inadequate supervision of the prison system. In *Howard v. Fortenberry,* 723 F.2d 1206 (5th Cir.1984), the theory of liability for negligent supervision was stated by the court as follows:

Because liability under Sec. 1983 cannot be premised on vicarious liability or respondeat superior, no defendant can be held liable unless it is shown that he breached some duty imposed by state law, and that the breach had some causal connection with the constitutional

deprivation.

In this case, two prisoners died as a result of being confined in an isolation cell. The court discussed the causation requirement in detail.

The Governor's only statutory duty in connection with local jails and prisons is to receive reports of the inspections conducted by the Department of Corrections and the Department of Health and Human Resources. The plaintiffs allege that this duty carries an implicit obligation to confer with the Department concerning the reports, and that, if the Governor had done this, he would have seen that only the kitchen and barracks at the East Carroll Parish Prison Farm had been inspected. Presumably, he would then have ordered that the sanitarians inspect any isolation cells that might exist. The sanitarians, in turn, would have ordered the prison to discontinue using the cells because they did not meet state standards of health and decency. This is the type of "but-for-cause" argument that is essential, but not sufficient, to establish legal causation. The duty to receive reports does not imply a duty to act on them. The argument is the legal equivalent of the saw, "for want of a nail the battle was lost". *The chain of causation is entirely too speculative to establish the Governor's liability under Sec. 1983.* The claim against the Governor was therefore properly dismissed.

***6** *Id.* at pp. 1211–1212 (emphasis added).

Howard relied on another Fifth Circuit case in articulating the above theory of liability. *See Sims v. Adams,* 537 F.2d 829 (5th Cir.1976) ("Another theory which includes the requisite causation is that a *supervisory* defendant is subject to Sec. 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury.") (Emphasis added.)

In light of *Howard* and *Sims* and their standards for causation, it appears that this is an entirely different theory from the one plaintiffs are asserting here. Under the theory articulated in *Bowen,* the Governor can be held individually liable anytime he properly delegates his authority in an area to someone and there is a history of widespread abuse in that department. If this case fell under the theory set out in *Howard* and *Sims,* the Governor would have no chance of being found liable.

Two other circuits have dealt specifically with foster care situations and the liability of superiors. In *Taylor v. Ledbetter,* 818 F.2d 791 (11th Cir.1987), the court held that a child involuntarily placed in a foster home was analogous to a prisoner placed in a penal institution and a child placed in a mental health facility and that therefore the foster child may bring a Sec. 1983 action for violation of Fourteenth Amendment Rights. The court went on to explain the theory of liability:

This holding does not mean that every child in foster care may prevail in a Sec. 1983 action against state officials based on incidental injuries or infrequent acts of abuse; only where it is alleged and the proof shows that the state officials were deliberately indifferent to the welfare of the child will liability be imposed.

Id. at p. 797. In the Fifth Circuit, the "causal connection" requirement is broader and includes failure to perform a duty if that failure causes deprivation of protected rights. *McClellan v. Facteau,* 610 F.2d 693 (10th Cir.1980) (citing *Sims v. Adams, supra.*)

The Second Circuit has dealt with state officials' liability for the foster care placement agency's failure to inspect and recertify foster homes annually as required by state law. *See Doe v. New York City Department of Social Services,* 649 F.2d 134 (2d Cir.1981). The theory of liability was that "government officials may be held liable under Sec. 1983 for failure to do what is required as well as for overt activity which is unlawful and harmful". *Id.* at p. 141 (citing *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285 (1976). "When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the non-feasance of which may violate the constitution." *Id.* The standards for liability in the Second Circuit are as follows:

When an official is charged with default in exercise of the above affirmative responsibility, there are two fundamental requisites for Sec. 1983 liability to be imposed:

***7** (1) the omissions must have been a substantial factor leading to the denial of a constitutionally protected liberty or property interest (cites omitted); and

(2) the officials in charge of the agency being sued must have displayed a mental state of "deliberate indifference" in order to "meaningfully be termed culpable" under Sec. 1983 (cites omitted).

Id.

Under the standards enunciated in either of those two foster care cases, Edwards would not be individually liable.

However, in the Fifth Circuit all a plaintiff has to do under the theory relied on by the plaintiffs is find a history of widespread abuse and that the defendant is a supervisory official. *See Bowen* and *Hinshaw, supra.* The facts of this particular case stretch this theory to its outer limits. However, I have to apply the facts to the law as it stands in the Fifth Circuit. Accordingly, defendant's motion for summary judgment on this grounds is denied.

Edwards next asserted grounds for summary judgment is a reassertion of the qualified immunity doctrine. Allegedly, the Fifth Circuit and I dealt with the prior assertion solely on a legal sufficiency basis. Now, this motion calls for an examination of the factual insufficiencies and focuses not on the "clearly established rights" aspect but on the conduct of the Governor. The supporting affidavit asserts that the Governor delegated the duties to responsible officials and had no knowledge of any propensity for irresponsibility they may have had.

Plaintiffs allege that this issue has already been decided by the Fifth Circuit, or, alternatively, that the affidavit submitted by the defendant is irrelevant, or, if not, that there are facts in dispute.

As the Supreme Court noted in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982):

We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Because the "clearly established" rights issue has already been decided by the Fifth Circuit, defendant urges that I now examine his conduct under the standard of objective reasonableness. *See Anderson v. Creighton,* 107 S.Ct. 3034 (1987). Defendant alleges that it was "objectively reasonable to delegate authority to responsible officials, and such delegation has not been shown by plaintiffs to have caused any violations of rights". *See* Defendant's Reply Brief at p. 15.

In determining the appropriateness of granting qualified immunity, courts have tried to balance the need for monetary damages against the "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties". *Anderson v. Creighton,* 107 S.Ct. 3034 (1987). As a result, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law". *Id.* (citing *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092 (1986)). "When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees'." *Id.* at 3038 (citing *Harlow,* 102 S.Ct. at 2736). In this case, however, the plaintiffs most helpful relief would be in the form of a mandatory injunction. The policy considerations behind the qualified immunity doctrine favor granting it to Edwards at this time.

***8** The Fifth Circuit examined the complaint and found that it alleges "wholesale neglect by these officials in following the dictates of the Child Welfare Act". *Del A. v. Edwards,* No. 88–3145 (5th Cir. September 28, 1988). "Any reasonable person would know, for example, when to develop a plan, when to review the plan, when to hold a hearing, what elements to include in the case plans, and that an information system must be developed." *Id.*

The theory of liability asserted is based on a "history of widespread abuse". Under the law in the Fifth Circuit, knowledge of that abuse may be imputed to the supervisory official and "he can be found to have caused the later violation by his failure to prevent it". *See Bowen.* Edwards falls into the category of those charged with such knowledge.

The Fifth Circuit has already established that the rights violated in this case are "clearly established". *See Del A. v. Edwards,* No. 88–145 (5th Cir. September 28, 1988). However, "even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendants are entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts". *Austin v. Borel,* 830 F.2d 1356,rehearing denied, 836 F.2d 1346 (5th Cir.1987) (citing *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806 (1985)). Under this standard, a plaintiff could adequately state a claim against a supervisory official and meet the causation requirement under a *Bowen* "history of widespread abuse" theory, but the supervisor could still be entitled to qualified immunity unless the plaintiff puts forth evidence indicating that the supervisory official in fact failed to act. This plaintiffs have not yet done.

The only evidence I have before me is an affidavit signed by defendant Edwards stating that he "[had] no personal knowledge of the specific allegations made by the next friends concerning the fifteen (15) children named herein" and that he "did not assume and had no responsibility for determining which classified civil servants would be terminated within the Department of Health and Human Resources". Plaintiffs have supplied no evidence although they do supply a lengthy "Statement of Material Facts" of

which the evidence in support of the facts is "too voluminous" to attach to the motion. Plaintiffs assert that "Defendant Edwards has been personally responsible for determining the number of caseworker positions allocated to DHHR". Unless plaintiffs can within 14 days from the date of entry hereof furnish evidence that Edwards failed to act, summary judgment will be granted.

Defendant has alternatively styled this motion as a motion to dismiss based on a Supreme Court opinion. In *Schweiker v. Chilicky,* 56 U.S.L.W. 4767 (1988), the Court held that money damages against state and federal officials were simply unavailable to remedy administrative violations of a Social Security Act program where there is a procedural remedy provided by law to safeguard against the violation. Plaintiffs attempt to distinguish this case on the grounds that it is a *Bivens* remedy case and not a Sec. 1983 case. The case of *L.J. v. Massinga,* 838 F.2d 118 (4th Cir.1988), involving money damages for violations of the Adoption Assistance Act is pending before the Supreme Court right now.

***9** It would be premature to decide this issue based on the pleadings especially since the Supreme Court has not yet decided anything on point that would affect this case. The law as of this date does not provide a basis for dismissal of plaintiffs' case.

Accordingly, defendant's motion to dismiss is DENIED.

Pursuant to this ruling, defendant's motion for a protective order quashing his deposition is also DENIED.

All Citations

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