

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WARREN L. BROWN,)
)
 PLAINTIFF)
)
 v.)
)
 H. ROLLIN IVES, ET AL.,)
)
 DEFENDANTS)

Civil No. 95-353-P-H

ORDER ON DEFENDANTS' MOTION TO DISMISS

This is a federal civil rights lawsuit brought by a grandfather against state officials. He seeks injunctive relief and damages as a result of allegations that he sexually abused one of his grandchildren. He attempted, unsuccessfully, to intervene in state court proceedings where the state officials successfully terminated the parental rights (his son being the father). He now seeks damages and injunctive relief against a variety of social workers and officials within the Maine Department of Human Services (“DHS”). I **GRANT** the defendants’ motion to dismiss.

The claims for declaratory and injunctive relief are now **MOOT**. The plaintiff’s concern was exclusion from child protective proceedings, or proceedings where his reputation or conduct might be in dispute. There is no suggestion that anyone in DHS contemplates bringing any further such proceedings. See Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 1664-65, 75 L. Ed. 2d 675, 683-84 (1983). There simply is no ongoing case or controversy concerning future actions by DHS personnel with respect to this plaintiff. See American Postal Workers Union v. Frank, 968 F.2d 1373, 1376 (1st Cir. 1992).

What remains is the grandfather's claim for damages. He asserts that the defendants violated his clearly established constitutional rights with respect to (a) his reputation, (b) his right to associate with his grandchildren and (c) his substantive due process rights against state conduct that shocks the conscience.

1. The action for damages against the defendants in their official capacities is **DISMISSED**. State officers acting in their official capacities are not subject to suit for damages under 42 U.S.C. § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989); accord Hafer v. Melo, 502 U.S. 21, 26, 112 S. Ct. 358, 362, 116 L. Ed. 2d 301, 310 (1991).

2. The defendant H. Rollin Ives is **DISMISSED**. Ives left office well before any of the events at issue.

3. The defendant Jane Sheehan is **DISMISSED** because there are no factual allegations against her in the Complaint.

4. The defendant Kevin Concannon is **DISMISSED**. He did not take office until February 22, 1995, well after the initiating events of this lawsuit. Concannon was Commissioner by the time the state court proceedings began, but the only specific allegation against him is that he is "responsible for the control and supervision of the personnel and activities of DHS." Verified Compl. ¶ 3. There is no *respondeat superior* liability under section 1983. See Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611, 638 (1978). The plaintiff also alleges generally that all defendants "breached their duty with regard to the supervision of the conduct of DHS personnel in that supervisors failed to train, supervise and/or control the actions of their subordinates and are therefore liable." Verified Compl. ¶ 39. These

general and conclusory allegations against the defendant Concannon, who was in office only during the court proceedings, are insufficient to withstand a motion to dismiss.

5. The remaining defendants are entitled to qualified immunity from liability for damages. To recover damages under 42 U.S.C. § 1983, the plaintiff must show that the defendants violated a clearly established statutory or constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). Not only must the right have been clearly established, but its contours must have been sufficiently clear that a reasonable official would understand that what he or she was doing violated that right. Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987). As I said earlier, the plaintiff has asserted three constitutional rights here: (a) his reputation, (b) his right to associate with his grandchildren and (c) his substantive due process rights against state conduct that shocks the conscience.

REPUTATION

The plaintiff may be able to escape the precedent of Paul v. Davis, 424 U.S. 693, 712, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405, 420 (1976), holding that there is no constitutional right in reputation alone, on the basis that the action of the DHS representatives also changed his status and therefore is closer to the action in Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515, 519 (1971). Any constitutional right he may have, however, certainly is not clearly established, for it requires at a minimum the balancing of his interest in his reputation against the state interest in protecting an at-risk child from potential abuse. As the First Circuit Court of Appeals has stated, a right “can rarely be considered ‘clearly established’” if balancing is required

unless there is a “closely corresponding factual and legal precedent.” Frazier v. Bailey, 957 F.2d 920, 931 (1st Cir. 1992), quoting Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir.), cert. denied, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987).

ASSOCIATION WITH GRANDCHILDREN

The plaintiff argues that he has a right to association with his grandchildren. That right also is not “clearly established.” The First Circuit Court of Appeals has recognized that the liberty interest in “family integrity” (which includes associational rights) is far from “absolute or unqualified.” Watterson v. Page, 987 F.2d 1, 8 (1st Cir. 1993), citing Frazier, 957 F.2d at 929-30. The Court of Appeals noted that, “[t]he right to family integrity clearly does not include a constitutional right to be free from child abuse investigations,” 987 F.2d at 8, and indicated that the “scope and level of constitutional protection” for grandparents’ rights of this sort “probably differs from that for parents’ interests” Id. at n.6.

SHOCK THE CONSCIENCE

The plaintiff argues that the DHS actions “shock the conscience,” and therefore violated his substantive due process right. The plaintiff has pointed to no precedent, however, to suggest that a DHS representative should reasonably have believed that what took place here invaded his clearly established constitutional right on this basis. Instead, there were existing state procedures for the grandfather to assert his rights in the child protection proceedings where he had the opportunity to show his “existing relationship” with the children and to demonstrate that his status as such “would

be in the best interest of the child.” 22 M.R.S.A. § 4005-B(3). He cannot show a “clearly established” constitutional right that would escape the qualified immunity defense.

Accordingly, all the remaining defendants are entitled to qualified immunity from damages. The defendants’ motion to dismiss is therefore **GRANTED** in its entirety.

SO ORDERED.

DATED THIS 3RD DAY OF JULY, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE